Neutral Citation Number: [2026] EAT 131

Case No: EA-2023-000761-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 September 2026

Before:

MR RECORDER SEÁN JONES KC

- -

Between:

MRS MG HARKINS

Appellant

- and –

MARKS AND SPENCER PLC

Respondent

- -

- -

Rad Kohanzad (instructed by Lawson West Solicitors Limited) for the **Appellant**
Grace Holden (instructed by Marks and Spencer plc) for the **Respondent**

Hearing date: 25 June 2026

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JUDGMENT

SUMMARY

Discrimination; Disability; Harassment

Discrimination; Disability; Discrimination arising from Disability

Discrimination; Disability; Failure to make Reasonable Adjustments

The Claimant had a generalised anxiety disorder, depression and PTSD and was a disabled person for the purposes of the **Equality Act 2010**. She worked as a Visual Merchandising Team Manager which required her to supervise other employees working on the shop floor. The Claimant struggled with the management element of her role and also with working on the shop floor during Covid as she was anxious that she might contract Covid and pass it on to her husband for whom she cared and who was having to shelter given his particular vulnerabilities. She complained that she suffered harassment relating to her disability in the following ways: on 19 April 2021 her then line manager asked her whether she felt able to do her role as a manager and informed her that she was being given a rating of "missed"; at some point in the period 19 May to 10 June 2021 there was an inappropriate discussion between one of the Respondent's employees and a former employee about the Claimant's ill health; on 23 August 2021 a successor line manager enquired whether she had considered giving up her management responsibilities to care for her husband; and on 25 August 2021, the same line manager told the Claimant that he had not fully read two forms which contained details of her disability. The Claimant also alleged that she had been discriminated against because of something arising in consequence of her disability: specifically, the incident on 23 August 2021 and the perception that her performance as a manager was poor. Finally, the Claimant alleged that there had been a failure to make a reasonable adjustment consisting of a failure to remove her from shop floor duties. The Tribunal dismissed all of the claims.

Held

(1) On the appeals relating to harassment;

(a) in dealing with the allegation that on 19 April 2021 her line manager asked her whether she felt able to do her role as a manager the Tribunal applied the appropriate subjective test to the question whether the conduct had been unwanted.

(b) since there was no challenge to the tribunal's finding that being given a rating of "missed" was unwanted conduct, the errors alleged were academic.

(c) the tribunal was entitled to find on the evidence before it that there had not been any inappropriate discussion of her ill health in the period 19 May to 10 June 2021.

(d) the tribunal was entitled to find that the successor line manager's enquiry about whether the Claimant had considered giving up her management responsibilities to care for her husband was not, in all the relevant circumstances, conduct that it was reasonable to consider had had the necessary harassing effect.

(e) the tribunal was entitled to find that the successor line manager's statement that he had not fully read the two forms was not conduct that it was reasonable to consider had had the necessary harassing effect.

(2) On the appeals relating to the allegations that the Claimant had been treated unfavourably because of something arising in consequence of her disability:

(a) the tribunal was entitled to find that the successor line manager's enquiry about whether the Claimant had considered giving up her management responsibilities to care for her husband was a proportionate means of achieving a legitimate aim.

(b) the perception that her performance as a manager was poor was not, on the tribunal's finding, something that arose in consequence of the Claimant's disability. There was no error in the tribunal's approach.

(3) On the appeals relating to the allegations of failure to make reasonable adjustments:

(a) the tribunal had been entitled to find that, in the light of the adjustment made, the Respondent had neither actual nor constructive knowledge of any substantial disadvantage;

(b) in the light of the failure of the appeal on the question of knowledge of substantial disadvantage the remaining ground was academic.

MR RECORDER SEÁN JONES KC

Background

1. Mrs Harkins ("the Claimant") was formerly employed by Marks and Spencer Plc ("the Respondent"). She commenced employment on 22 October 1995. Her employment terminated on 4 March 2022 when she was dismissed.

2. At the date of her dismissal, the Claimant was working as a Visual Merchandising Team Manager. Her role, the Tribunal found, "primarily involved working on the shop floor ensuring that the shop floor was in accordance with management directions and managing a small team of staff".

3. The Claimant's line manager was someone identified in the Tribunal's decision only as "SF". The Claimant found SF to be "blunt" and "often direct". SF was also in a relationship with one of the colleagues who reported to the Claimant which meant that, when the Claimant felt undermined by those reporting to her, she had no confidence that SF would be a source of support.

4. The Claimant is a disabled person within the meaning of **Equality Act 2010**, **s. 6**. The parties agreed and the Tribunal found that, at the material time, the Claimant "suffer[ed] from depression and generalised anxiety disorder". Although the Claimant's depression and anxiety disorder had persisted for a number of years, her symptoms became more acute in January 2020.

5. The Claimant missed a number of shifts and was referred for a telephone occupational health assessment. The resulting report identified that the Claimant had been signed off work by her GP by reason of her anxiety and that she was on anti-anxiety medication. The Tribunal found that SF would have seen that report.

6. From April to 30 August 2020, the Claimant was on furlough as a result of the COVID 19 pandemic. The Claimant's husband had a particular vulnerability and was required to shield.

7. The Claimant returned to work and resumed her duties on the shop floor. However, her anxiety about COVID 19 (and about her husband catching it from her) intensified to such an extent that in November 2020 she was taken from work by the emergency services and taken to a mental health crisis unit. Subsequently, on 7 January 2021 she suffered a panic attack. On her return to work it was agreed that she would spend less time on the shop floor, thereby reducing her contact with the public and, it was hoped, reducing the likelihood of her falling ill and communicating her illness to her husband.

8. The Claimant was absent from work because of anxiety and depression from 1 February to 27 February 2021. On 5 March 2021 she commenced a phased return to work.

9 On 9 March 2021 the Claimant was formally diagnosed with general anxiety disorder. The Claimant told her line manager, who at that point was a Miss Boniface, about the diagnosis and mentioned that she self-harmed and had suicidal ideation.

10. The Claimant had her end of year review on 19 April 2021. It was conducted by the Deputy Store Manager, Miss Green. The Tribunal made the following findings about what happened at the meeting:

> *"13. … the Claimant was nervous at the start of the end of year review. Miss Green went through the usual yearly objectives and highlighted the Claimant's strengths. She then moved onto the colleague KPIs. There was a discussion about the Claimant's leadership presence and her ability to commit to 'M&S behaviours'. There was concern expressed as to the Claimant's leadership. The Claimant admitted that she was struggling to manage members of her team. Miss Green asked why this had not been mentioned before but the Claimant gave no clear answer. Miss Green said that overall the Claimant would be rated as 'missed' for the year. There was no reference to the Claimant's performance being 'poor' and there was no suggestion then or at any stage that a missed rating would lead to any performance capability or disciplinary measures. The discussion concluded with Miss Green asking the Claimant whether she enjoyed the*

> *leadership role and wanted to continue doing it or whether she preferred to concentrate purely on the visual aspect of the role. The Claimant said that she wished to continue in her present role as it was. It was left at that.*
>
> *14. At a point in the discussions the Claimant became visibly upset. Miss Green suggested taking a break and left the room. Miss Green then went to make her own manager aware of the result of the review. The Claimant's condition worsened in the meantime. She telephoned her husband and he advised her to come home immediately. The Claimant said she was too upset to drive and she also had sedatives in her system. The Claimant called the PAM assist team (employee assistance providers) who after a quick initial discussion said they would call her back. There was a delay in reverting to her. The Claimant also spoke to her daughter for support. After a discussion with PAM Assist the Claimant was advised to call the emergency services. A paramedic undertook a telephone assessment and the Claimant returned home. The Claimant had periodic absences from work until 3 June 2021."*

11. On 19 May 2021 the Claimant met with Miss Boniface to discuss the former's absences. Miss Boniface prepared two documents: a well-being recovery action plan (known as a "WRAP") and a well-being adjustment plan (or "WAP"). One purpose of these documents was to allow other managers quickly to understand the nature of Claimant's difficulties so that support could be provided.

12. In June 2021 the Claimant saw something that had been posted on Facebook by SF who had, by this point, left M&S. The Claimant thought the image was aimed, even if indirectly, at her. The Tribunal records that the basis of the Claimant's belief was that: "SF appeared to know of her ill health". The Tribunal had, of course, found that SF had seen the February 2020 report produced as a result of the Claimant's telephone occupational health assessment. The Claimant called SF. The Claimant's evidence was that SF told her that Ms Boniface had said that the Claimant's ill health had not been properly followed up in February 2020.

