EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Sue Elliott**
Respondent:	**Home Office**
Heard at:	**London South via CVP (video)**
On:	**28 May 2024**, 29 May 2024, 30 May 2024, 31 May 2024
Before:	**Employment Judge Beckett** **Ms S Lansley** **Mr R Singh**
Appearances:	
Claimant	Miss E Sole (counsel) Claimant Mrs S Elliott
Respondent	Mr P Livingston (counsel) Ms F Cowie (observer) Ms R Begum (witness) Mr A Lyons (witness) Mr P Spreadbury (witness)

RESERVED JUDGMENT

1. The complaint of direct disability discrimination is not well-founded and is dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability as a result of requiring an Occupational Health Assessment and in respect of raising a grievance and requiring Occupational Health Assistance are well-founded and succeed.

3. The complaints of unfavourable treatment because of something arising in consequence of disability as a result of working part-time/flexibly is not well-founded and is dismissed.

4. The complaint of failure to make reasonable adjustments for disability is well-founded and succeeds.

5. The complaint of harassment related to disability is well-founded and succeeds.

6. The complaint of victimisation is well founded and succeeds.

REASONS

The Hearing

7. The final hearing in this case was listed for four days starting on 28 May 2024.

8. The remote hearing format was agreed by the parties and was by video hearing through HMCTS Cloud Video Platform. A face-to-face hearing was not required because all relevant matters could be determined in a remote hearing.

9. It was clearly set out within the documentation provided to parties at the time of the listing that of the 4 days listed, 1 day had been set aside to be used only for Tribunal deliberation time (letter dated 15 September 2022, at page 61 of the bundle).

10. On the afternoon of 27 May 2024, the tribunal had been provided with a bundle which ran to 1,607 pages.

11. There was a further bundle amounting to 117 pages comprising of four witness statements. The claimant's witness statement was 66 pages long.

12. The parties had not complied with the directions previously made. The parties only contacted the tribunal just before the hearing to indicate that the four-day timetable was no longer realistic in light of the size of the bundle of documents provided and the detailed witness statements.

13. The tribunal asked the parties to provide a list of documents that they expected the tribunal to read. The bundle provided was simply unmanageable.

14. The tribunal had to use the whole of the first day to read the relevant documents and witness statements.

15. All witnesses confirmed the contents of their witness statements and signed them when they had not done so previously.

16. The claimant was then cross-examined on day two (29 May 2024).

17. The witnesses for the respondent, Rashid Begum (RB), gave evidence on 30 May 2024. Alex Lyons (AL) and Peter Spreadbury (PS) gave evidence on 31 May 2024.

18. RB was the claimant's line manager whilst she worked in the CCTC Hub. AL was RB's line manager, and PS was the grievance decision-maker.

19. Counsel for each party provided written submissions on 31 May 2024 and the tribunal heard oral submissions at 3pm.

20. The tribunal directed each party to send any written response to the other side's submissions by 14 June 2024. The tribunal sat in chambers to deliberate on 21 June 2024. Unfortunately, on that date, given the number of claims and the volume of material, we were not able to reach decisions in respect of each claim. The tribunal therefore fixed a further day to deliberate on 1 July 2024.

21. For reasons that I shall not rehearse here, the tribunal panel was not able to meet on 1 July, and unable to reconvene again until 9 December 2024. It is understood that the parties were updated as to the delay, which unfortunately was unanticipated and unavoidable.

Finding of facts

22. The Tribunal made the following finding of facts.

23. For the avoidance of doubt, the Tribunal has restricted its determinations to claims raised and have set out the necessary facts as found. We did not determine all the factual disputes between the parties; only those which were necessary to determine a particular claim.

24. The claimant commenced her employment with the civil service on 25 November 1996. She commenced employment with the respondent on 3 April 2017. The tribunal has considered evidence as to her roles from June 2020.

25. It is agreed evidence that on the 30 June 2020 the claimant was offered a role as a Senior Executive Officer (SEO) Secretariat within the respondent's Clandestine Channel Threat Command Team (CCTC). The claimant stated that she had applied for a SEO Briefing Manager Role in Criminal Investigations but had been offered the Senior Secretariat Support Manager role in CTC.

26. The claimant was disabled at the time of her allegations. She has Auto-Immune diseases, Myalgic Encephalomyelitis (ME), Fibromyalgia and Immune Dysfuction. The respondent accepts that she is disabled, as a result of those conditions, within the meaning of the Equality Act 2010.

27. The claimant had a workplace adjustment passport, or disability passport, at the relevant time. The process of agreeing relevant adjustments had been started by the claimant in 2017. Adjustments had been agreed in 2019, which were implemented the following year, from 5 February 2020 (bundle pages 1589 to 1602). The passport made a number of recommendations including the removal of night shifts, flexibility around start and end time of shifts, and the ability to work from home as required.

28. The claimant accepted the new role and the process of onboarding started. At this time, the claimant had accrued 145 hours of annual leave which had to be taken by the end of February 2021 (RB witness statement (WS) para 13).

29. On 7 December 2020 her line manager, Rashid Begum (RB) contacted the claimant as to her start date. RB was in the Illegal Migration Strategy Unit, which is a separate although connected department to the CCTC.

30. The claimant advised RB that she had residual leave to carry over into her new role. The tribunal accepts that this caused an issue between the parties. The claimant's position was that she had worked the hours, and that her previous management had allowed her to accrue the hours. She was therefore entitled to carry those hours over, or to be paid for them.

