EMPLOYMENT TRIBUNALS

MS. HARRIET GREGORY

Claimant

-and-

BIO-TIFUL DAIRY LIMITED

Respondent

Heard at: London Central On: 3 to 10 November 2025

Before: Employment Judge Nash

Ms M Pilfold

Mr R Baber

Representation

Claimant: In person

Respondent: Ms Bowen of counsel

RESERVED JUDGMENT

1. The respondent did not subject the claimant to discrimination arising from her disability pursuant to section 15 Equality Act 2010.
2. The respondent did not harass the claimant contrary to section 26 Equality Act 2010.

REASONS

1. The Claimant presented her claim to the Employment Tribunal on the 8th of July 2024 following Acas conciliation from the 15th of March to the 26th of April 2024.
2. The case came before the tribunal at a case management hearing on 4 November 2024 where the list of issues was nearly completed.

3. The tribunal had sight of an agreed bundle of 554 pages, and all reference are to that bundle unless otherwise stated.
4. The tribunal heard from the following witnesses on behalf of the Claimant
    a. The claimant
    b. Mr Allen Speight, her partner
    c. Ms Kate Walsh formerly the respondents financial controller; and
    d. Ms Helen Cross Fancy, previously the respondent's marketing manager.
5. On behalf of the respondent, it heard from
    a. Ms Natasha Bowes its former chief executive officer; and
    b. Mr Vincent Lawson, its chief marketing officer.
6. The claimant also relied on the statement of a Ms Carmen Fan the respondent's former senior product project manager.
7. All these witnesses swore to their statements. The claimant also swore to her disability impact statement.
8. The respondent also sought to rely on the statement of Mr Barry Ross their solicitor. However, as he gave evidence only relating to his investigation during the claimant's appeal and grievance and he had no first-hand knowledge of the matters relevant to the issues, the tribunal did not accept his statement as it was not relevant to the issues.

The Claims

9. The claimant brought the following claims
    a. Discrimination arising from disability under Section 15 Equality Act 2010.
    b. Harassment relating to disability under Section 26 Equality Act.

The Issues

10. The issues were as agreed at the list of issues set at the case management hearing with amendments during the hearing. The final agreed list of issues is appended to this judgment.

Preliminary Issues

11. There were two preliminary issues concerning the list of issues.
12. The s15 claim was not complete in the list of issues. Upon the tribunal raising the matter, the claimant confirmed that in respect of her section 15 claim, the something that she contended arose from her disability was her sickness absence absences.

13. The tribunal raised with the parties, the respondent's position on disability. The respondent contended that its position was that it denied that the claimant was a disabled person on the basis that her condition was not long term at the material time.
14. However, the respondent made no reference to its letter to the tribunal of 3rd of February 2025. Respondent counsel told the tribunal that she was unaware of this letter. The Tribunal found this letter on the file and determined that the respondent had in terms in this letter accepted that the claimant was a disabled person for the purposes of section 6 Equality Act at all material times. The respondent then had in effect sought to resile from this position and withdraw this concession by a way of a further letter of the 26th of February 2023. The tribunal had made no determination on this matter.
15. The tribunal therefore heard submissions from both parties and determined that it was in the interests of justice that the respondent be permitted to withdraw its 3 February concession. The tribunal treated this as an application to amend and applied the case law on amendments. Full reasons were given at the time, and it is not proportionate to repeat these here.
16. Accordingly, the only issue on disability was whether the effect of the claimant's impairment on her ability to carry out day to day activities was long term at the material time. The claimant was granted permission to provide and swear to a further statement going to this question.
17. There were a number of applications from both parties for late disclosure, all of which were granted save an application on the final day of the hearing in respect of what was said to be the respondent's sickness policy.
18. During evidence, the respondent applied to call a further witness its head of product, Mr Heeney. The claimant objected and the Tribunal rejected the respondents application's which for reasons which were given in full at the time and it is not proportionate to repeat here. In summary the tribunal was not satisfied that it was in the interests of justice as it might endanger the hearing timetable, which was already tight, and the respondent was already calling the CEO who made the decision to dismiss and the claimant's line manager who was actively involved in the decision.

The Facts

19. The respondent was a start-up business, manufacturing dairy products to be sold in grocery stores to the public. The business model was to build up the business and then sell it. By the final merits hearing the business had been sold.
20. The Claimant commenced employment with the Respondent on the 15th of August 2022.
21. She was employed as its Head of Innovation, working four days a week. According to the advert, the post involved a big challenge in a fast growing company, and the post was not for the faint-hearted. The successful applicant would need to thrive under pressure in a fast-paced environment. The role was to identify new possibilities in dairy products and develop a prototype and generate recipes. The claimant received a written contract of employment.
22. The claimant reported to the Marketing Director. Shortly after the claimant started work in September 2022 the head of marketing resigned, and the claimant was asked to temporarily fill in as the head of its product function. Ms Bowes accepted that this was in effect a step up for the claimant as it was a more senior role. This was not the respondent's case in its grounds of resistance, where it stated that in fact the claimant had continued with her existing role.
23. However, there was no dispute at the hearing that the claimants role was very significantly increased within a matter of weeks of her starting work. The respondent suffered a high level of staff turnover. The claimant's evidence, which was not significantly challenged, was that this resulted in working extra hours and more than her four day week. The claimant also worked on product development, office planning and move and recruitment.
24. The tribunal accepted the claimant’s evidence that she never got to carry out her head of innovation role because she was so busy doing a number of other functions. It also accepted that it was difficult to concentrate on her core role and her work was stressful and unpredictable.
25. The claimant was praised for her attitude and efforts and received an award for this. The claimant passed her probation on the 1st of September 2022 and Ms Bowes referred to her outstanding work. Her first performance appraisal was highly positive. Ms Bowes asked the claimant if she would step up to five days with an increase of pay but the claimant refused as she wished to keep her work life balance.