13 In August 2021 the Claimant acquired a new line manager, Mr Sahota. He had an informal

discussion with the Claimant on 23 August 2021. The Tribunal made the following findings:

> *"17. … During an informal chat he touched upon various matters including the Claimant's communication skills which he said he had been made aware were negatively impacting other colleagues. During the discussion the Claimant asked if she could work a 4 day week instead of 5 as this would help her care for her husband and also help her with her mental health. Mr Sahota said that this could be considered but if the Claimant was struggling to undertake her work over 5 days it might be difficult to do it in fewer days and that it might also exacerbate her stress levels. Mr Sahota asked her whether she had considered stepping down from her managerial role to enable her to care for her husband."*

14. There followed a further meeting on 25 August 2021 during which the Claimant became "emotional". She asked Mr Sahota if he had read her WRAP and WAP documents and he replied that he had "flipped through them but not read them page by page". The Tribunal goes on to record that: "The Claimant says that her triggers had been hit but Mr Sahota was dismissive of her mental health".

15. On 6 September 2021 the Claimant lodged a grievance in which she alleged that the Respondent had "failed in their duty of care, subjected the Claimant to discrimination and disclosed confidential information". Both the grievance and a subsequent appeal were rejected.

16. By 27 September 2021 the Claimant had a new line manager, Ms Robinson, but had commenced a period of long term sickness absence.

17. On 29 October 2021 the Claimant contacted ACAS and then submitted a claim to the Tribunal on 4 January 2022.

18. In January 2022 the Claimant was invited to attend meetings to discuss her absence but declined to do so on grounds of ill health. The Claimant was the subject of a further occupational health report dated 17 February 2022. The report records the Claimant as believing that "mutual trust and respect ha[d] been damaged beyond repair". The report concluded that the Claimant was "unfit

for work and there [were] no adjustments [that the author] could reasonably suggest … to alter this. In summary there [was] no foreseeable return to work date …".

19. The Claimant attended what the Tribunal describes as an "ill health meeting" on 23 February 2022. The Claimant told Ms Robinson that she agreed with the report and that there were no adjustments that could be made to facilitate a foreseeable return to work. Ms Robinson warned the Claimant that if that was the case the employment might be terminated at a subsequent meeting. The termination warned about came to pass and the Claimant was dismissed on grounds of capability at a meeting on 4 March 2022. The Tribunal records Ms Robinson's reasons in the following terms: "… the Claimant had been absent for over six months with an 80% non-attendance rate for the financial year, … no reasonable adjustments were possible, … the Claimant was unable to suggest any reasonable adjustment that would enable her to return to work and the most recent occupational health report did not believe there were any adjustments that would facilitate a return to work.

20. The Claimant then submitted a second claim form.

21. The Tribunal sat over 8 days (the last of which was a reserved decision meeting) to consider claims of discrimination arising from disability; failure to make reasonable adjustments; victimisation; harassment; and unfair dismissal. The Tribunal dismissed all the claims in a reserved judgment sent to the parties on 5 May 2023.

22. The Claimant has advanced eight grounds of appeal. They are set out over 6 pages and are not easily summarised, but may be grouped as follows:

(1) Grounds two, three, four, five (in part) and seven relate to the Tribunal's determination that the Respondent did not harass the Claimant;

(2) Grounds five (in part) and six relate to the Tribunal's finding that the Respondent did not treat the Claimant unfavourably because of something arising from her disability; and

(3) Grounds one and eight relate to the Tribunal's finding that the Respondent had not failed to make a reasonable adjustment.

I will deal with the grounds in that order.

Harassment

(1) **The Law**

23. **Equality Act 2010**, **s. 26** provides, so far as is presently relevant, as follows:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to [disability]; 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 purpose or 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."

24. In order for conduct to be capable of amounting to harassment it must be "unwanted". **EHRC Guidance on sexual harassment and harassment at work** (30 January 2020) ("the Guidance") suggests, at paragraph 1.9, that "unwanted" means "essentially the same as 'unwelcome' or 'uninvited'".

25. The conduct must be unwanted by the worker: **Thomas Sanderson Blinds Ltd v English** UKEAT/0316/10/JOJ at paragraph 28 (and see the Guidance at paragraph 1.10: "unwanted means unwanted by the worker").

26. Whether the conduct is unwanted is a question of fact. The test is a subjective one: **Governing**

Body of Windsor Clive Primary School and another v Fosbrook and another [2024] EAT 183. The Tribunal should ask itself how the worker felt about the conduct and not how a reasonable person would have felt.

27. The fact that the test is subjective has a number of consequences:

(1) It will be no answer at this stage of the analysis to say that the worker was over-sensitive;

(2) If the conduct was not in fact unwanted, it does not matter that a reasonable person would not have wanted it;

(3) It is open to the Tribunal to conclude that conduct is unwanted whether or not the worker has ever objected to it, even where it has continued over a period. One of the reasons harassment is so insidious is that its victims often feel under pressure to grin and bear it, even to play up to it, as a self-defensive measure. Harassment is all too easily disguised as "banter" and "I was only joking, can't you take a joke?" is a stock line in every bully's repertoire. That is not to say that a lack of objection or participation in an exchange of "banter" is irrelevant, but the relevance is limited to what light it shines upon the true subjective position of the worker.

(4) It is not necessary for the alleged harasser to have appreciated that the conduct was unwelcome.

28. For liability to be established, the unwanted conduct must be "related to" a protected characteristic. It does not have to be the claimant's protected characteristic. In **English v Thomas Sanderson Blinds Ltd** [2008] EWCA Civ 1421, the successful claimant was a heterosexual man who had been the target of homophobic "banter".

29. Whether conduct is related to a protected characteristic is another question of fact. It is a broader enquiry than the narrower causal question in **Equality Act 2010**, **s. 13**. Certainly, if the conduct is "because of" the protected characteristic, that will suffice. However, the alleged harasser's motivation is not the "necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question": **Tees Esk and Wear Valleys NHS Foundation Trust**

v Aslam UKEAT/0039/19. In **Carozzi v University of Hertfordshire and another** [2024] EAT 169 HHJ Tayler suggested (a suggestion that I gratefully adopt) that "the term 'related to' is designed to cover all forms of conduct that, properly viewed, [have] a relationship to the protected characteristic". At paragraph 25 of his judgment, HHJ Tayler gives a helpful example of where "related to" will be broader than "because of":

> *"… a person who unknowingly uses a word that is offensive to people who have a relevant protected characteristic because it is historically linked to oppression of people who have the protected characteristic. The fact that the person, when using the word, did not know that it had such a meaning or connotation, would not prevent the word used being related to the protected characteristic."*

30. If the conduct is unwanted and relates to a protected characteristic, the next question is whether it was intended either to violate the worker's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the worker. Again, the question of the alleged harasser's purpose is a question of fact and must be assessed subjectively.

31. What does it mean to have the violation of someone's dignity as one's purpose? The statute does not define what is meant by the term. Nor does it define what is meant by "an intimidating, hostile, degrading, humiliating or offensive environment". That being so, the terms must be given their ordinary, natural meanings. The Court of Appeal gave guidance in **Land Registry v Grant** [2011] EWCA Civ 769. At paragraph 47, Lord Justice Elias says:

> *"Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the*

> *claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute."*

The statutory language is pitched at a level that suggests that it is intended to cover what one might call "serious" cases. Having one's dignity violated smacks of something more than merely being embarrassed or being legitimately upset. Intimidating, hostile, degrading, humiliating and offensive are all terms that connote something more than discomfort even where it is genuine and understandable. The warning not to "cheapen" the significance of the words is an important one. Although Lord Justice Elias goes on to speak of excluding acts which are trivial and upsets which are minor, I do not read him as suggesting that those adjectives define the boundary of harassment. It is not enough to show that the act was more than trivial and the upset more than minor. That is why the real upset that the claimant felt in that case was, Lord Justice Elias concluded "far from attracting the epithets required to constitute harassment". That is consistent too with the later case of **Pemberton v Inwood** [2018] EWCA Civ 564 in which the fact that the conduct complained of had been "profoundly upsetting" for the Claimant did not mean that, at least in the particular circumstances of that case, his dignity had been violated.

32. If neither the violation of the worker's dignity nor the creation of a harassing environment is the alleged harasser's purpose, the next stage is to ask whether one or other of those things was nevertheless the effect of their conduct.

33. In looking at whether dignity has been violated or a harassing environment created, **s. 26 (4)** requires the Tribunal to consider three matters: the perception of the claimant; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

34. The perception of the worker is self-evidently a subjective question. If the worker says, for instance, that they felt that their dignity had been violated and the Tribunal accepts that evidence, that limb is satisfied. It follows from the purely subjective nature of the test that the Claimant cannot have

perceived themselves as having had their dignity violated if they were unaware of the relevant conduct: **Greasley-Adams v Royal Mail Group Ltd** [2023] EAT 86.