31. RB in evidence set out her concerns, namely that the hours were significant, that she had a small team which was understaffed and busy, and that it would potentially have a significant negative impact.

32. There were email exchanges and discussions over telephone about the residual leave during December 2020, and into January and February 2021. In December 2020 the claimant was asked for an explanation as to how she had accrued the leave. The claimant set out a detailed explanation in an email on 23 December 2020 (page 381).

33. The onboarding process took place during December 2020 and continued into the following year.

34. RB telephoned the claimant on 11 January 2021. The claimant's evidence in front of the Tribunal was that RB had been verbally aggressive but that she could not recall the specific words used. The note that she made the following day did not record an aggressive tone.

35. The email following the phone call was factual and acted as a headline or reminder. The email was considered in the context of a busy, high paced role. The Tribunal accepted that both the claimant and RB had a right to feel frustrated or annoyed about the position they both found themselves in.

36. The Tribunal accepted the claimant's evidence that she had been upset following the call. This was evidenced by the fact that she felt sufficiently upset to make a written note and sent it to herself over email. However, the Tribunal did not find that RB was verbally aggressive on the balance of probabilities.

37. The claimant transferred to the Illegal Migration Strategy Unit (IMS) on 1 March 2021. At that time Rashid Begum (RB) became the claimant's new line manager. She was not aware that the claimant had a work adjustment passport. The tribunal accepts the evidence of RB that she became aware of the work adjustment passport in April 2021.

38. On March 1, 2021, RB emailed the claimant asking for confirmation of her salary and allowances.

39. As a result of the transfer, RB became line manager for the claimant on the Metis system, the HR system used by the respondent at this time.

40. The claimant's evidence was that at the time of transfer, she had not been made aware that she was being placed in a role which she stated was significantly different from the role that she had been offered and accepted (paragraph 76 witness statement).

41. The claimant further stated that she had understood that RB, as she had access to Metis, would have had access to records which "clearly outlined [her] requirements for workplace adjustments, encompassing aspects relating to "Working arrangement, physical considerations, and other"" (paragraph 77 witness statement).

42. The claimant's role within IMS included dealing with complaints, Freedom of Information requests, Ministerial inquiries, Subject Access Requests and responding to Parliamentary questions.

43. It also included drafting a weekly note for the Home Secretary. The claimant was first tasked with the completion of the note on 10 March 2021.

44. The claimant stated that the treatment by RB of her differed in person/ on a telephone call compared to her treatment in writing. By way of example, she cited a conversation which upset her, which took place on the telephone on 10 March 2021. The claimant stated that RB had called her and used a sharp, aggressive tone", and that the call, which lasted for four minutes, left her feeling upset.

45. However, after the call, RB sent the claimant a message stating "just remember what I said, you are here because you are the best candidate for the role. I have every confidence that you can do this role. I am here to support you if you need it – my virtual door (atm) is always open. Take care." (page 503).

46. On 12 March 2021 AL had an introductory 1:1 meeting with the claimant, which took place over Skype and lasted for 30 minutes. AL stated that during that call he specifically asked whether there was anything about the claimant's working pattern or arrangements she wanted to tell me, or anything around flexible working we needed to know. He stated that he asked that question in all introductory meetings with new staff as he himself worked flexibly (by way of compressed hours) and wanted to reassure new starters that flexible working was "fully supported" within the team (paragraph 11 witness statement).

47. The claimant stated that by the end of March 2021 she and a colleague had only had "approximately ten minutes oversight training only" (paragraph 87 witness statement).

48. At the end of March 2021, the claimant also queried her contract as it stated that her working pattern was 5 days, whereas she stated that it had been agreed that she would work 30 hours over 4 days (page 518). RB responded confirming the role was a 4-day working pattern for 30 hours on 12 April 2021 (page 517).

49. On 1 April 2021 Kelly Brierly, who worked in the IMS for Alex Lyons notified the claimant that she had requested an internal transfer to the CTC Duty Office, so might be leaving the IMS "soon" (page 1587).

50. On 22 April 2021 the claimant contacted RB expressing an intention to adjust her working hours the following day. This was in order to complete the weekly briefing note for the Home Secretary by an earlier deadline as RB required the

note in the morning. RB responded that there was no need for her to start early as another member of the team, Andrew Curtis, would be drafting the note.

51. On 25 April 2021 the claimant emailed RB, copying in AL, marked as confidential, relating to her role. Within that email she said that she believed that she was doing a "completely different" job to the one that she applied for, was offered and accepted. She then set out the role that she was undertaking. She stated within that e-mail that there was little flexibility around attendance times which added a further layer of pressure if there was a deadline. She further stated that she believed the training provided had been minimal (pages 546 to 547).

52. The claimant then wrote:

    "As I explained last Friday, the role that I am currently doing is not the role that I applied for, was offered or one that I would have accepted, because I have a serious underlying ill-health issue (Auto-Immune Diseases that have caused further relatively recent ill-health). My disability is defined in the Equality Act 2010. I have a Disability Passport on Metis.
    As a result of my protected characteristics (diseases) I suffered re-activated Epstein Barr Virus (Glandular Fever) in 2018, which caused post viral ME (Chronic Fatigue) and Fibromyalgia".