26. However, both the claimant and the respondent agreed that the claimant was not a natural fit as head of product. This role involved a number of areas in which she was less comfortable working, for instance manufacturing and development of the actual product.
27. On the 13th of March 2023, the claimant was awarded share options by the respondent who referred to her valuable and high quality contribution to the business. These share options would become exercisable should the business be sold.
28. Some difficulties arose by May 2023. The claimant overheard Ms Bowes say in a call, what exactly does the claimant do? The claimant's second performance review in May 2023 was mixed. A number of sections were marked as red, as opposed to yellow or green. The tribunal accepted the claimant's evidence that these sections generally related to areas where the claimant was covering the head of product function and not her innovation core role.
29. Mr Lawson sought to reassure the claimant after this review, telling her she was an asset to the team, and all employees had areas for development, and they now had to support her in those areas. He was sure, she would do brilliantly.
30. During May one of the claimants dogs died and she was deeply distressed.
31. On the 29th of May 2023, the claimant was awarded a performance bonus by the respondent. Again, her performance was praised.
32. The tribunal saw evidence in the bundle that the claimant with other senior employees had been developing various proposals for a restructure during early May. However, by late June 2023, the respondent Senior Leadership Time Team had decided on a different restructure.
33. Ms Bowes and Mr Lawson told the claimant that she would go back her head of innovation role, and they would hire a new person as head of product. The claimant welcomed this plan. The respondent was at this time working to hit a £50 million annual revenue target, which would be the trigger for seeking a sale of the business.
34. Three days later, on the 29th of June 2023, another of the claimant's dogs died unexpectedly. The claimant's evidence was that she was deeply distressed, and this precipitated a mental health crisis which related back to a family bereavement years before. The stress of her working conditions then exacerbated her symptoms.

35. There was a dispute between Mr Lawson and the claimant as to how much the claimant told Mr Lawson about her medical condition at the time. Although it was not mentioned in her witness statement, she told the tribunal that she had told Mr Lawson that she has suicidal thoughts. Mr Lawson denied this. As this was not in the Claimant's witness statement and Mr Lawson was robust in his denials, the Tribunal preferred his version of events.
36. On the 1st of July 2023 the Claimant was signed off work until 8 July. Her fit note referred to unwell recent trauma / bereavement. (The bereavement related to the claimant's two dogs.) The claimant returned to work after the sick note expired.
37. Again, there was a dispute between the claimant and Mr Lawson about how much she explained her mental health condition to him. At some time, the claimant told Mr Lawson that she had been taking tablets to control a high heart rate and was seeing a counsellor due to deep historical trauma. However, both witnesses accounts of what was said were unsatisfactory. The claimant's account in her witness statement was extremely vague. Mr Lawson's account of this meeting was unreliable as he resiled from his account in his witness statement before the Tribunal and accordingly, the Tribunal could have little confidence as to his recollection as to this meeting. The Tribunal found that the claimant had told Mr Lawson some details about her medical condition and he was aware of her difficulty after returning to work. The tribunal accepted that she was visibly emotional, including bursting into tears and having some visible difficulty eating and drinking.
38. On the 19th of July 2023 the claimant was signed off work until the 2nd of August. Her fit note stated acute stress and bereavement reactions.
39. The respondent had, as planned, externally recruited a head of product and appointed Mr Luke Heeney in July 2023.
40. After 2 August the claimant returned to work again. At the beginning of August, there were messages between Mr Lawson and the claimant trying to resolve how much sick pay and annual leave she had received. No witness provided coherent or reliable evidence as to what had happened about the claimant's pay for August and July. The claimant simply said she only received about £600 in salary in August. However, there were no details.