35. The Claimant's perception is not, of course the end of the analysis. If it were, it would risk creating what Underhill P, as he then was, called in **Richmond Pharmacology v Dhaliwal** [2009] UKEAT/0458/08 a "culture of hypersensitivity". One must also consider the other two factors. In practice, those two factors, the other circumstances and whether it is reasonable for the conduct to have the harassing effect, are closely inter-related. In other words, the answer to the question whether it is reasonable for conduct to have a harassing effect is likely to depend on the circumstances.

36. HHJ Tayler's analysis in **Carozzi** is a very helpful starting point. He suggests that the legislation is trying, pragmatically, to balance the need to protect the dignity of workers with protected characteristics and the need for workplaces not to be carpeted in egg shells. That balance will require a mindful sensitivity on the part of managers and colleagues and, to quote HHJ Tayler, a "reasonable robustness" on the part of the worker. I would add that in assessing what degree of robustness may be reasonably expected of an employee with a mental impairment, it will be important to bear that impairment in mind in making the assessment. An employee who is known by an employer to have, say, an anxiety disorder or PTSD, may require to be dealt with in a manner which is characterised by a greater degree of sensitivity and care than an employee might typically require if a finding of harassment is to be avoided. What might be reasonably expected of them in terms of robustness is different. There must, however, be a limit. Some mental impairments may have the effect of making it significantly harder for an employee to view good faith attempts to engage with their performance as being anything other than unjustified persecution. It cannot have been the intention of the legislature to make it impossible for an employer to discuss performance concerns without committing an act of harassment. It follows that there is a balance to be struck in determining what is reasonable. An employee's vulnerability is a factor to be taken into account but equally the tribunal

cannot find itself in a position where it is imposing unrealistic expectations upon employers.

37. There are two contexts in which allegations of harassment most commonly arise. The first is where a worker is unhappy with the manner in which they are managed. The second is in their interactions with colleagues. Both arise in the present case.

38. Turning first to interactions with management, there are few of us who welcome criticism, even when, if pressed, we would have to accept that it was well-founded. It is very easy to see why being told that you are not meeting the standards expected of you would be "unwanted" conduct. You might very well find the experience upsetting. However, it would be difficult for an employment relationship to function if an employer could not, in a proportionate manner, draw to the attention of an employee good faith concerns about their work. That must be so even where the conduct can be characterised as "relating to" a protected characteristic. To give one example, where an employee has periods of absence from work as a consequence of their disability it must be open to an employer to address those absences without thereby triggering a liability in harassment. Similarly, if an employee's disability is impacting their performance at work, an employer wishing to understand the difficulty and to address the possibility of reasonable adjustments must be able to do so without the mere raising of the topic amounting to an act of harassment.

39. That is not to say that management interaction will never be of a kind that it would be reasonable to see it as having a harassing effect. There may be harassment, for instance, where the manager has confected the supposed concerns or where the manner in which they are addressed is disproportionate. Disproportionality might arise where the context in which the concern is raised is humiliating for the worker, e.g. criticising a worker in front of colleagues when it would have been possible to do so in private. Another example might be where the concern is communicated in an unnecessarily aggressive, disrespectful or insensitive manner. A still further example would be where the concern is raised relentlessly so that a worker is constantly picked on. As I observed above, what

is proportionate may also depend on the characteristics of the employee. If, for instance, an employee suffers from an anxiety disorder, the employer will need to have that in mind when deciding when and how any concerns about performance are to be addressed.

40. Turning to interactions with colleagues, it is unlikely that mere reference to a worker's protected characteristic would ever give grounds for a finding that there had been conduct that could reasonably be considered to have a harassing effect. There would, ordinarily, need to be something more. If, for instance, a worker had made it clear that it was a matter that they were particularly sensitive about and would prefer was not referred to, or if the reference was disparaging or mocking, or if the colleague was otherwise inappropriately intrusive or insensitive.

(2) The grounds of appeal relating to harassment.

(a) Ground 2

(i) The finding challenged

41. The Claimant alleged that she was harassed on 19 April 2021 when Ms Green asked her whether she felt she could do her job as a manager. The tribunal's finding (at Paragraph 63 of its decision) was:

> *"There was a genuine concern as to the Claimant's leadership skills and performance. She was asked whether she felt she could do her role as a manager. This was not unwanted conduct as the Claimant herself had admitted there were performance concerns about the leadership aspect of the role. The purpose of the comment was not to create a hostile environment or violate the Claimant's dignity but simply to provide feedback. The Claimant was prepared to receive feedback in the meeting. The comment was made in the context of an end of year review where employees are provided with feedback. It was not related to the Claimant's anxiety disorder."*

(ii) The parties' submissions: the first alleged error

42. Mr Kohanzad, on behalf of the Claimant, contends that the Tribunal erred in three ways. The first alleged error relates to the tribunal's finding that being asked whether she felt she could do her

role as a manager was not "unwanted conduct". Whether the employer's question was unwanted should have been assessed by focussing on the Claimant's own perception whereas the tribunal, it is contended, instead focussed on whether this was feedback she might reasonably have been expecting given that the Claimant herself had acknowledged that she was finding this aspect of her role difficult. Ms Holden, on behalf of the Respondent, argued that there was no error of law. The fact that the Claimant had admitted performance difficulties was something that the tribunal was entitled to take into account when assessing what her true subjective response had been.

(iii) Discussion

43. Applying **s. 26(1)(a)**, the tribunal had first to consider whether the conduct was unwanted. The tribunal made a finding of fact to the contrary. Since it was a finding of fact it can only be challenged on the basis either that the tribunal applied the wrong legal test or else that it reached a perverse conclusion. The Claimant's submission is that the wrong test was applied. It resolves to the following question: did the tribunal have in mind that the test was a subjective one? There is no perversity appeal set out in the grounds or in the submissions in respect of this finding.

44. The tribunal's self-direction on the law consists simply of reciting the statutory provision. Although the parties agree, relying on **Reed v Stedman** [1999] IRLR 299, that the test is a subjective one, the tribunal itself neither states that principle nor does it refer to any authority on the point. It does not follow, of course, that it did not have the principle in mind particularly in circumstances where the correct test was not in dispute. The Claimant says that the failure to apply a subjective test is demonstrated by the tribunal's reasoning.

45. The tribunal's reasoning is compressed. It deals with more than one issue in a single short paragraph. In the course of six sentences it deals with at least whether the conduct was unwanted and whether it related to the Claimant's disability. However, that is not all they find and it is not immediately clear what, if any, the impact of the other findings might be. Where, for instance, it finds

that "the purpose of the comment was not to create a hostile environment or violate the Claimant's dignity but simply to provide feedback" is that a point which is being taken into account for the purposes of deciding whether the conduct was unwanted, or whether the harassment was the Respondent's purpose within the meaning of **s. 26(1)(a)**, or both? Similarly, is the reference to the Respondent's concern being genuine a finding that is taken into account when determining that the conduct was unwanted or not? The only factor which is expressly linked to the decision on whether the conduct was wanted is that "the Claimant herself had admitted there were performance concerns about the leadership aspect of the role" which I will refer to as the "Admission of Concerns".

46. Might the Admission of Concerns make it less likely that an enquiry about whether she felt able to discharge her responsibilities was unwanted? The Claimant says it cannot. She says the Admission "says nothing about whether the … question … was unwanted"[1]. I have come to a different conclusion.

47. If the Claimant's position had been that she was excelling at management, being asked "whether she enjoyed the leadership role and wanted to continue doing it or whether she preferred to concentrate purely on the visual aspect of the role" would very likely have been unwelcome. However, if an employee is struggling they might welcome the possibility of giving up the responsibility. Whilst it does not follow as a matter of necessity that an employee who admits to struggling will welcome an enquiry of that sort, it is, I consider, a factor which is capable of shedding some light on the subjective question. On a fair reading of the tribunal's decision that is what the tribunal has done.

48. In so far as the other matters referred to in the paragraph were taken into account the same might also be said of them: queries reflecting genuine concerns are less likely to be unwelcome than

[1] Appellant's submissions, Paragraph 38

those which do not; feedback is less likely to be unwelcome at a meeting the express purpose of which is to provide it; and queries which do not have the purpose of creating a hostile environment are less likely to be unwelcome than those that do. I do not consider that the tribunal can be said to have erred by failing to consider the subjective view of the Claimant.