53. The claimant then set out that she was under the care of an Immunologist and was "susceptible to further illness" if she did "not manage stressors, fatigue and ensure '*Pacing*'". She stated that before joining IMS she requested to work 3 days a week to support her "home and work life (well-being) balance". She said that she had hoped that the fourth day she was now required to work would be manageable but that the additional day, in addition to the "constant pressures" in the role she was covering were having a significant impact on her health.

54. She ended the email asking to discuss her doing the role that she had applied for, and to "re-request working 3 days P/T PW (As per Reasonable adjustment guidance – as the request is disability related) so that I can pace (pacing) [herself] and recover between workdays to support [her] ill-health". The claimant stated that she had worked "in this way (2- or 3-days PW) for the HO since circa 2008".

55. RB responded to the email on 27 April (page 546), again copying in AL. she stated that she wanted to write to the claimant "as a matter of priority" about the claimant's "health, well-being, and the disability that [she had] identified in [her] email below, for the first time". She continued as follows:

"Obviously, I was unaware of this, and I thank you for sharing that with me now and I would like to reassure you that I will treat this information in confidence.
It is of critical importance to me and Alex that we explore how best we can support you going forward, to ensure that your wellbeing and health are maintained".

56. RB then stated that she considered that it was important to seek "proper medical input" from OH to ensure that they could support the claimant. She attached a consent form to the email, which was sent at 08.59.

57. The claimant responded to the email at 10.52 (page 545). She stated that she had not had an opportunity to have a 1:1 with RB and had not felt able to discuss her illnesses with RB, although she said that she previously mentioned in a call that she had underlying conditions. She said that the "Disability Passport on Metis provides detail of the conditions/ position/ RAs". The claimant also said that she had been subjected to discrimination as a direct result of her disability previously.

58. RB responded to the email at 13.02 (page 545). Again, she reiterated that her door was always open, and that she had viewed their conversations thus far as "informal 1 to 1 conversation". However, she said that she would arrange more formalised meetings if the claimant would prefer. RB then stated that the disability passport on Metis did not "provide specific details for [her] sight" and that she could only see the phrase working arrangements so did not know the details of her "particular disability needs".

59. RB then sent two further messages on the internal system at 13.19 and 13.20, stating that she was here to chat, and that she wanted to make sure that the claimant was "okay" (page 548).

60. The claimant sent a further email to RB and AL at 16.48 on 27 April 2021. Within her email, she stated that she was happy to share the details of her Disability Passport with RB, and that she had not realised that she had been "unable to see the content fully", adding that she would email it to her.

61. The claimant set out the reasonable adjustments that she said had been previously agreed. This included her description of flexible working that she had benefited from: working 3 days per week to manage her health and wellbeing/ pacing, and flexible start and finish times, as well as home working.

62. There was no mention of working outside core hours in the emails summarised above.

63. The Tribunal accepted the evidence of RB and AL as to when they found out about the claimant's disability. The emails in the bundle supported the evidence given by RB and AL, that is that they did not know prior to the exchanges set out above that the claimant had a disability under the EqA 2010. It follows that they were not aware that the claimant had a Disability Passport.

64. However, the Tribunal did not accept the evidence given on behalf of the respondent that management made a reasonable adjustment

65. On 4 May 2021 the claimant raised the possibility of a managed move with RB. RB advised the claimant to think about it whilst adding that and a report from occupational health would assist in providing support in the current role and any necessary actions (page 1422).

66. In her evidence before the Tribunal, the claimant stated that she told RB on 4 May 2021 that she needed flexibility to work outside of core hours. This was not in her witness statement. RB had recorded a contemporaneous note of the conversation and stated in her evidence that the claimant had not spoken about working outside core hours.

67. The Tribunal finds that the claimant did not state, within that call or indeed in any other conversations at that time, that she needed to work outside core hours. This was not raised in any of her emails to RB, which set out other details as to the issues she faced.

68. The claimant raised the possibility of a managed moved again on 11 May 2021, with RB and also with Human Resources. Again, RB asked the claimant to give it further thought but again stated that she would ideally wish to leave the option of a managed moved until after the OH report was received (pages 598 to 601).

69. A managed move was discussed, and the claimant repeated her wish for a managed move on 17 May 2021. RB's position at this time remained that she wanted to wait for a clinical opinion as to support and potential adjustments in the claimant's current role. By this time, RB had discussed the issue with her own manager AL.

70. The wording of the OH referral was agreed between RB and the claimant on 18 May 2021, and the referral to OH was then made by RB on 21 May 2021.

71. The claimant sent an email to RB on 27 May 2021 stating that she suspected "as a part-time, disabled member of staff, it may not be possible for [her] to meet [RB's] expectations in this role" (pages 672 to 673).

72. RB responded advising the claimant that a managed move was not her decision (p675). She did this following HR advice, which set out that RB needed to have a clear understanding of the current reasonable adjustments that the employee had in their current role (page 670).

73. There was no reference made by the claimant to working outside core hours in any of the emails during this period.

74. RB responded to the e-mail on the 28 May 2021. She stated that she ticked boxes on the online referral on the basis of HR advice, and that “the boxes were ticked to inform [them] of what was required for this role in terms of adjustments”.

75. She explained that in respect of part time working the claimant had agreed to working 30 hours over 4 days per week. She confirmed that there were no issues with her working in the team as a disabled member of staff and stated that she had a “long standing disability” herself. Dealing with the managed move, RB said it was the claimant's decision and that RB could explore it with her or HR but she stated that her plan most to support the claimant in her present role with advice from OH “or by the least obtain that advice first” (pages 694 and 695).