41. The claimant was then signed off sick from 14 August to 4 September. The sick notes stated, work and bereavement stress, and stress related problem.
42. On the 18th of August, whilst the claimant was signed off sick, Ms Bowes and the claimant spoke on the telephone. Whilst there was some dispute as to what was said, the fundamentals of this call were agreed. Ms Bowes and the claimant, discussed the claimant's potential return to work. Ms Bowes stated it was not sustainable for an SME to be without a senior product developer for a long time and she would need to be kept posted on the claimant's progress. Ms Bowes offered the claimant an exit offer that if she left she would receive three months' pay. Ms Bowes said the respondent would support the claimant either way 100%. The claimant said that she wanted to return to work.
43. In an e-mail on the 31st of October, Mr Lawson set out the respondent's thought process behind this call. He stated that the respondent had concluded it did not want the claimant to return and had hoped that she would accept the exit offer. The tribunal accepted that the respondent was then frustrated when the claimant said that she wanted to return.
44. A few days later, Mr Heeney started employment as the respondent's head of product.
45. The Claimant returned to work on the 4 September 2023 on a phased return lasting until the 30th of September. The claimant was welcomed into the office by Ms Bowes and told that she should sit at a different desk no longer by the window. The claimant said she did not like sitting by the window, but it was nevertheless humiliating to be moved without warning or consent.
46. The tribunal accepted that the respondent was a small organisation with a crowded office and with a high turnover of staff and therefore members of staff regularly moved between desks. However, the respondent at this time, as stated in the 31 October email, wanted the claimant to leave and was actively hoping that she would realize this during the phased return.
47. The next day, the 5th of September, the new head of product asked the claimant what her official job title was as he was trying to get some organisation proposals on the table with the senior management team.
48. On the 6th of September 2023, Mr Heeney shared two new proposals for a restructure with the senior leadership team with organograms. The first proposal showed him as

head of product with a number of reports including a product development project manager, marked as Claimant / vacancy. The second proposal showed the claimant in her current role as head of innovation, reporting to the head of product. The first proposal was a smaller structure, or perhaps a flatter structure. The second proposal involved the claimant's role being unchanged.

49. On 11 September 2023, Ms Bowes emailed staff to provide an update on the proposed team structure. She stated that it was important for the team to have clarity on the overall setup and indicated that she was happy to take any residual questions. The structure disseminated by Ms Bowes was very similar to the first proposal issued on 6 September 2023, under which the Claimant would report to the Head of Product and there was no reference to her as head of innovation.
50. The Claimant subsequently emailed Mr Lawson, stating that the proposed structure did not reflect what had been discussed and agreed, describing the situation as 'a bit of a shocker.' The Tribunal found that, by this date, Ms Bowes had decided to adopt the Head of Product's initial proposal, although she may have acted prematurely in doing so, as the matter had not been fully discussed with Mr Lawson or the Head of Product. Ms Bowes apologised to the Claimant for the confusion caused.
51. On 3 October 2023, the Head of Product emailed Mr Lawson to discuss the proposed restructure stating that he had spoken to Ms Bowes and there were two personnel issues to address under head of innovation. He stated

> "Incumbent is not a fit with the business primarily due to output volume and desire/capability to lead projects and the role of senior NPD manager is required. This role isn't being made redundant (although renamed from head of innovation). Action- start conversation to exit incumbent by 22 December on the basis of fit with business. Start permanent recruitment immediately."

52. Mr Lawson sent an email in almost identical terms to Ms Bowes on 5 October, and the tribunal found that he agreed with Mr Heeney's proposal in the 3 October email. The tribunal found that the respondent's motivation to exit the claimant was that they did not want to employ her personally, because of her skillset and because she had been ill and might fall ill again.
53. There was a meeting between the claimant and Mr Lawson on or around the 9th or 11th of October. The witnesses were not consistent as to the date, but there was

agreement it was in early October. The claimant stated that Mr Lawson and Ms Bowes had told her she would need to give 125% effort and that they felt tired and stressed as they had been covering her role during her absence. In cross examination the claimant accepted that Mr Lawson and Ms Bowes had not said used these words, they said they were feeling tired due to having to do the innovation work. Mr Lawson denied saying that he had used the phrase 125% at the meeting.

54. The claimant was told that her job was potentially at risk and Ms Bowes felt the claimant did not want to continue to wo in a high pressure environment and this meeting might prompt the claimant to accept this. In Mr Lawson's email of 31 October he stated that the respondent had hoped that this meeting would trigger the claimant into accepting the exit offer.
55. However, the claimant did not indicate that she wanted to leave.
56. The claimant requested a week's leave (16 to 19 October) with about two weeks' notice. Mr Heeney and Mr Lawson were concerned upon receiving the request that it was too short notice. Ms Bowes made the decision to refuse the claimant's annual leave.
57. The tribunal accepted the respondent's evidence which was not challenged that September and October was the respondent's busiest time of the year after January.
58. On 31 October Mr Lawson emailed the respondent's recently retained external HR function concerning the claimant. He stated that she had evolved into head of product shortly after being taken on as head of innovation. After 9 to 12 months, it became evident that the head of product role was not suitable, and it was agreed she would revert to being head of innovation. Then the claimant had approximately two months off sick leave with stress, depression, and trauma between June and August and returned on a phased return during September.
59. However, during her absence and phased return the head of product and CEO had completed a lot of work that the claimant had been tasked to do before the sickness and it became evident she did not have the skill set they required.

60. Mr Lawson continued

> "Before she returned from sick leave we gave her the opportunity to walk away with full notice pay, but no requirement to work. [Ms Bowes's telephone call of 18 August]. She still decided to return and as such supported the phased return, hoping she would realise quite quickly that the job was not for her, that she would accept the offer we made. This has not happened. We have had an informal discussion with the employee earlier this month to alert her that the structure is likely to evolve by early next year. This was done in the hope it may get her to trigger the offer we previously made.[The meeting between the claimant, Ms Bowes and Mr Lawson in early October.]