(iv) The parties' submissions: the second alleged error

49. The second alleged error relates to the next stage of the analysis: whether the unwanted conduct had either the purpose or effect of violating the Claimant's dignity or creating a harassing environment for her.

50. The tribunal found that: "*The purpose of the comment was not to create a hostile environment or violate the Claimant's dignity but simply to provide feedback"* and that finding is not challenged. However, the Claimant says that the tribunal should then have gone on to consider whether or not Ms Green's question nevertheless had a harassing effect. The tribunal has not expressly considered any of the factors specified in **s. 26(4)** which, the Claimant suggests, indicates that they skipped this step. The Respondent says that the matter is dealt with implicitly and points to the tribunal's reference to the question having been posed to the Claimant in the context of an end of year review where employees expect to receive feedback. That demonstrates, according to the Respondent, that the tribunal considered that it was not reasonable for the conduct to have had the necessary harassing effect.

(v) Discussion

51. The short answer to this ground is that the tribunal found that the specific conduct was not unwanted. That being so, the claim failed and it was not necessary for the tribunal to develop the analysis any further. However, the tribunal does go on to address other issues.

52. The fact that the question was posed at a meeting the purpose of which was to review

performance is certainly a relevant "other circumstance" for the purposes of **s. 26(4)(b)**. The tribunal might have gone on to say that since it had not found that there was anything about the question that suggested that it was asked in bad faith or that it was disproportionate to ask it or that the manner in which it was posed was disproportionate (perhaps because it was asked aggressively, dismissively or insensitively) it would not have been reasonable for the conduct to have had the necessary harassing effect within the meaning of **s. 26(4)(c)**. There is no such analysis however, or at least no express analysis. Whilst it seems to me to be the conclusion that the tribunal would most likely have reached, had I concluded that the tribunal had erred in respect of whether the conduct was unwanted, I would have concluded that the tribunal had erred either by failing to consider the relevant issue or by failing to provide adequate reasons for any implicit conclusion.

(vi) The parties' submissions: the third alleged error

53. The tribunal also concluded that the comment was not "related to" the Claimant's disability. The Claimant says that is an error. The comment related to the Claimant's struggles with management and they in turn arose from her disability. The tribunal was bound to find that the comment related to the Claimant's disability in those circumstances. The Respondent's position is that the criticism of the tribunal's decision assumes that the relationship between the Claimant's disability and her struggles with management had been demonstrated. On the contrary, the Respondent says, the tribunal found that there was no such relationship. At Paragraph 83 of its judgment the tribunal found as fact that: "[t]*he Claimant's leadership issues arose from her failure to address issues with her team which were unrelated to her disability*". Further, at Paragraph 72, the tribunal says: "*We do not find that the Claimant's perceived performance arose from her disability. It arose from her failure to meet the relevant standards, in particular the lack of relevant leadership qualities and her failure to manage her team properly.*" In the same paragraph the tribunal observes: "[the Claimant] *fails to provide any evidence or reason as to why her performance was impacted by her anxiety*".

(vii) Discussion

54. Since I have already concluded that the tribunal made no error when it found that the conduct was not unwanted, this sub-ground is also academic.

55. The passages relied upon by the Respondent appear in the section of the judgment which deals with the Claimant's **s. 15** claim and not with the harassment claim, but the Respondent is correct to say that the judgment must be read as a whole. I did ask counsel, somewhat unfairly, whether there was any material difference between saying that performance difficulties were something arising from disability (to use the formula in **s. 15**) and saying that the performance difficulties relate to disability (to use the language in **s. 26**) where the nature of the relationship relied upon is that the latter causes the former. If there is some difference of nuance it does not matter in this case because the tribunal took the position that the Claimant had put forward no evidence from which any causal link at all might be deduced and went on expressly to decline to find a causal link. It follows that no matter how low the causal hurdle might have been set, the Claimant failed to clear it.

56. The Claimant says in the further alternative that the tribunal failed to provide sufficient reasons for its conclusion that the conduct was not related to the Claimant's disability. I disagree. Reading the judgment as a whole it is clear that the tribunal was not persuaded that the performance concerns were causally related to the Claimant's disability.

(b) Ground 3

(i) The finding challenged

57. Ground three also relates to the Claimant's meeting with Ms Green. The particular finding at issue is at paragraph 65 of the judgment:

> "*On 19 April 2021 Miss Green did conclude that the Claimant had missed her objectives. The Claimant was rated as 'missed' in her end of year review not adjudged to be 'poor'. There is no rating of 'poor' in such reviews. This conduct was not unwanted*

as the Claimant had accepted legitimate performance concerns. The rating was not related to the Claimant's anxiety disorder."

(ii) The parties' submissions: the first alleged error

58. The first alleged error is:

"*Purpose or Effect*

16. The ET wrongly focused on the purpose of the "missed" rating rather than also asking what the effect of it was (per paragraph 65 ET Reasons). The ET erred in failing to consider the effect of rating on the Claimant."

59. The Respondent says that the tribunal found that the conduct was not unwanted and that that finding of fact is not appealed. Since that meant the claim was bound to fail, Ground Three is academic.

(iii) Discussion

60. The tribunal does not appear to have addressed the purpose of Ms Green giving the rating. It dismisses the claim on two bases: that the conduct was not unwanted and that it was unrelated to the Claimant's anxiety disorder. The ground of appeal appears to misidentify the tribunal's focus.

61. The Respondent is right to observe that the ground of appeal does not address the question whether the conduct was unwanted at all. Nor did the Claimant's skeleton. Nothwithstanding that the point was raised in the Respondent's skeleton exchanged before the hearing, there was no application before me for the grounds of appeal to be amended (and I would have been disinclined in any event to entertain one coming so late in the day) so that the ground relied upon is, of necessity, academic and is dismissed.

(iv) The parties' submissions: the second alleged error

62. The second alleged error is that it is "not clear on what basis the [tribunal] found that the missed rating was not related to the Claimant's disability". This alleged second error has two aspects.

The first is what I read as an assertion that the finding was perverse. The argument is premised on the Claimant's disability causing her to struggle and her struggling causing her to receive the missed rating. The second aspect is a suggestion that the tribunal has failed to give adequate reasons.

63. There are a number of difficulties with this ground. The first is that it is academic for the same reason given immediately above – there is an unchallenged finding that the conduct was not unwanted. That means that even if the conduct had "related to" the Claimant's anxiety disorder, the claim would still fail. The second is that tribunal's finding that there was no evidence of any causal link between the Claimant's struggles and her disability. Third, for the reasons already given above, I consider that the tribunal has provided adequate reasons. Ground 3 is dismissed.

(c) Ground 4

(i) The finding challenged

64. One of the instances of harassment alleged is that "… between 19 May 2021 and 10 June 2021, the Claimant's mental health had been discussed amongst members of staff".

65. The significance of the date range is that on 19 May 2021 the Claimant had an absence meeting with her line manager, Ms Boniface which had involved a discussion of the former's ill-health. The Claimant was accompanied at the meeting by her representative, Ms Timms. The relevance of the second date is that there was a discrete allegation that SF had posted something on her Facebook page which the Claimant understood to be a reference to her and to her ill-health. At paragraph 16 of its judgment the tribunal found as follows:

> "*On or about 10 June 2021 the Claimant discovered that a former colleague had posted an image on Facebook which she believed was indirectly aimed at her. She believes it was posted by SF who by this point had left her role with the Respondent. She says that on the basis of this post SF appeared to know of her ill-health … The Claimant rang SF who said that Ms Boniface had said that the Claimant's ill-health had not been properly followed up in February 2020 …*"

SF, I was told, had left the Respondent's employment in October 2020. The Claimant says that it follows from what she was told that Ms Boniface spoke to SF about the Claimant and her ill-health following the 19 May 2021 meeting.

66. The tribunal's finding (at paragraph 66 of its judgment) was as follows:

> "*The only people who would have discussed the Claimant's health are likely to have been her managers to ensure they were aware of the support she required. There is no evidence that the Claimant's ill health was discussed outside normal or acceptable parameters or that there was any suggestion it had been handled incorrectly in February 2020. The meeting where the issue was discussed was only attended by the Claimant, Miss Boniface and Miss Lesley Timms (the Claimant's representative). The Claimant does not accuse either Miss Boniface or Miss Timms of leaking any information from the meeting. Miss Boniface confirmed that she never expressed an opinion on how the ill health meeting was handled and we accept her evidence that there was no suggestion from her that the ill health process was handled incorrectly*."