76. The claimant had her OH assessment on 22 June 2021. During that meeting she stated that she continued to find flexibility outside core hours helpful and added that she remained concerned that “an aggravation of her condition in the absence of this flexibility may result in the requirement to restart medication which may negatively influence her susceptibility to Coronavirus” (pages 715 to 717). She did cite during that meeting a “negative impact on her health in association with short concurrent deadlines and a requirement to deliver at pace”, which was consistent with her evidence to the Tribunal.

77. The tribunal accepts, following a review of the relevant policies and considering all of the evidence given, that the onus was upon the claimant to advise her line manager that she had a work adjustment passport. The tribunal finds that the claimant did not do so prior to her transfer to her new role, nor did she do so during the onboarding process. The first time she informed her management that she had a Disability Passport was in her email sent on 25 April 2021.

78. In May/ June 2021 AL stated that he decided to introduce more structure to his team and review the line management arrangements. AL expressed the view that the line management structures in place at that time were ‘flat’ “with a number of staff in various junior grades all reporting into and being line

managed by Rashid… and responsibilities were relatively fluid". By that stage AL said that the "IMS team had reached a more manageable 'steady state' in terms of its remit, capacity and workload", which enabled AL to move towards a more "traditional hierarchical set up" (AL witness statement paragraph 18).

79. Following a discussion with AL's two grade 6 managers (one of whom was RB), AL made changes to reporting lines. As a result, the claimant's line management was moved from RB to Claire Gunstone (the grade 7 Head of the Coordination Hub). However, AL also decided that, given the claimant's ongoing OH referral process, "on balance" RB "should retain 'ownership' of that process and continue to lead on any subsequent decisions needed around any additional adjustments that it identified" (AL witness statement paragraphs 18 and 19).

80. AL's intention was that under this arrangement, Ms Gunstone (CG) would take on "all day-to-day task management of the claimant with immediate effect, including all routine managerial responsibilities and communication". RB's only role would be "concluding the OH referral process for the claimant (which by that point was already underway) and for working out what, if any, changes were needed to the workings of the team in order to cater for any reasonable adjustments the OH outcome identified" (AL witness statement paragraph 19).

81. AL said that he had anticipated that this arrangement would be in place for weeks, not months. He added that he "judged this arrangement as striking the right balance between minimising direct contact between Rashid and the claimant – which was causing the claimant problems – whilst at the same time concluding the OH process and implementing any further adjustments needed as quickly and effectively as possible" (AL witness statement paragraphs 20 and 21).

82. The changes to the organisational structures were communicated in an email to the team, sent by RB on 9 June 2021 (pages 823 and 824). The Tribunal noted that within this email, RB set out that annual leave had to be entered on Metis and approved. The email was sent to six people including the claimant, two managers, AC and CG, with AL and one other copied in. It is clear that this was a small team and on the face of that email, there were only four people either in the role undertaken by the claimant, or with similar duties to the claimant.

83. The Tribunal also noted that again within the email, RB stated that the claimant had created a rota for monitoring the IMS and IMS Correspondence email inboxes, which needed to be covered from 8am to 5pm each day. RB added that when a lunch break is taken the grade 7 manager with oversight

for that day should be advised so that they can either cover themselves or arrange cover.

84. On 18 June 2021 the claimant asked that RB update the Metis system to make CG her line manager (page 823). RB responded, saying to discuss the email next week (page 822). The claimant responded within 20 minutes, again asking for her LM to be transferred on Metis to CG, as per the policy. She stated that she appreciated that the OH was ongoing and that it would be a decision for AL and RB to decide what IMS could support, but she understood that restricting access to her medical data and OH reports was reasonable.

85. AL and RB had decided that RB should retain Metis line management responsibility for the claimant. RB communicated this to the claimant by email on the next working day, at 19.57 on 21 June 2021 (pages 821 to 822). RB stated that having considered the claimant's email, she proposed that line management should revert to her.

86. At 10.20am on 22 June 2021, the claimant responded to the email saying that she had tried to avoid the conversation but that she found RB's management style "aggressive at times", and it was impacting on her "health (stress levels)" which was a contributory factor to her seeking a managed move (page 821). The claimant asked RB to reconsider her decision.

87. The claimant copied the email to AL and Kevin Mills. AL responded at 10.40am, directly to the claimant without copying any others into the message, stating that it was "an extremely serious allegation to make" and that he would have to consult HR in order to take action.

88. RB emailed Clare Cook (HR) at 10.54am asking for contact regarding the very serious allegation made against her (page 839). It is clear from the email in response, sent at 20.57, that HR had advised RB to step away from the claimant's direct line management whilst the concerns were being looked into.

89. There was a planned meeting between the claimant and RB, which the claimant declined at 14.35, saying that she had had her OH meeting and was then catching up on other duties (page 838).

90. It is clear from the evidence that various emails were then exchanged between management and HR relating to line management, the breach of GDPR and whether the claimant was raising a grievance.

91. On 8 July 2021 the claimant notified the respondent that she believed that her personal data had been breached. She alleged that her WPA passport had

been disclosed to OH without her consent, and that her personal data had been sent by email to the IMS shared inbox.

92. The claimant stated that she did not give RB permission to see the OH report, which was dated 7 July 2021.

93. The claimant had a meeting over the telephone with AL on 8 July 2021. AL stated that during that meeting the claimant was "quite upset and overcome with emotion at several points" (AL witness statement paragraph 31).