61. Mr Lawson explained that the respondent now wanted to recruit someone into a new more junior role of senior product developer five days a week and would not require the claimant as head of innovation. They did not believe she was suitable for the new role and did not want her to apply for it. Currently she was only operating at about 50% productivity (viewed generously). They would like to make the claimant redundant in March so they could retain her for a few months during the recruitment of her placement.
62. The tribunal had sight of an email on 2 November from Mr Lawson to the chief executive officer and head of product. He provided a summary of the advice from HR on the basis that the claimant, would no longer be required and the respondent would be replacing her with a distinctly different new role. This would be a redundancy situation. The biggest risk was a claim of discrimination on the grounds of disability discrimination on mental health grounds.
63. The tribunal found that the respondent had decided that it wanted to exit the claimant and knew that her position was not redundant. However, following HR advice it created a narrative of redundancy of the claimant's role so as to exit her in a way to reduce the risk of legal proceedings.
64. The email conversation continued with Mr Lawson stating on 7 November that the respondent needed to initiate the redundancy process with the claimant and if it was not done soon,

> "the alternative is we do this week on Thursday, although given her mental state landing this news before her time off for as she put it, "general wellness" probably not the best way forward."

65. On 24th of November 2023, Ms Bowes shared an up-to-date team structure with all staff, which showed the claimant no longer as head of innovation but reporting to the head of product and in effect demoted.
66. On 30 November Ms Bowes emailed the head of product and Mr Lawson emphasising that the job description for the new product developer needed to be more distinct from that of the head of innovation. She stated, "this difference needs to come through loud and clear". The tribunal found that Ms Bowes was concerned that the new job description was not sufficiently dissimilar to the claimant's head of innovation role which did not fit with the narrative of a redundancy.
67. The respondent held its first redundancy consultation meeting with the claimant on 4 December. The claimant's role was put at risk of redundancy and respondent told her that this was as a result of the proposed restructure. It told the claimant of the new role of senior product development manager and that she could apply. It was not a replacement role for the head of innovation as it had no seniority. The claimant was told this was a high pressure role, and it would not play to her strengths. The claimant's account was that Ms Bowes told her that she wanted to recruit "lovely new talent" for this role. (The list of issues stated that this exchange occurred in the second consultation meeting, but it was accepted that this occurred in the first consultation meeting). The claimant was told that there would be an external recruitment process including competitive interview for the new role. The claimant was told that she should keep the matter confidential, but she told her colleague Ms Walsh in confidence.
68. The respondent held its second consultation meeting with the claimant on 11 December 2023. There was a discussion relating to the claimant's share options. The claimant's evidence was that she was told or led to believe in this meeting and subsequently that her existing share options would be lost if she accepted the new role. However, the tribunal having considered the references to the share option scheme in the bundle and having heard the evidence of the witnesses could find no such specific reference. Mr Lawson told the claimant that she would lose access to the share option scheme, but it was unclear whether this meant that she would lose her existing share options or simply lose the possibility of obtaining further share options.

69. The tribunal accepted the claimant's case that the respondent did not want her to apply for this role because the respondent stated so in terms on 31 October 2023.
70. On 11 December 2023 the Respondent confirmed that the claimant was to be made redundant. It advertised the role of senior product developer on 13 December, at four days a week but stated that this was an error as the role was full time.
71. On 2 January 2024 there was a discussion between Ms Bowes and the claimant. The claimant alleged that Ms Bowes told her that she "just added costs" to the product. This was not included in the claimant's witness statement. Ms Bowes's account was they had a conversation along these lines on the 11th rather than the 2nd of January. She was trying to explain to the claimant that it was not cost-effective to have both a senior product manager and a head of innovation in a competitive market.
72. The tribunal preferred Ms Bowes version of events for the following reasons. Ms Bowes's account was plausible and coherent. Whatever the wisdom of replacing the claimant's role with a senior product manager once the decision was made it would not be cost-effective to have both. Further, while Ms Bowes had shown herself at times to be clumsy in her dealings with the claimant, there was no evidence that she had said something as evidently crass and objectionable as the claimant just adding cost to the product. The tribunal found that the claimant had interpreted Ms Bowes's comments in this way and misremembered what she had said.
73. The final consultation meeting to confirm the claimant's role as redundant was on 24 January 2024.
74. Mr Lawson emailed Ms Bowes and the head of product stating the claimant was rather bitter about her exit and did not want to go quietly. He said that she wanted the redundancy announced at an all hands meeting because it would cause a stir. It was agreed that the announcement would be by email.
75. The next day, 25 January, Mr Lawson wrote to the claimant to confirm the termination of her employment by reason of redundancy.
76. The claimant's evidence was that it had been difficult and upsetting for her not to be able to share the situation with her colleagues for so long.
77. On 27 January the respondent sent an email to all hands stating that the claimant was being made redundant and referring to the claimant in very positive terms. The email went on to announce the appointment of the incoming senior product development

manager. In the view of the tribunal, anyone reading the email would understand there was a link between these two events.