(ii) The parties' submissions

67. The ground of appeal is as follows:

> "*In relation to the issue … that between 19 May 2021 and 10 June 2021, the Claimant's mental health had been discussed amongst members of staff, the ET's findings at paragraph 66 simply do not address the Claimant's case. The Claimant's case was that the ex-member of staff knew what was said during the meeting and that she was unable to say who leaked it but that someone did. The Claimant knew that because her undisputed evidence was that an ex-member of staff was aware of some of the confidential things said in a meeting. The ET needed to make findings as to whether the ex-member of staff did or did not know what was said during the meeting and decide whether it was prepared to draw any inferences from that about whether the matter was leaked.*"

It will be apparent that the "discussion amongst members of staff", appears to refer to a discussion between a member of staff (Ms Boniface) and someone who was not a member of staff (SF). The discussion was harassment because it involved the leaking of confidential things said during the meeting on 19 May 2021, specifically (it is to be inferred from the finding at paragraph 16) that Ms Boniface leaked the fact that she did not consider that the Claimant's ill-health had been properly followed up in February 2020.

68. In the Claimant's skeleton the argument is further developed. The finding that the tribunal made at paragraph 16 means that it was necessarily established that information must have left the closed circle of the "discussions" (which I take to be a reference to the 19 May 2021 meeting). The submissions accept that the Claimant did not accuse either Ms Boniface or Ms Timms of having leaked the information. The argument appears to be that the tribunal should have approached the matter from the other end of the chain. It should have asked itself whether SF was in possession of the information and, if she was, whether that would be possible without there having been a leak.

69. The Respondent's submissions accept, as their starting point, that SF told the Claimant that Ms Boniface had told her that she considered that the Claimant's ill health had not been properly followed up in February 2020. However, even if that is what SF said it does not make it true. The tribunal also accepted Ms Boniface's *"... evidence that there was no suggestion from her that the ill health process was handled incorrectly."* In other words, the tribunal did not believe that Ms Boniface told SF that the Claimant's ill-health had not been properly followed up. Once the tribunal had made that finding, there was no need for them to go on and make the further findings that the Claimant says the tribunal should have made.

(iii) Discussion

70. The Claimant says that the tribunal failed to ask itself whether SF "did or did not know what was said during the meeting". I consider that the tribunal did ask itself that question. It concluded that Ms Boniface had made no suggestion that the ill health process was handled incorrectly. That does not mean that the Claimant's evidence about what SF told her is inaccurate, but it does mean that what SF told her was untrue. Having made that finding, there was no need to draw any inferences

about whether Ms Boniface or anyone else had "leaked". This ground of appeal is dismissed.

(d) Ground 5

(i) The finding challenged

71. The act of harassment alleged was as follows:

> "*At the end of August 2021, the Claimant met with Mr Sahota when she explained that she was struggling owing to her mental health and that she wished to amend her working hours. The Claimant contends Mr Sahota responded to the Claimant's request by suggesting that she step down from her existing role*".

The Respondent denied that Mr Sahota had made any such suggestion, but argued, in the alternative, that if he had it did not amount to harassment.

72. The factual findings made by the Tribunal are paragraph 17 of its decision:

> "*Mr Arron Sahota became the Claimant's line manager in early August 2021. On 23 August he met the Claimant. During an informal chat he touched upon various matters including the Claimant's communication skills which he said he had been made aware were negatively impacting other colleagues. During the discussion the Claimant asked if she could work a 4-day week instead of 5 as this would help her to care for her husband and also help her with her mental health. Mr Sahota said that this could be considered but if the Claimant was struggling to undertake her work over 5 days it might be difficult to do it in fewer days and that it might also exacerbate her stress levels. Mr Sahota asked her whether she had considered stepping down from her managerial role to enable her to care for her husband.*"

73. The tribunal's rejected the allegation that Mr Sahota had harassed the Claimant, setting out its reasoning at Paragraph 68:

> "*We accept that Mr Sahota did ask the Claimant whether she considered stepping down from her role to give her more time for caring responsibilities but we do not find that the comment had the purpose or effect of creating a hostile environment or violate the Claimant's dignity. The Claimant was openly discussing issues with her home life with Mr Sahota. It was not reasonable for the Claimant to have perceived the suggestion as*

an act of harassment. Given the context it was to do with the management of her husband's condition alongside the stress of the role rather than the Claimant's anxiety disorder."

(ii) The parties' submissions

74. On behalf of the Claimant it is said that she had caring responsibilities for her husband and asked Mr Sahota, her line manager, to reduce the number of days that she worked from 5 to 4. In the context of that discussion, Mr Sahota asked her whether she wished to step down from her management role. The Claimant was offended and extremely upset (and never returned to work again). Mr Sahota denied that he had made the suggestion, but, the Claimant says, accepted in cross-examination that if he had said any such thing it would have been offensive. The tribunal having accepted he did say it, should, in the light of his concession as to its offensiveness, have gone on to find that the suggestion had the necessary harassing effect. The tribunal erred by failing to make that finding.

75. Next it is said that the conclusion that it was unreasonable of the Claimant to have perceived the suggestion as harassment is perverse or that it represents a misunderstanding of the legal test.

76. Finally, it is contended that the tribunal's finding that the suggestion did not relate to the Claimant's disability is perverse and that the reasons given are insufficient. The Claimant says that: "'the stress of the role' is clearly related to the Claimant's disability by reference to a relatively loose test of causation".

77. The Respondent contests the proposition that it necessarily followed from a finding that the suggestion was made that there was harassment related to disability. They do not accept that Mr Sahota agreed in cross-examination that asking whether the Claimant had considered stepping down from her managerial role was "offensive".

78. The tribunal concluded that the conduct complained of had not had the necessary harassing effect and given reasons for that finding. It was a finding that was open to the tribunal. In any event, the tribunal had gone on to find that it was not reasonable for the conduct to have had that effect which, again, was a finding that was open to the tribunal.

79. On the finding that the conduct was related to the Claimant's disability, the Respondent says that even on a "loose test" of causation, the Claimant did not explain how the combined difficulty of her role and managing her husband's condition related to her disability.

(iii) Discussion

80. I address the Claimant's three points in reverse order. There was no dispute that the Claimant asked to reduce her work week from 5 days to 4. The tribunal found that two reasons for the reduction were given: to "help her to care for her husband and also help her with her mental health". Mr Sahota's enquiry about whether or not the Claimant had considered giving up her managerial responsibilities arose directly out of, and was therefore related to, the Claimant's request. The question is whether the request was in turn sufficiently closely related to the Claimant's disability as to require the tribunal to conclude that the enquiry could be said to relate to the disability.

81. Since one of the reasons for the Claimant's request was the impact of the 5 day working week on her "mental health" that would seem strongly to suggest that the request did relate, at least in part, to the Claimant's disability. Because Mr Sahota's enquiry was in part motivated by a concern that acceding to the request might exacerbate the Claimant's stress levels, that too might be thought to suggest a connection between the Claimant's anxiety disorder and the relevant conduct.

82. That does not mean, of course, that the tribunal was compelled to find that the conduct related to the disability, but it would be important for the tribunal to explain why the test was not made out. The tribunal's reasoning is as follows:

> "*Given the context it was to do with the management of her husband's condition alongside the stress of the role rather than the Claimant's anxiety disorder.*"

The tribunal appears to be drawing a distinction between the "stress of the role" and the Claimant's anxiety disorder. In other words, the tribunal is suggesting that Mr Sahota was concerned about exacerbating the Claimant's stress but not her anxiety disorder. That is not an immediately obvious distinction and, if it is to be drawn, I consider that the tribunal needed clearly to explain the basis for doing so. It has not provided that explanation. I do not consider that the invocation of the "context" is sufficient to elucidate the tribunal's reasoning. If the context showed that the Claimant's mental health was not one of the concerns which prompted Mr Sahota to make the enquiry, the tribunal needed to identify the aspect of the context that was said to demonstrate that. The tribunal's reasoning on this issue is not, to use the familiar shorthand, "Meek compliant".

83. However, the tribunal also found that it was not reasonable for the conduct to have had the necessary harassing effect. If the tribunal was entitled to make that finding, the error identified immediately above would be rendered academic. The tribunal's reasoning, as I read the relevant passage in the judgment, was: "the Claimant was openly discussing issues with her home life with Mr Sahota". Brief though the reasoning is, it is possible to understand why the tribunal has reached the decision which it has when read with the findings made at Paragraph 17. Mr Sahota's enquiry arises as part of a discussion as to how the Claimant might be enabled to devote more time to caring for her husband. A consideration of what would and would not be workable would naturally form part of that discussion. The enquiry is made because Mr Sahota is concerned that what the Claimant is proposing may be harmful rather than helpful to her well-being. In those circumstances, the decision that it was not reasonable for the conduct to have had a harassing effect was one which was open to a reasonable tribunal properly instructing itself in law. I consider that is so specifically taking into account the fact that the Claimant was unwell and known to be so that an additional measure of sensitivity may reasonably have been expected of a line manager tackling the issue. I also consider it

to be the case even if, as the Claimant contends (and the Respondent disputes) Mr Sahota had conceded in cross-examination that making the enquiry could be seen as being offensive. It is ultimately a matter for the tribunal to form its own view on the reasonableness of the alleged effect and Mr Sahota's own views would not be determinative even if he had expressed them in an unqualified manner. However, I was not satisfied on the material before me that Mr Sahota had expressed such a view.