94. On 19 July 2021 the claimant emailed AL stating that she had become unwell due to the ongoing issues and had suffered a fall as a result. She said that she would not be attending work. She also advised AL that she wanted to make a formal complaint against the breaches of her personal data.

95. The claimant was on sick leave with workplace stress/ anxiety from 19 July to 1 November 2021.

96. Initially the claimant was signed off work for one month from 19 July 2021. On 19 August 2021 she was signed off for a further month.

97. The claimant stated that the issues that had caused her health to decline or that were exacerbating her conditions included the following:

- the role was different to the one she had applied for and accepted.
- there was an expectation or requirement to deliver at pace, to meet short deadlines.
- the team was under-resourced.
- she had received minimal training.
- her work pattern had changed to add an extra day.
- the way RB managed her.

98. In respect of the OH report, AL stated that he received notification that he could access the claimant's OH report just before a pre-booked period of leave. He emailed the claimant on 30 July 2021, stating that he would review the report after his return. AL was on leave from 3 to 19 August 2021.

99. In fact, AL did not review the OH report until the first week in September 2021.

100. During her sick leave, the claimant emailed AL to request that she be referred to OH. That took place on 6 September 2021.

101. On 9 September 2021 the claimant met with AL and Kevin Mills (KM, the claimant's PCS Union Representative) to discuss the OH referral. It was agreed that the OH referral process would be re-run to ensure a wider set of

questions were asked and that the clinician had a more accurate job description. RB was to undertake the process, but it was agreed that she would not have sight of the report (paragraph 38 witness statement).

102. On 18 October 2021 the claimant raised a grievance relating to RB.

103. She alleged that she had been bullied and harassed by RB between December 2020 and July 2021; that she had been placed into the IMST rather than the CTCT; that RB had failed to agree and implement her reasonable adjustments; that she had suffered three separate data breaches; that RB continued to verbalise concerns as to the claimant's annual leave; and a failure by the unit head to take action to de-escalate the situation. This grievance was made to Dan O'Mahoney.

104. The claimant returned to work on 1 November 2021.

105. On 5 November 2021 the claimant attended a further OH review. The second OH report was dated the same date. The report writer recommended consideration be given to whether the role could be significantly adjusted and recommended consideration of redeployment if that could be done in accordance with the relevant policies and procedures (pages 1012 to 1016).

106. On 8 November 2021 the claimant was transferred to the Future Planning and Capability Unit (FPCU) of the CCTC. At that time, the claimant asked for her line management to be transferred to her new line manager on Metis (page 1028).

107. On 13 November 2021 AL emailed the claimant advising her that he would be overseeing the OH process and that her line management on Metis would move to him temporarily.

108. On 16 November 2021 the claimant raised a grievance against AL, alleging that he had pre-empted the outcome of the OH report; that he had not acted in respect of bullying claims against RB; and had failed to take action to de-escalate the situation.

109. Whilst working in the FPCU the claimant was managed by Ms Toni Jones (TJ) and Ms Lindy Beach (LB).

110. On 18 January 2022 LB emailed the claimant stating that she had rejected a request at the weekend for her line management to transfer to her and had asked RB to resubmit it with Karen Mount (KM) as the claimant's line manager (pages 1073 and 1074). On 20 January 2022 the claimant confirmed that her line management on Metis had been transferred to KM (page 1118).

111. As set out above, the grievances were lodged on 18 October 2021 and 16 November 2021.

112. In email correspondence in April 2022 the claimant stated, "I appreciate that a thorough investigation will take time and should not and cannot be rushed; my expectations surrounding this have been managed by the IM". She added that she did not want to make any representations about the grievance process or the time it was taking, as she was "satisfied that it is progressing well, given the timelines and evidence submitted" (page 1199).

Claim

113. The claimant presented her claim form the ET/1 on 27 March 2022.

114. ACAS was notified of the claim on 14 February 2022 and issued the certificate on 28 February 2022.

The Law

Direct discrimination

115. Under s4 Equality Act 2010 ("EqA 2010"), a protected characteristic includes the claimant's disability. An employee should not be discriminated against on the basis of her disability.

116. Disability is defined in s6(1) EqA 2010:

A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

117. In this case, the respondent concedes that the claimant had the disabilities as set out above, namely as a result of Auto-Immune diseases, Myalgic Encephalomyelitis (ME), Fibromyalgia and Immune Dysfuction.

118. Section 13 EqA 2010 precludes direct discrimination.

119. S13 Equality Act 2010 provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

120. The comparison must be between the treatment which would have been afforded to another person having the complainant's characteristics except, int this case, for her disability.

121. The leading case on the concept of 'less favourable' treatment contained in s13 EqA 2010, or 'detriment' in s39(2)(d) and (4)(d) EqA 2010 is *Shamoon v RUC* [2003] I.C.R. 337. The House of Lords construed the concept of less favourable treatment or a detriment extremely widely: any treatment, if viewed by the Complainant as a detriment, and so long as holding such a view was not unreasonable, then that treatment is to be considered to be a detriment. The Complainant's perception of the treatment is vitally important, therefore.

122. As set out above, the legislation requires the less favourable treatment to be "because of" a protected characteristic, which is a wide concept incorporating the concept of "on the grounds of".