78. On 6th of February 2024 the claimant issued a grievance and appealed her dismissal. In the grievance the claimant for the first time mentioned PTSD and made her first reference to disability discrimination. She also made a subject access request under data protection legislation. The subject access request referred to any documents referencing the claimant's name and the names of a number of other employees. The claimant made no reference to the subject access request in her witness statement.
79. The claimant met with the chief financial officer for a hearing of her appeal and grievance on 9 February 2024.
80. The claimant's effective date of termination was 29 February 2024.
81. The reply to the subject access request was due on 19 March 2024. The respondent missed the deadline.
82. On 5 April 2024, Ms Paula Hawkins issued a grievance and appeal investigation report. On 24th of April Mr Barry Ross (the Respondent solicitor) provided the grievance outcome and appeal outcome. The grievance and appeal were not upheld
83. On 7 May the respondent replied to the subject access request. There were logistical delays in the claimant's accessing the information, for instance a zip file could not be unloaded, and a memory stick could not be operated. The respondent's stated that the delays in replying to the subject access request were caused by the task being given to a new employee and the fact that the claimant was often referred to as "H" in respondent documents which complicated the task.

The Applicable Law

84. The applicable law is found in the Equality Act 2010 as follows

6 Disability

(1)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.

(2)A reference to a disabled person is a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.…

(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

15 Discrimination arising from disability

(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.

26Harassment

(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.

Schedule 1 – Disability supplementary provision

2(1)The effect of an impairment is long-term if—
(a)it has lasted for at least 12 months,
(b)it is likely to last for at least 12 months, or
(c)it is likely to last for the rest of the life of the person affected.
(2)If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
(3)For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

5(1)An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a)measures are being taken to treat or correct it, and
(b)but for that, it would be likely to have that effect.
(2)“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid…

Submissions

85. The respondent provided written submissions on the facts and the law to the tribunal and the claimant. After the tribunal and claimant had read the submissions, the respondent spoke briefly to the submissions. The claimant then presented her prepared oral submissions and the respondent replied briefly.

Applying the Facts to the Law

Was the claimant a disabled person?

86. The tribunal firstly considered whether the claimant was a disabled person at the material time, that is, at the date of each alleged act. The period of the alleged acts of discrimination was from the end of August 2023 through to mid-March 2024 (when the respondent's deadline for compliance with this subject access request expired).
87. The respondent accepted that the claimant suffered from severe anxiety including ptsd and depression. It disputed disability on the sole ground that the condition and its effects was not long term.
88. The tribunal directed itself in line with the Disability: Equality Act 2010 - Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability, updated on 8 March 2013.
89. Further, it accepted the respondent's legal submissions in respect of the definition of disability. The burden was on the claimant in establishing she is protected by section 6. It agreed that when determining whether a condition was likely to last 12 months, "likely" is to be interpreted as meaning, it could well happen (see *SCA Packaging v Boyle* [2009] IRLR 746 and the Equality and Human Rights Commission Guidance).
90. The question for the tribunal was whether at any of the dates of the acts of alleged discrimination - the substantial adverse effect on the claimant's ability to carry out normal day-to-day activities was likely to last at least 12 months, in the sense that it could well happen.
91. The tribunal must assess the likelihood of the adverse effects lasting for 12 months as at the date of the alleged discrimination. It must not take into account anything only known or occurring after that time. The question of whether at date of an alleged discriminatory act the impairment was likely to last 12 months is a different question

from whether at the date the tribunal determines the question, the effects had in fact lasted 12 months.

92. The tribunal saw no medical evidence going to this specific question. It drew no adverse inference against the claimant because the respondent had conceded on disability and was only permitted to withdraw this concession on the first day of the hearing.
93. The tribunal considered the limited evidence before it. The tribunal noted that the claimant and the respondent had referred to the death of the claimant's two dogs as triggering deep-rooted historical issues. The claimant's case was that her reaction to this was exacerbated by pressure of work. The tribunal accepted that it was plausible that adverse effects from a mental health condition linked to a deep-rooted historical issue might be more likely to be longer term than an immediate reaction to a traumatic event. The tribunal reminded itself that the seriousness or acuteness of the effects of an impairment, is not necessarily a reliable indicator as to how long those effects might last.
94. On 1 July 2023 the claimant's GP recorded the claimant did not feel well mentally and felt traumatised and she was prescribed sleeping tablets.
95. A doctors letter from 10 June 2024 stated the claimant was diagnosed in July 2023 with moderate to severe anxiety with symptoms including hypervigilance PTSD and panic attacks and secondary depression. However, there was no express reference to this diagnosis in the GP records.
96. The claimant was prescribed diazepam and beta-blockers on 3 July. It was stated the claimant felt numb and there was reference to the loss of her dogs and stress due to the historical family bereavement. She was said to feel very desperate with dark thoughts, feeling low and guilty and she suffered intrusive thoughts but no thoughts of acting upon them. She had been allocated to in-house counselling.
97. On 17 July it was recorded that she was very tearful and suffering sleep issues. The doctor stated that what she was feeling appeared to be a normal part of the grieving process
98. On 19th of July, she reported that the room had been spinning, she was very anxious and stressed and suffered flashbacks. There was a reference to acute stress and bereavement reaction and to hypervigilance, PTSD flashbacks and panic attacks.