84. Finally, the Claimant's contention that the tribunal erred in concluding that the conduct did not have the harassing effect is not, in truth, a discrete point. The tribunal having considered the factors at **s. 26(4)** and determined that it was not reasonable for the conduct to have had the alleged harassing effect (by reference to **s. 26(4)(c)**) the appropriate conclusion for the tribunal to reach was that the Respondent did not harass the Claimant. That is because the purpose of considering the **s. 26(4)** factors is to determine whether, as a matter of fact, the necessary effect existed. I dismiss Ground 5.

***(e) Ground** 7*

(i) The finding challenged

85. The particular conduct alleged to have been harassing was set out at paragraph 54.5 of the tribunal's decision:

> "*On 25 August 2021, the Claimant had a brief meeting with Mr Sahota during which he asked her whether she had any issues with him. The Claimant began to get upset. The Claimant avers that Mr Sahota responded by challenging the Claimant on her emotions. The Claimant asked Mr Sahota whether he had read her WRAP and WAP forms. Mr Sahota stated that he had briefly read through the forms. The Claimant states that her triggers has been hit but he dismissed her comments.*"

86. The conduct complained of appears to have comprised three elements:

(1) Mr Sahota responded to the Claimant becoming upset by challenging the

Claimant on her emotions;

(2) Mr Sahota told the Claimant that he had briefly read through her WRAP and WAP forms; and

(3) When the Claimant told Mr Sahota that her "triggers had been hit", he dismissed her comments.

87. The tribunal's finding is at Paragraph 69 of the judgment:

"*On 25 August 2021 the Claimant had a brief meeting with Mr Sahota during which he asked her whether she had any issues with him and the Claimant became upset. We do not accept that Mr Sahota "challenged" the Claimant on her emotions. Mr Sahota had only just started to work and there is no reason why he would challenge her. Neither in her oral evidence nor in her witness statement does the Claimant explain what "challenging" her means. We accept that Mr Sahota had not fully read the WRAP and WAP forms but this in itself is not unfavourable treatment. He could have engaged with the Claimant for longer, and it may have appeared to the Claimant that he was dismissive when he was simply under pressure of work. The comments could not reasonably have the effect of creating a hostile environment or violating the Claimant's dignity.*"

88. Two of the three elements of the alleged conduct (the matters set out at Paragraphs 86(1) and (3) hereinabove) were not established on their facts.

(ii) The parties' submissions

89. The Claimant's submissions focus on the finding of fact that Mr Sahota told the Claimant that he had not fully read the WRAP and WAP forms. The Claimant alleges two errors (she had formerly relied on a third alleged error which was dropped during the course of the hearing). The first alleged error is that the tribunal concludes that Mr Sahota's failure to read the forms was not "unfavourable treatment". That, the Claimant says, is not the test applied when determining whether or not something amounts to harassment.

90. The second alleged error is the finding that telling the Claimant that he had not fully read the

forms could not reasonably have had the effect of creating a hostile environment or violating the Claimant's dignity. That was not a conclusion that was open to the tribunal. In other words, it was a perverse conclusion to draw. In suggesting that Mr Sahota was simply under time pressure rather than that he was dismissive, the tribunal has asked itself whether his conduct was "excusable" rather than whether the conduct could have had the prescribed effect.

91. The Respondent says that the reference to "unfavourable conduct" is likely a slip and that what the tribunal should be understood as meaning was that the conduct was not "unwanted". In respect of the second alleged error, it is said that the conclusion was one which was open to the tribunal, particularly in circumstances where some of the conduct relied upon had not been established.

(iii) Discussion

92. The most natural reading of the tribunal's finding in respect of the failure fully to read the WRAP and WAP forms is that when they say that the treatment was not unfavourable, they mean it. If the tribunal meant to say that the conduct was not unwanted they would no doubt have said so as they have done in other findings. A finding that it was, at worst, a matter of indifference to the Claimant whether or not the forms had been read would be a very striking finding indeed and one would expect to see some reasoning in support of it. No such reasoning appears in the judgment and that also leads me to conclude that the tribunal used the word it meant to use. The tribunal was not, it follows, applying the correct test and erred.

93. Once again, however, that error will be of no material consequence unless the tribunal's finding that it was not reasonable for the conduct to have a harassing effect was also made in error. In my view, it was not. I can quite see that a tribunal might, without error, conclude that a failure to read the forms was harassing conduct. However, a reasonable tribunal properly instructing itself in law could, I consider, reach this tribunal's conclusion. The hurdle for establishing perversity is,

deliberately, set high and I do not consider that the Claimant's appeal has cleared it. This ground of appeal is dismissed.

Discrimination arising from disability

(1) The Law

94. The relevant statutory provision is **Equality Act 2010**, **s. 15** which provides:

> **"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."

95. To succeed in a claim an employee must establish that they have been treated unfavourably. Treatment will be unfavourable where it places an employee at a disadvantage (see **EHRC Employment Code of Practice** at **Paragraph 5.7**). The threshold of disadvantage is "relatively low" (per Lord Carnwath in **Williams v Trustees of Swansea University Pension and Assurance Scheme and another** [2018] UKSC 65). **Williams** is also authority for the proposition that one is not treated unfavourably merely because one could have been treated more favourably.

96. The unfavourable treatment must be "because of" something which arises "in consequence" of the person's disability. The section envisages therefore, that the disability itself will not be the immediate cause of the treatment. Where an employee's employment is terminated, for instance, because an employer refuses to employ anyone who is HIV+, that is a matter which is dealt with under the direct discrimination provisions of **s.13**. Where an employee's disability results in periods of absence from work and the employee is dismissed because of their absence record, they are treated

unfavourably (being dismissed) because of something (the absences) arising from their disability. The section therefore anticipates that there will be a causal chain with at least two links, although there may be more (see **Sheikholeslami v University of Edinburgh** UKEATS/0014/17/JW per Simler P, as she then was, at Paragraph 65).

97. The first link is between the treatment and the relevant something. The test of causation ("because of") is the same as that in **s. 13**. The relevant something need not be the sole or principal cause of the treatment, it is enough that it is a significant cause. This first causal issue requires an "examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment" (see **Sheikholeslami**, above, at Paragraph 62).

98. The second link is between the relevant something and the disability. That is a question of fact and does not turn on what was in the employer's mind. Indeed, the employer does not need even to appreciate that the "something" arises in consequence of the disability (**City of York Council v Grosset** [2018] UKEAT/0015/16/BA, per HHJ Eady, as she then was, at Paragraph 40).

99. Where a claimant establishes that they have been treated unfavourably because of something arising in consequence of their disability, their employer will not be liable where they can show that the treatment was a proportionate means of achieving a legitimate aim.

(2) The grounds of appeal relating to Equality Act 2010, s. 15.

(a) Ground 5

(i) The finding challenged

100. The relevant issue for the tribunal to determine is set out at Paragraph 44.5 of the judgment:

> "[A]t *the end of August 2021 at a meeting with Mr Sahota when the Claimant explained that she was struggling owing to her mental health she wished to amend her working hours. The Claimant contends Mr Sahota responded to the Claimant's request by*

suggesting that she step down from her existing role".

101. The tribunal's findings are at Paragraph 76 of the judgment:

> "*We would also repeat out earlier findings in relation to the incidents with Mr Sahota. We do not find that there was any unfavourable treatment and if there was, asking an employee if they can cope with doing the same job in less time when they are already failing to meet targets and standards is justified, that is it is a proportionate means of achieving a legitimate aim.*"

The earlier findings referred to are those extracted at Paragraph 73 above. The claim failed on two grounds: Mr Sahota's enquiry was not unfavourable treatment and, if it was, making the enquiry was a proportionate means of achieving a legitimate aim.

(ii) The parties' submissions

102. The Claimant's primary submission in relation to the finding that the enquiry was not unfavourable treatment is that the finding was perverse. In the alternative, it is said not to be "Meek compliant".