123. As to causation, where there is more than one reason for the less favourable treatment of the complainant, it is a question of fact for the tribunal to determine whether the unlawful ground was an "important factor", but it need not to be the sole or, presumably, even the principal ground for the act.

124. The burden of proving unlawful discrimination is on the claimant. Section 136 EqA 2010 instructs Tribunals that "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred", unless "A shows that A did not contravene the provision".

125. It is for the applicant who claims discrimination to make out their case on the balance of probabilities. The tribunal can draw proper inferences from the primary facts of the case. "At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such

inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case" (per Neill LJ in *King v The Great Britain-China Centre* [1991] I.R.L.R. 513, CA, approved by the House of Lords in *Zafar v Glasgow City Council* [1998] I.R.L.R. 36 at 38).

126. Therefore, where the applicant proves facts which give rise to a prima facie case of discrimination the Tribunal must uphold the complaint unless the respondent proves that they did not commit the act.

127. There is a two stage approach when considering the burden of proof in respect of discrimination claims (Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 and Igen Ltd v Wong [2005] ICR 931). The Tribunal must ask itself:

1. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?
2. If the claimant has satisfied the first question, but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

128. The tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the difference of race and that they are not merely two unrelated factors. There must be evidence of less favourable treatment.

129. The burden of proof in discrimination cases is as set out in s136(2) and (3) EqA 2010. Once there are facts upon which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent, who then needs to prove a non-discriminatory explanation.

130. A respondent's inconsistent, untruthful or inaccurate evidence could lead a tribunal to draw an inference of discrimination so that the burden of proof shifts to the employer.

131. A tribunal can draw inferences from the fact that there have been inconsistencies in the employer's explanation (*Veolia Environmental Services UK v Gumbs* EAT 0487/12).

132. Even if the tribunal believes that the respondent's conduct requires explanation, there must be evidence or primary findings to suggest that the treatment was due to the claimant's disability before the burden of proof shifts.

133. The standard of proof in respect of all claims in the Employment Tribunal is the civil standard, that is to say, on the balance of probabilities.

Discrimination arising from disability

134. Section 15 EqA 2010 precludes discrimination arising from a disability.

135. S15 EqA 2010 provides:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

136. S15 protects against discrimination arising from or in consequence of the disability rather than the discrimination occurring because of the disability itself, which is covered by direct discrimination as set out in s13 above.

137. No comparator is required for this form of alleged discrimination (as shown by the term 'unfavourably' rather than 'less favourably'). Simler J stated in *Pnasier v NHS England* [2016] IRLR 170:

> (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A… The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial influence on the unfaithful treatment) and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the inquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.
(d) The tribunal must determine whether the reason/ cause or, if more than one, a reason or cause is "something arising in consequence of B's disability" …
(e) … the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought process is of the alleged discriminator.

138. The EAT has emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment (*Hall v Chief Constable of West Yorkshire Police* UKEAT/0057/15). The burden on a claimant to establish causation in this type of claim is relatively low. It will be sufficient to show that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability.

139. The employer's motivation is not relevant. In *Charlesworth v Dransfields Engineering Services Limited* (UKEAT/0197/16) the EAT stated that s15 EqA 2919 requires the unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If the *something* is an effective cause, the causal test is satisfied. An effective cause is a cause or an influence that operated on the mind of the alleged discriminator to a sufficient extent.

140. If a claimant is able to establish discrimination arising from disability, the respondent can defend the claim by showing that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

<u>Failure to make reasonable adjustments</u>

141. Under sections 20 to 22 and schedule 8 EqA 2010 an employer has a duty to make reasonable adjustments in three specific situations. Only the first is relevant to this claim, so is set out below.

142. The relevant provisions of section 20 EqA 2010 (Duty to make adjustments) are:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

143. Section 21 EqA 2010 provides:

Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

144. The duty to make reasonable adjustments arises only where the disabled person is put at a “substantial disadvantage” in relation to a relevant matter in comparison with persons who are not disabled. Section 212(1) EqA 2010 states that “substantial” means more than minor or trivial.

145. The Tribunal must identify the following:

(a) The PCP applied.
(b) The identity of the non-disabled comparators (where appropriate); and
(c) The nature and extent of the substantial disadvantage suffered by the claimant
(*Environmental Agency v Rowan* 2008 ICR 218 EAT).

146. The Tribunal must consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable. The Tribunal should avoid making generalised

assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

147. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The reasonableness of the adjustment is an objective test.

148. A comparator or group of comparators is required as set out in the legislation above. The comparator(s) must have circumstances which are the same or nearly the same as the disabled person (*Fareham College Corporation v Walters* 2009 IRLR 991, EAT).

149. As set out above, the burden of proof in discrimination cases is as set out in s136(2) and (3) EqA 2010. Once there are facts upon which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent, who then needs to prove a non-discriminatory explanation.

Harassment

150. The relevant parts of section 26 EqA 2010 provide as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B.

(b) the other circumstances of the case.

(c) whether it is reasonable for the conduct to have that effect.

151. Section 26(5) EqA 2010 confirms that disability is a protected characteristic.

152. Although the perception of the claimant is relevant in determining whether their treatment amounts to harassment, it is not in itself sufficient to turn otherwise reasonable conduct into harassment.

Victimisation

153. The relevant parts of section 27 EqA 2010 provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act.

(b) giving evidence or information in connection with proceedings under this Act.

(c) doing any other thing for the purposes of or in connection with this Act.