99. She was prescribed exercise, Pilates and referred to mental health self-help books on 2 August. The claimant started counselling on 8 August she was recorded as suffering from a raised heartbeat for tears and shaking. She said she had suffered trauma since late June and 9 August. She reported a panic attack.

100. On 25 August the claimant suggested a staged return to work to help her readjust and to take diazepam for a month. She mentioned that she might then move on to antidepressants after a month. On 3 October, the claimant was prescribed sertraline.

101. The tribunal reminded itself that the claimant did not have the opportunity to obtain medical evidence going to the question of whether at any or all time between August 2023 to March 2024 it could well happen that the substantial impact on her daily activities would last 12 months.

102. Nevertheless, the medical evidence that the tribunal did see was not consistent that during the summer of 2023 it could well happen that the significant effects would last 12 months. The GP prescribed relatively low level interventions to get over an immediate traumatic event. There was a reference to this being a normal reaction to a bereavement.

103. However, the claimant unfortunately did not recovery quickly. She in October started to take antidepressants. The tribunal found that this was consistent with a concern that her condition might well be long lasting. The GP records showed that the claimant was initially reluctant to take antidepressants, which the tribunal accepted was a common attitude, as there can be issues with identifying the correct antidepressant or the correct dose and then later the issues with coming off the antidepressants.

104. The tribunal accepted that the claimant in October had overcome her initial resistance to antidepressants indicated that she, with the agreement of her doctor, now thought that it could well happen that her condition would last much longer. It was likely that the claimant's view had changed over time and this was not a sudden decision on 3 October.

105. Further, by mid-September the claimant had suffered further stressors in her life. She had increasing and reasonable concerns over job security, firstly following Ms Bowes's offer about her exiting employment on 18 August and then during

September, when it appeared that her position might be removed in the restructuring. In the view of the tribunal therefore from the middle of September, when the claimant was first actively considering going on antidepressants, it could well happen that the significant impact on the claimant's daily to day activities would last 12 months.

106. Therefore, the claimant was a disabled person protected under s6 Equality Act from the middle of September 2023 and remained so at least until the last act of discrimination relied upon in March 2024.

The respondent's knowledge of disability

107. To be fixed with liability under s15, an employer must have actual or constructive notice of the employee's disability.

108. According to the EHRC Code of Practice on Employment, an employer must do all it can reasonably be expected to do to *find out* whether a person has a disability (para 5.15 emphasis added). Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person", — paragraph 5.14.

109. According to *A Ltd v Z 2020 ICR 199, EAT* , the question is what the employer might have found out had it made enquiries. According to *Gallacher v Abellio Scotrail Ltd EAT 0027/19* an employer should have some knowledge of the detail necessary to establish that a person is protected by section 6.

110. The tribunal considered whether the respondent had knowledge of the claimant's disability at the material time. The tribunal found that the use of the words *find out* in the Employment Code indicated at least some degree of proactivity was expected from an employer. An employer cannot be entirely passive.

111. The tribunal considered what the Respondent knew from mid-September 2023 when the tribunal had found the claimant to be protected by section 6.

112. By this time the respondent had seen the claimant's fit notes stating that she had time off for mental health. They had noticed in August that she was tearful and shaking in the office. She had three attempts to return to work until she successfully returned on a phased return. However, they did not take the opportunity to send the Claimant to occupational health which they were entitled to do under the contract of employment. The tribunal found that the claimant would have willingly attended

occupational health by September as her condition had not proved short term. From 18 August Ms Bowes had doubts that the claimant would be fit enough to return to work long term which was why she suggested an exit.

113. The tribunal found that the respondent was profoundly concerned about the claimant's resilience due to her mental health in their high-pressure environment as well as about her inherent fitness for the role. The tribunal accepted that the respondent's concern about the long term impact of the claimant's condition manifested firstly on 18 August and became stronger over time.

114. Mr Lawson told HR that the respondent did not think that the claimant would be able to perform the role. When the respondent had reached a settled decision on how to exit the claimant by 31 October it immediately went to human resources for advice on how to effect this. At this time the respondent were concerned that the claimant might be a disabled person, and they might be exposed to a risk of tribunal proceedings if they were to terminate her.

115. The tribunal could identify no precipitating event between the middle of September and the end of October that might make the respondent more concerned that the claimant was a disabled person. The tribunal found that the respondent's concern that the claimant would be protected under section 6 existed in mid-September in the same way as it existed in late October / early November.

116. This was consistent with the respondent being aware of the elements of the definition of disability. It was aware that the claimant had been suffering from a mental health impairment from the summer as was shown by its concerns about her resilience. Further, it was concerned about the impact of this condition on her ability to carry out day-to-day activities. Finally, it was concerned that it could well happen that the claimant would be so affected for 12 months and this was reflected in the respondent's concerns about her continuing to employ the claimant.

117. Accordingly, the Tribunal found that the respondent was on constructive notice of the claimant’s disability from the middle of September 2023, that is when the claimant became protected under section 6.

<u>Section 15 Discrimination Arising from Disability</u>

118. There is a two-stage test for causation under section 15. As set out in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT*,

a. the disability must have a consequence of something; and

b. the Claimant must be treated unfavourably because of that something.