103. On the alternative finding of justification, the grounds of appeal simply assert that the tribunal was trying to "appeal proof" the decision. The Claimant's skeleton does not address justification at all. In oral submissions, Mr Kohanzad advanced an argument that if the finding on harassment was perverse, the dismissal of the **s. 15** claim was "unsafe" notwithstanding the justification finding.

104. The Respondent's submissions were that the finding on unfavourable treatment was not perverse as the Claimant was "not disadvantaged by the comment in circumstances where it was found that the Claimant was openly discussing issues with her home life. Asking the Claimant if she wished to reduce her work and step down from her management role ... flowed from the Claimant raising her personal struggles."

105. In respect of justification, the Respondent says that no error of law has been identified.

Asserting that the tribunal "appeal proofed" its decision is not to assert an error at all.

(iii) Discussion

106. Again, I deal with the points in reverse order. I agree that the Claimant has not identified a possible error of law in the tribunal's justification finding still less established that an error has been made. Since the tribunal's determination that there was no harassment was not perverse, the submission that Mr Kohanzad developed orally goes nowhere.

107. It follows that there was no error in the tribunal's decision that any unfavourable treatment was justified. From that it also follows that the question whether the tribunal erred in deciding that the enquiry was not itself unfavourable is now academic. In any event that conclusion was not perverse. The legitimate aim which the Respondent contended for and which, in the absence of any challenge to its legitimacy, the tribunal must be taken to have accepted was the creation of a "supportive environment". The tribunal must be taken to have accepted that Mr Sahota was trying to help. It would be open to a reasonable tribunal properly instructing itself in law to conclude that an enquiry made in those circumstances was not, assessed reasonably, an unfavourable act however the Claimant may have responded to it. This ground of appeal is dismissed.

(b) Ground 6

(i) The finding appealed

108. The finding in issue is at Para 72 of the judgment:

> "*We do not find that the Claimant's perceived performance arose from her disability. It arose from her failure to meet the relevant standards, in particular the lack of relevant leadership qualities and her failure to manage her team properly. The Claimant did not say at the time that her performance was in any away impacted by her anxiety. She did not allege that as part of her grievance. Even for the purpose of these proceedings she fails to provide any evidence or reason as why her performance was impacted by her anxiety*".

109. It is a finding to which I have already made reference in the course of the discussion of other grounds. I have already expressed my conclusion that the tribunal is explicitly declining to find the existence of any connection between the Claimant's disability (her anxiety) and her struggling to manage her team effectively.

(ii) The parties' submissions

110. The Claimant says that the Tribunal has applied the wrong causal test. The relevant "something" is the Claimant's perceived poor performance. The perception arises from her struggle with her management role and her struggle arises from her anxiety. The tribunal, it is said, failed to recognise that there were two links from disability to the relevant something. The tribunal only asked itself why the perceived performance was poor, told itself that the answer was failure to meet relevant standards and failed to ask why the Claimant was failing to meet them. Had they done so, they would have concluded that the reason was her anxiety.

111. The Respondent says that the case was not put below in the form in which it has been put to the Appeal Tribunal but that, in any event, there was no error in the tribunal's reasoning the question of causation.

(iii) Discussion

112. It is not correct to say that the tribunal failed to consider whether the Claimant's difficulty in meeting the relevant standards arose in consequence of her disability. That is, on any fair reading, the point they are making in the last three sentences of the finding in issue. The tribunal is saying that the Claimant did not suggest at the relevant time that her performance was impacted "in any way" by her anxiety; that she did not suggest any such causal link in her grievance; and that she failed to provide any evidence at all of a causal link in the proceedings. There was no evidential basis for the crucial first link in the causal chain contended for by the Claimant, i.e. the link between her anxiety and her

struggle with management. The tribunal's finding is that, in the absence of any such evidence, it was not prepared to find that the perceived poor performance arose in consequence of the disability.

113. In the grounds of appeal, the Claimant appears to suggest that the tribunal made an inconsistent finding of fact. It is said that "the first link was, on the tribunal's own primary findings, in evidence". The finding relied upon is as follows:

> "*The Claimant had a difficult relationship with some of the staff she managed. She says they constantly undermined her and at times she was intimidated by them. She felt powerless to change things ...*"

The ellipsis is important here. The sentence might have continued "because her anxiety meant she lacked the necessary confidence" or something else which explicitly suggested that her anxiety was a cause of the difficulty but instead it continues "as one of them was in a personal relationship with [the Claimant's] own line manager ... and so nothing was likely to be done". The tribunal finds that the feeling of powerlessness arose not from the Claimant's anxiety but from the fact that she was managing someone who was in a personal relationship with her own line manager. I reject, therefore, the suggestion that the tribunal reached an inconsistent finding.

114. This ground of appeal is dismissed.

Failure to make reasonable adjustments

(1) The Law

115. The duty to make reasonable adjustments is imposed by **Equality Act 2010**, **s. 20** which, so far as is presently relevant, provides as follows:

> "***20 Duty to make adjustments***
>
> *(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.*
>
> *(2) The duty comprises the following three requirements.*

> *(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.*
>
> …
>
> *(8) A reference in section 21 or 22 or an applicable Schedule to the first … requirement is to be construed in accordance with this section.*
>
> …"

116. The formulation of the first requirement of the duty set out at **s. 20(3)** does not explicitly require that the employer, A, should know that the disabled person has a disability or that the relevant provision, criterion or practice is likely to put the disabled person at a substantial disadvantage. That is addressed, however, at **Paragraph 20(1)(b)** of **Schedule 8** of the Act, which provides:

> "*20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*
>
> *(a) …*
>
> *(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

It should be noted that the provision does not require actual or constructive knowledge of the fact that the disabled person is being placed at a substantial disadvantage. Instead, it requires only that the employer should have actual or constructive knowledge that the disabled person is *likely* to be put at a substantial disadvantage. The combined effect of **s. 20** and **Paragraph 20(1)(b)** is that if an employer knows or ought to have known that a substantial disadvantage is likely they are not exempt from the duty but the duty will only actually bite if the substantial disadvantage actually exists.

117. In assessing whether or not a PCP is likely to put a disabled person at a substantial disadvantage, the tribunal has to focus on two matters: the degree of disadvantage and the probability of its occurrence. As to the first matter, **Equality Act 2010**, **s. 212(1)** defines "substantial" to mean more than minor or trivial. The threshold is set, deliberately, low. Absent any good reason to interpret

the word “likely” in **Schedule 8, Paragraph 20** in a different manner from how it is interpreted when it is used in **Schedule 1**, **Paragraph 5** (which deals with whether an impairment would be “likely” to have a substantial adverse effect on the ability of a person to carry out normal day-to-day activities in the absence of medical treatment or other measures) it will mean, according to **SCA Packaging Limited v Boyle** [2009] UKHL 37, that it “could well happen”. That, again, is a low threshold.

118. **Paragraph 6.19** of the **EHRC Code of Practice on Employment** (2011) suggests that there is an active duty on an employer to “do all they reasonably can be expected to do to find out whether” the Claimant is likely to be placed at substantial disadvantage.

119. The question whether a particular adjustment is a reasonable one is an objective question. The fact that the employee did not themselves propose the adjustment is not a determinative factor. It is, nevertheless, a factor that may be relevant in some cases to the tribunal’s determination. Nor is it determinative that the employer did not consider it to be a reasonable adjustment. It is a matter for the tribunal’s judgement. In determining the issue, the tribunal should ordinarily take into account amongst other matters, the extent to which taking the step would prevent the employee being put at the relevant substantial disadvantage, i.e. whether there was a real prospect that the step would have made a difference (see **First Group plc v Paulley** [2017] UKSC 4, per Lord Neuberger). It should also consider how practicable it is for the employer to make the adjustment. If, for instance, there is reason to believe that the disabled employee might oppose the step, that will go the practicability of talking it.

(2) The grounds of appeal relating to the alleged failure to make reasonable adjustments.

120. There are two linked grounds of appeal: grounds 1 and 8.

(a) Ground 1

(i) The finding challenged

121. Before the tribunal the Respondent contended that it only had knowledge of the Claimant's disability from March 2021, which was when the Claimant was formally diagnosed with generalised anxiety disorder. At paragraph 59 of its judgment, the tribunal rejected that contention. Instead, it found that the Respondent either knew or could reasonably have been expected to know that the Claimant was suffering from depression from 12 February 2020. That was the date on which the Respondent's line manger received an occupational health report. That finding does not appear to be challenged.