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

154. A claim of victimisation does not require the claimant to show that the employer treated them less favourably than it treated other persons in the same circumstances; it is enough to demonstrate that a claimant has been subject to a detriment due to a protected act. This means any treatment that a reasonable worker could view as detrimental (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337; *Warbuton v Chief Constable of Northamptonshire Police* [2022] EAT 42).

155. The test of detriment has both subjective and objective elements as the situation must be looked at from the claimant's point of view, but their perception must be "reasonable" in the circumstances.

156. There must be a causal link between the detriment and the protected act. Even when the detrimental act is in response to a protected act, it may not always amount to unlawful victimisation, for example where the "real" reason is the manner in which the protected act was done and not the fact of the protected act in itself. The EAT confirmed in *Martin v Devonshires Solicitors* [2011] I.C.R. 352 that the question in any claim for victimisation is what was the "reason" that the respondent did the act complained of: if it was,

wholly or in substantial part, that the claimant had done a protected act, the respondent is liable for victimisation; and if not, not.

157. A person claiming victimisation need not therefore show that less favourable treatment was solely because of the protected act. If protected acts have a 'significant influence' on the employee's decision making, discrimination will be made out. A significant influence is an influence which is more than trivial (*Nagarajan v London Regional Transport* 1999 ICR 877, HL, *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong* 2005 ICR 931, CA).

158. Where there has been a detriment and a protected act, but the detrimental treatment was due to another reason, such as absenteeism or misconduct, a claim of victimisation will not succeed.

159. As set out above, the burden of proof in discrimination cases is as set out in s136(2) and (3) EqA 2010. Once there are facts upon which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent, who then needs to prove a non-discriminatory explanation.

Conclusions: applications of the law to the facts found

160. The Tribunal made the following decisions. The relevant paragraphs of the list of issues are in brackets after each head of claim to assist the parties.

161. The Tribunal had regard to the witness statements, the evidence in the bundle, the oral evidence and submissions, both orally and in writing.

Direct discrimination (issue 2)

162. The Tribunal found the complaint of direct discrimination was not well-founded.

163. We found that there was insufficient evidence as to Kelly Brierly being an appropriate comparator. There was no evidence that Ms Brierly had any issues with her line management, or that she had been struggling with her job. The evidence showed that Ms Brierly had applied for a post and was promoted.

164. Even if there was an appropriate comparator or a hypothetical comparator, there was no evidence that the claimant's requested managed move was refused. Management did not agree or refuse, as they were trying

to sort out issues in the role the claimant had. If they had not been able to sort out those issues, they would have had to consider a managed move.

165. When asked in cross-examination why the claimant believed that her request had been refused, she said that management had wanted to keep her in the IMS as they were understaffed and desperate for resources.

166. The tribunal finds that the claimant has not proved on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. The claimant has not proved that her requested, managed move was in fact refused.

167. The Tribunal did not therefore go on to consider the issues at paragraph 2c to e inclusive of the agreed list of issues.

Discrimination arising from disability (issues 3 to 12 inclusive)

168. The complaint of unfavourable treatment because of something arising in consequence of disability as a result of requiring an Occupational Health Assessment and in respect of raising a grievance and requiring Occupational Health Assistance are well-founded and succeed.

169. The complaint of unfavourable treatment because of something arising in consequence of disability as a result of working part-time/flexibly is not well-founded and is dismissed.

170. It is accepted by the respondent that the claimant's requirement for an OHA was something arising in consequence of her disability.

171. The Tribunal therefore considered the issues as to whether the claimant had proved that she suffered the following unfavourable treatment:

(a) Mismanagement of the first occupational health referral on or around May/June 2021.
(b) Having to organise and undertake a second occupational health assessment due to the failure of the first assessment whilst absent around early November 2021; and
(c) Sending her personal data to Health Management without her consent on or around summer 2021 (as per issue 4 in the agreed list of issues).

172. The Tribunal found that the claimant had proved that she had suffered the unfavourable treatment listed above.

173. When requesting the OH assessment, RB did not tick the correct boxes. Further, the job description attached to the request was not in fact the claimant's role. The work adjustment passport had insufficient information.

The passport was sent to HR into an inbox which could be accessed by others. This was found to be a data breach.

174. The Tribunal found that the necessity of organising a second OH report amounted to unfavourable treatment. The data breach involving the claimant's private details also amounted to unfavourable treatment.

175. Further, the Tribunal found that the unfavourable treatment was because of the claimant's requirement for an OH assessment.

176. Management could have implemented changes as reasonable adjustments without the OH assessment. The consideration in respect of adjustments was delayed as when the report arrived, AL did not look at it. He then went on holiday, and then reported having IT issues. He could have asked the claimant for a copy of the report.

177. The first OH referral was made on 21 May 2021. The claimant requested a further referral on 6 September 2021. There was a meeting on 9 September 2021. Questions were then drafted by management and advice sought from HR. The claimant sought advice from the union. The appointment was on 5 November 2021.

178. The respondent's submission therefore that any unfavourable treatment was because of a proportionate means of achieving a legitimate aim is rejected. It is accepted that the referral was appropriate, and that the claimant consented to it. However, the way in which the referral was made, and the issues that arose, were not proportionate.

179. The complaint of unfavourable treatment because of something arising in consequence of disability as a result of working part-time/flexibly is not well-founded and is dismissed.