127. According to the EAT in *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT* the Tribunal must investigate two distinct causative issues :

(i) did the employer treat the Claimant unfavourably because of an identified something? and

(ii) (ii) did that something arising in consequence of the Claimants disability?

128. The first issue involves an examination of the alleged discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment. If the something was a more than trivial part of the reason, the test is satisfied. The second question, the relation between the disability and the "something arising", is one of objective fact for a Tribunal to decide in light of the evidence.

129. The tribunal firstly considered if the sickness absences arose in consequence of the disability. The difficulty for the claimant was that the absences on which she relied occurred when the claimant was not a disabled person. The tribunal had found that the claimant became a disabled person for the purposes of s6 in mid-September 2023. The claimant had returned to work on 4 September. The tribunal considered if the last half of the claimant's phased return could be an "absence". The claimant had been asked by the tribunal to prepare a chronology of the absences on which she relied but had not done so. The tribunal could not accept that sickness absence could include a phased return. The claimant was no longer absent sick, she had "returned" to work.

130. The tribunal took into account *British Telecommunications plc v Robertson EAT 0229/20* in which the EAT held that a tribunal needed to consider carefully the facts relating to whether a sickness absence relied upon in fact related to the disability.

131. It was an objective fact, the tribunal found, that the claimant's sickness absences could not arise in consequence of a disability because she was not a disabled person at the time of the sickness absences.

132. The EAT in *Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT*, stated that there only needs to be some kind of connection between the disability and

the unfavourable treatment. However, there could not be a connection in these circumstances.

133. The tribunal considered if it was possible to interpret the list of issues or the claim form as the claimant relying on something other than the sickness absences as the something arising from disability. The tribunal reminded itself that the claimant was a litigant in person and it applied the over-riding objective to avoid formality and seek to create a level playing field between the parties. However, the list of issues was reviewed with the parties on the first day of the hearing and the tribunal directly asked the claimant to identify the "something arising from disability" on which she relied in her s15 claim. The claimant confirmed expressly that she relied on her sickness absences. There was no suggestion or indication that she relied on anything else, such as a perception on behalf of the respondent that it saw her as lacking resilience in a high pressure environment because of her disability as evidenced by the sickness absences. The tribunal noted that there was no suggestion of this in the claim form or the list of issues or the case management order.

134. The tribunal applied the case law that it should not allow a list of issues, even if agreed, to prevent it from considering the actual claim. But in this case, the claimant stated in terms in her claim form that the reason for the dismissal was her sickness absences and her refusal to accept the exit offer on 18 August (at a time when she was not protected by s6).

135. As the sickness absences relied on did not arise in consequence of the claimant's disability, the section 15 claim could not succeed.

<u>Harassment s26 Equality Act</u>

134. According to *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT* (a case under the legacy race legislation) tribunals are advised to consider the three elements of a harassment claim : (i) unwanted conduct, (ii) the proscribed purpose or effect, and (iii) which relates to the protected characteristic.

135. As set out in paragraph 7.8 EHRC Employment Code, unwanted means unwelcome or uninvited. According to *Thomas Sanderson Blinds Ltd v Englisch EAT 0316/10*, *unwanted conduct* is conduct that is unwanted *by the employee.*

136. The Court of Appeal in Pemberton v Inwood 2018 ICR 1291, CA gave guidance as to s26 as follows

> 'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances — sub-section (4)(b). … The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so'.

137. Elias LJ in *Land Registry v Grant (Equality and Human Rights Commission intervening)* 2011 ICR 1390, CA, warned tribunals against distorting the language of the statutory definition of harassment,

> 'When assessing the effect of a remark, the context in which it is given is always highly material…It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable….Tribunals must not cheapen the significance of [the words in what is now s26(1)(b)]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'

138. According to *Richmond Pharmacology v. Dhaliwal*

> "…not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said

> or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase." And
>
> 'one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to … produce the proscribed consequences: the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt'.

139. In *Betsi Cadwaladr University Health Board v. Hughes* [2014] UKEAT/0179/13/JOJ, at [12], referring to the above two authorities the EAT stated:

> "… The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."

140. The tribunal firstly considered the act of harassment at 3.1 .1 - failing to pay the claimant correctly in August. The claimant was not a disabled person at this date.

141. The tribunal went on to consider issue 3.1 .2 - at a meeting on 9 October 2023 the claimant was told to give 125% effort and the CMO and CEO (Mr Lawson and Ms Bowes), telling the claimant that they felt very tired and stressed covering her role. Ms Bowes said in her statement that they were hoping at this meeting that the claimant would realise that she did not want to work in their high pressure environment and would leave.

142. There was no consistency on the date of this meeting. Dates were given in the list of issues, Ms Bowes statement, and the grounds of resistance of variously as 9 or

11 or 16 October. However, all agreed that there had been a meeting where an exchange relating to this had occurred in the first half of October.