122. At paragraph 60 of its decision, the tribunal went on to consider the question of knowledge of substantial disadvantage:

> "*We do not however accept that the Respondent would have been aware of any substantial disadvantage by the Claimant working on the shop floor for the following reasons: the Claimant indicated that she did not want to be furloughed, on the contrary she made it clear to her management that she preferred to be at work rather than at home. The Claimant did not suggest that she could not work on the shop floor at all or that she be completely removed from it, she did not indicate that the measures put in place to reduce the working on the shop floor were inadequate nor did she complain in her fairly lengthy grievance about working on the shop floor. Furthermore there was never any suggestion in the Claimant's OH referrals that the Claimant should be removed from the shopfloor as an adjustment.*"

It is this finding that is the subject of the challenge in Ground 1.

123. Before moving to the parties' submissions on Ground 1, it is first necessary to set out some of the other issues and findings below as the submissions cannot be properly understood without the context that they provide.

124. The Claimant relied on the following alleged PCPs:

(1) Attending work;
(2) Requiring the Claimant to work on the shop floor; and
(3) Undertaking a year-end review.

The tribunal found that all of those PCPs were made out. It is the second that is relevant to the present appeal.

125. The PCPs were alleged to result in the following substantial disadvantages:

(1) It was harder for the Claimant to attend work than it was for a non-disabled employee;

(2) Her reviews were likely to be worse than those of a non-disabled employee;

(3) She was subject to an increased risk of further injury or exacerbation of her disabilities to which a non-disabled employee was not similarly subject;

(4) She suffered an increased risk of general health problems which a non-disabled employee would not suffer; and

(5) She suffered financial loss.

126. A number of potential reasonable adjustments were in issue. For present purposes only one is relevant: "from 7 January 2021 not requiring the Claimant to work on the shop floor ("the Shop Floor Adjustment").

127. At Paragraph 81 of its decision, the tribunal observes that the relevant PCPs have not been matched to the relevant alleged substantial disadvantages:

> "*It is not ... clear what substantial disadvantage is said to flow from each relevant PCP*".

Over the course of Paragraphs 82 to 84 of the judgment, the tribunal considers each alleged substantial disadvantage in turn and, with the exception of it being harder for the Claimant to attend work, does not find any of them to be made out.

128. The Tribunal then moves at Paragraph 85 of the judgment to consider the reasonable adjustments contended for and in respect of the Shop Floor Adjustment makes the following determination:

> "*We do not find that removing the Claimant from working on the shop floor was a*

> *reasonable adjustment for the following reasons: the Claimant did not suggest that she could not work on the shop floor at all or that she should be removed from it. It was a key part of her role and the Claimant would not doubt have realised that if this was removed her managerial responsibilities would be at risk which she did not want. The Claimant did not indicate that the measures put in place to reduce working on the shop floor were inadequate. She did not complain in her grievance about having to work on the shop floor."*

That finding is the focus of Ground 8 of the appeal.

(ii) The parties' submissions

129. The Claimant says that the findings that the Respondent had constructive knowledge of her disability from February 2020 but that it did not have constructive knowledge of the substantial disadvantage to which requiring her to work on the shop floor subjected her are inconsistent.

130. Mr Kohanzad's submissions then shift somewhat to emphasising the extent of the material that was before the Respondent about the extent of the Claimant's mental health difficulties. In February 2020, the Respondent had been aware that the Claimant had suicidal ideation. The question of working on the shop floor arose directly in November 2020. The tribunal found that, at Paragraph 8 of the judgment, that "the Claimant feared that she was going to catch Covid whilst at work. Her anxiety became severe to the extent that she was taken by emergency services to a mental health crisis unit". On 7 January 2021, the tribunal found, the Claimant suffered a panic attack worrying about her husband catching Covid. On her return to work she spent, by agreement, less time on the shop floor. The tribunal found at Paragraph 9 of its decision that that was "to minimise public interaction and thus reduce the risk both to herself and to her husband".

131. In that context, the tribunal's finding that the Respondent did not have the requisite knowledge of the substantial disadvantage is said to be perverse. The Respondent knew that the Claimant suffered from an anxiety disorder. It knew that the Claimant's anxiety was exacerbated by fear that she and,

through her, her husband might catch Covid and that that fear was related to the amount of time that she had to spend on the shop floor. That those matters were within the Respondent's actual or constructive knowledge is the only explanation available for why it agreed to reduce the time she spent on the shopfloor. I pause to note that the contextual material to which Mr Kohanzad referred in this written and oral submissions ranged more widely than that set out in Paragraph 4 of the grounds of appeal. The last date referred to there is 29 February 2020.

132. The Respondent says that the question is academic for two reasons. The first is that the tribunal did not find that any substantial disadvantage had been made out. There is no direct challenge to those findings in the grounds of appeal. It follows that the appeal is academic. Without such a finding, the duty would not bite. The second is that the tribunal's finding that the adjustment contended for was not a reasonable one means that it does not matter whether or not the Respondent had the requisite knowledge.

(iii) Discussion

133. At Paragraph 60 of its judgment, the tribunal is, I consider, looking at the correct issue. The issue is not whether the Respondent knew or ought reasonably to have known that working on the shopfloor was likely to exacerbate the Claimant's poor mental health (that being the third of the five alleged substantial disadvantages) but whether working the reduced number of hours would be likely to have that effect. When considering that question the tribunal must bear in mind that it is only concerned with a disadvantage which is more than minor or trivial and one which is likely in the sense that it could well happen.

134. The tribunal's reasoning is, again, somewhat compressed. My observation is not intended as a criticism. Authority commends concision (for the parties' sake as much as for the sake of the appeal courts). Paragraph 60 does not consider actual and constructive knowledge as discrete possibilities. Nor does it involve any self-direction about what "substantial" and "likely" mean in this context. The

Respondent contends, and I accept, that the tribunal is to be read as ruling out both forms of knowledge.

135. In summary, the tribunal's reasoning is that the Respondent neither knew nor could they have reasonably have been expected to know that working the reduced number of hours on the shopfloor would be likely to put the Claimant at a substantial disadvantage because neither she nor any OH report ever suggested that it would. Can it be said that in circumstances where the Claimant has returned to work on a phased basis and continued to work without further panic attacks triggered by having to work on the shop floor and without complaint no reasonable tribunal properly instructing itself in law could have concluded that the employer lacked the requisite knowledge? I do not think the tribunal decision can be said to have been perverse. I think it is entirely conceivable that a Respondent might reasonably conclude in those circumstances that the measures that they had taken had been sufficient to reduce the risk to a level that the Claimant was more comfortable with and thus that the risk of any substantial disadvantage had receded. This ground is therefore dismissed.

136. If I had taken a different view, I would not have been persuaded that the appeal was bound to fail for want of any direct challenge to the findings in relation to substantial disadvantage. That is because it seems to me to be necessarily implicit in the Claimant's perversity challenge that the tribunal was bound to reach a different conclusion on the question.

(b) Ground 8

(i) The finding challenged

137. The finding challenged is that set out in Paragraph 85 of the judgment, which I have already extracted above.

(ii) The parties' submissions

138. The essence of the Claimant's argument is that "the tribunal's reasoning rests entirely on the

proposition that the Claimant did not herself ask to be removed from the shop floor and did not complain about it in her grievance". That is said to indicate that the wrong test has been applied. There is no obligation on an employee to identify to an employer that a reasonable adjustment (or any particular adjustment) is required. If the employer knows (or is to be treated as knowing) that a PCP applied by them is likely to put the employee at a substantial disadvantage and the substantial advantage in fact exists, the duty bites whether or not the employee has requested the employer to make an adjustment.

139. The Respondent submits that the appeal must fail because the tribunal has not found that any substantial disadvantage exists. In the alternative, there is no error in the tribunal's reasoning. The absence of complaint from the Claimant was a relevant factor that the tribunal was entitled to take into account.

(iii) Discussion

140. Because I have dismissed the appeal against the finding that the Respondent lacked the necessary knowledge of disadvantage, this ground must also fail and I dismiss it. In any event, I do not think it is a fair characterisation of the tribunal's reasoning to suggest that the tribunal has treated the lack of a specific request for the adjustment as determinative. That is to ignore the reference to the Claimant's unwillingness to give up her management responsibilities. The tribunal had found at Paragraph 3 of the judgment that the Claimant's role "primarily involved working the shop floor ensuring that the shop floor was in accordance with management directions and managing a small team of staff". The tribunal must be taken to be finding, at Paragraph 85, if it was not already explicit from what they say at Paragraph 3 of their judgment, that managing those who reported to her required the Claimant to work on the shop floor. Since suggesting to her that she might wish to consider giving up those responsibilities was alleged to amount to harassment it is unsurprising that the tribunal concluded that unilaterally removing them from her by having her work away from the shop floor

was not a reasonable adjustment in the particular circumstances of the case.

Conclusion

141. For the reasons given above I dismiss the appeal.