180. The respondent accepted that the claimant's need to work flexibly arose in consequence of her disability but did not accept that the claimant's need to work part-time did.

181. The Tribunal found the claimant had not proved that she was treated unfairly by being subjected to verbal aggression from RB. As set out above the tribunal was not satisfied that RB was verbally aggressive in telephone calls from late December 2020 until late February 2021. The tribunal also found that the emails which the claimant described as forcefully worded was simply to the point.

182. The respondent accepted that requirement for an OH assessment arose in consequence of the claimant's disability but denied that the grievances arose in consequence of her disability.

183. The tribunal found that RB's continued management of the claimant from June or July 2021 until January 2022 and AL's management from November 2021 until March 2022 did amount to unfavourable treatment.

184. The respondent raised a jurisdictional issue in respect of this claim. The Tribunal found that it would have been prejudicial to the claimant if the time limit was not extended. The reason for the delay was mismanagement, and the claimant raised grievances. There is limited, if any, prejudice to the respondent. The evidence is within the documents and witnesses did not have to rely on their own recollections.

Failure to make reasonable adjustments (issues 13 to 18 inclusive)

185. The respondent accepted that there was a PCP of requiring work during standard "office hours" over a working week in the IMS role during March to October 2021.

186. The Tribunal found that the PCP did put the claimant to a substantial disadvantage because of her disability.

187. The claimant stated that she was put at a substantial disadvantage in the symptoms relating to her disability fluctuated in terms of their severity over the course of a whole day and night, without any clear pattern, which meant that she might not be medically able to work her contracted number of hours over the course of normal office hours even with flexibility as to start times and that she was unable to plan her working week in advance. She stated that the lack of flexibility to work outside of normal out office hours also caused additional stress which potentially led to a worsening of symptoms.

188. The tribunal found that the respondent knew by September 2021 that the claimant would be put at that substantial disadvantage. The tribunal further found that the respondent could reasonably have been expected to know at the end of July 2021, which was when the OH report was available to be considered by management.

189. The tribunal found that the respondent did fail to make reasonable adjustments to the PCP. The respondent could have allowed the claimant to work outside the core office hours during the course of a week. During cross-examination, both RB and AL accepted that the claimant could have worked outside office hours to undertake some work, and then could seek clarity or

finalisation of drafted documents, when needed, within core working hours when more senior staff were working.

190. If that simply could not be undertaken within that role, the claimant could have been moved to a different role which would allow for more flexible working. This of course did in fact happen to the claimant in November 2021 on a temporary basis, which then became permanent in April 2022.

191. The tribunal found that those steps would have been reasonable in the circumstances and could have alleviated the alleged substantial disadvantage.

192. The respondent was unable to provide any adequate explanation for failing to make reasonable adjustments. The Tribunal does limit the time period to that set out above, when the respondent could reasonably have been expected to know about the claimant being put at a substantial disadvantage.

Harassment (issues 19 to 21 inclusive)

193. The tribunal did not find these claims to be well-founded and they are therefore dismissed.

194. The two issues submitted by the claimant as harassment are insufficient management action to implement disability passport adjustments and insufficient management action in response to grievances.

195. The tribunal found that the claimant had proved that there was no or not sufficient management action to address the implementation of her WPA passport adjustments.

196. The tribunal found that the claimant had not proved that there was no or not sufficient management action in response to her grievances. This was apparent from her own evidence, as set out above.

197. The tribunal found that management omissions could amount to unwanted conduct relating to the claimant’s disability.

198. However, the tribunal did not find that the omissions had as their purpose or effect of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment. It was clear from the evidence that the claimant’s perception was that the omissions did have such a purpose or effect. However, the tribunal had to look at all of the other

circumstances of the case including whether or not it was reasonable for the conduct to have had that effect.

199. Whilst we found that there was insufficient management action to address the implementation of the claimant's WPA passport adjustments, it did appear to the Tribunal that there was no violation of the claimant's dignity, and no intimidating, hostile, degrading, humiliating or offensive environment. We accepted that the environment was uncomfortable for the claimant. However, the test was not met.

Victimisation (issues 22 and 23)

200. The Tribunal found that the complaint of victimisation is well-founded.

201. The respondent accepted that the grievances made by the claimant on 18 October 2021 and 16 November 2021 were protected acts.

202. The tribunal finds that RB's continued management of the claimant was a detriment.

Jurisdiction (issues 24 and 25)

203. The respondent raised a jurisdictional issue in respect of this claim. The Tribunal found that the claimant had not presented her claims within the relevant primary time period, but that she had proved that the claims were part of a continuing act, ongoing at the time of the presentation of the claim.

204. The Tribunal noted that, if we were incorrect as to the above, we would have extended the time as it would have been just and equitable to do so. We found that it would have been prejudicial to the claimant if the time limit was not extended.

205. The reason for the delay was mismanagement, and the claimant had raised grievances. There is limited if any prejudice to the respondent. The evidence is within the documents and witnesses did not have to rely on their own recollections.

Remedy hearing and previous directions

206. Remedy will be dealt with at a hearing on 14 March 2025, via CVP.

207. Please could parties provide the Tribunal with an agreed bundle for the hearing by 7 March 2025.

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Employment Judge Beckett
26th January 2025

JUDGMENT SENT TO THE PARTIES ON

19 February 2025

FOR THE TRIBUNAL OFFICE

P Wing

Notes:
Public access to Employment Tribunal Judgments
All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.