143. The tribunal knew from the email of 31 October and Ms Bowes's witness statement that the respondent wanted to persuade the claimant to leave its employment at this meeting. The tribunal accepted that Ms Bowes and Mr Lawson had said that they were tired and stressed from covering functions when the claimant was absent sick. However, the tribunal could not accept that this comment was related to disability. It was simply a comment that they were tired and stressed from doing duties which had fallen to themselves. This was because of the claimant's non-disability related absence and the fact that the claimant was not well suited to doing these duties.

144. Further, the tribunal could not accept that this comment met the statutory definition of harassment. It was not a statement that could reasonably be said to violate the claimant's dignity or create an oppressive or otherwise proscribed environment for the claimant. The tribunal did not accept that these comments had serious, marked effects, and found that they were of lesser consequence.

145. The tribunal went on to consider the 125% effort comment. The tribunal accepted that this was said because it fitted with the fact that Ms Bowes and Mr Lawson wanted to persuade the claimant to leave and that the respondent's was a high-pressure start up environment.

146. However, the tribunal did not accept that the comment met the definition of harassment. It was a far from uncommon comment or attitude in a high-pressure environment. It was a generic and unremarkable comment which could not reasonably be said to have violated the claimant's dignity or have created an otherwise proscribed environment.

147. The tribunal considered the act at paragraph 3.1 .3 - that on 11 December 2023 (changed from 4 December in the list of issues), telling the claimant they wish to recruit lovely new talent in relation to the newly created senior product developer role.

148. Although this comment was denied in terms in the grounds of resistance, Ms Bowes did not refer to this in her witness statement. The tribunal accepted that the language was consistent with the language used by Ms Bowes in her emails, which

was often enthusiastic. Therefore, the tribunal found that she had referred to lovely new talent. The question was whether she made this comment in general or only if the claimant did not apply for the newly created role.

149. The tribunal accepted the respondent's submission that the claimant did not come up to proof in respect of this allegation. The claimant's evidence was not clear that Ms Bowes said or implied that they wanted to recruit lovely new talent in any event, that is, even if the claimant did apply. Ms Bowes's evidence was that this remark was made in the context if the claimant did not apply. There was insufficient evidence to find that this comment was made so as to indicate a preference for a new hire over the claimant. A simple reference to new talent, without an indication that this would be preferred to the claimant, could not objectively be viewed as approaching the statutory definition of harassment.

150. The tribunal went on to consider act 3.1.4 - on 2 January 2024, CEO told the claimant she just adds costs to product. Before the tribunal the claimant accepted that she did not know the date of the comment. It was not referred to in her witness statement.

151. The tribunal found that there was a limited negative impact on the claimant's credibility because a number of the dates in the list of issues and the witness statement were incorrect. However, this was outweighed by the negative effect on the respondent's credibility due to its witnesses denying that its decision to dismiss the claimant was related to the claimant personally rather than a redundancy of the role when this was manifestly inconsistent with its contemporaneous documents.

152. Nevertheless, Ms Bowes gave a plausible account of this exchange. The tribunal accepted that it was logical that it would not be cost effective to have both a head of innovation and the new role at the same time. Whatever the rights and wrongs of removing the head of innovation role and replacing it with a cheaper role, once the decision was made, it was not cost effective to continue with two roles. In the view of the tribunal this was an example of the claimant deciding what she thought Ms Bowes had meant and confusing this with what Ms Bowes said.

153. The tribunal considered the act at 3.1.5 - failure to provide the response to the subject access request in a timely manner.

154. The claimant confirmed that this referred to a response that was supplied after the data protection deadline in mid-March 2024. The response was not received till May and even then there was delay in the claimant accessing it.

155. The tribunal accepted that this act was related to disability. The claimant had made it clear that she wanted this information because she believed her dismissal and treatment was related to her disability.

156. However, there was nothing concerning this matter in the witness statement and this was not consistent with the claimant subjectively believing that this delay had violated her dignity or creating an intimidating, or otherwise proscribed environment for her. Before the tribunal, the claimant's evidence was notably more concerned with what she viewed as omissions in the subject access request rather than the delay in replying. These were distinct matters.

157. For the avoidance of doubt, the tribunal heard no evidence that the respondent had not effectively complied with the subject access request. At the tribunal's request, the claimant pointed to two documents in the bundle that she said had not been provided in the subject access request and were later provided in disclosure in tribunal proceedings. However, there was no evidence or indication that these two documents would have been properly disclosable under the subject access request. They were properly disclosable under the tribunal disclosure order and had been disclosed. The documents did not contain the names which were the subject of the SAR.

158. It was self-evidently regrettable that the respondent took so long to reply to the subject access request. The delay cannot have reassured the claimant that her concerns were being dealt with seriously. Nevertheless, the task was given to a new member of staff and in the experience of the tribunal subject access requests regrettably are often delayed.

159. Further, this was not a straightforward subject access request. The claimant was often referred to as “H” in the respondent documents making the search relating to her name more difficult in any event.

160. In the circumstances the tribunal could not see that a delay in providing a response to the subject access request in these circumstances violated the claimant’s dignity or created for her a hostile or otherwise proscribed environment.

161. Accordingly ,the harassment claim must fail.

Approved by:

Employment Judge Nash

11 November 2025

JUDGMENT SENT TO THE PARTIES ON

24 November 2025

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FOR THE TRIBUNAL OFFICE