EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss E Simms	**v**	**British Telecommunications Plc**

Heard at: Norwich Employment Tribunal

On:
6 November 2017 (Reading Day)
7, 8, 9, 10, 13 & 14 November 2017 (Hearing Days)
15 & 16 November 2017 and 14 December 2017 (Discussion days)

Before: Employment Judge Postle
Members: Mr C Davey
Mrs L Jaywood

Appearances
For the Claimant: In person
For the Respondent: Mr Selwood, Counsel

JUDGMENT

1. The claimant's claims brought under the Equality Act 2010 for protected characteristics of disability are not well founded.

REASONS

1. The claimant, by one claim form filed on 5 December 2016 with an ACAS certificate, made a number of claims under the Equality Act 2010 for the protected characteristic of disability, namely multiple sclerosis (MS). The claimant was diagnosed with MS in January 2016. The respondents have conceded the claimant's disability from that time.

2. At the first CMD in February 2017 the claimant identified a number of issues as set out in the notes of the Case Management Discussion (1120-1122), particularly paragraphs 9.1 to 9.6. The claimant was then given a further opportunity to clarify her issues prior to the second CNMD in April 2016. The claimant subsequently filed further and better particulars listing

allegations from September 2012 right up until the present time (115-138). Clearly prior to the claimant's diagnosis in January 2016.

3. It is important to note at this stage that there was no other evidence before the tribunal that the claimant suffered any other disability prior to January 2016. It is accepted the claimant had a number of absences prior to January 2016 including time off for a hysterectomy. The claimant also has a period of paid leave from September 2015 to December 2015 when the claimant was absent to look after her father who sadly died in December 2015.

4. On the face of the claimant's allegations, only three appear to be in time, and they are claims against Miss Kellett, on 5 September 2016, 10 October 2016 and those against Mr Neilson. The claimant contends matters before that date constitute continuing acts and therefore asserts they are in time. The tribunal, regardless whether the claims are in or out of time, have nevertheless addressed the claimant's allegations from January 2016 and also will address whether they are continuing or single acts and dependent on the answer will also address whether it would be just and equitable to extend time.

5. In this tribunal we have heard evidence from the claimant and Mr Roegele who was also employed by the respondent and gave evidence through a prepared witness statement.

6. For the respondent we heard evidence from:

   - Miss L Kellett, Senior Partner Manager
   - Mr T Dennett, Sales Centre Manager
   - Mr G White, New Sites Reception Team
   - Miss M Colwell, Open Reach Manager
   - Miss J Hobson-Frohoc, Operations Manager
   - Mr N Barnes, In Site Manager
   - Mr A Neilson, Senior Service Manager
   - Mr R Dyke, Second Line Manager
   - Miss N Hudson, Senior Ops Manager
   - Miss J Cullum, Leader Infrastructure Solution

   All giving their evidence through prepared witness statements.

7. The tribunal have also had the benefit of four lever arch files consisting of some 1,579 pages. The claimant also requested further documents from the respondents during the hearing and those being a Coppers Planners Users Manual which is 109 pages long and further examples of Workers Job/Work Sheets. Also disclosed for the hearing for the first time was the Facebook entry, undated, believed to be 29 January 2016 which the claimant only saw at the point of disclosure in the course of these proceedings.

Law-Limitations

8. Section 123(1) of the Equality Act 2010 provide that the complaint of disability discrimination may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal considers just and equitable. Conduct extending over a period is to be treated as done at the end of the period (s.123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on it (s.123(3)(b). In the absence of evidence to the contrary, a person (A) is to be taken to decide on the failure to do something when A does and act in consistent with it or, if A does no inconsistent act on the expiry of the period in which A might reasonably have been expected to do it (s.123(4).

Primary limitation period

9. The claimant notified ACAS of her claim on 23 September 2016, and ACAS issued an Early Conciliation Certificate on 17 October 2016. It is accepted that this serves to extend the three month time limit available to the claimant. However, the latest allegation within the claimant's schedule of allegations (with the exception of allegedly on going reasonable adjustments and those allegations are accepted to be in time) is 27 July 2016. The time limit for a claim in relation to that date expired on 17 November 2016. The claimant's ET1 was received on 5 December 2016.

10. In relation to reasonable adjustments, the claimant seeks to plead extended timescales for such adjustments and/or "ongoing timescales". However, the affect of s.123(4) in relation to reasonable adjustments was addressed by the Court of Appeal in Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170, which held that the reasonable adjustment duty was not a "continuing" one, but rather one which should be held to have occurred at the date on which the adjustment should reasonably have been in place.

Continuing act

12. At paragraph 269 of the claimant's ET1, the claimant acknowledges the potential difficulty posed by her late presentation of allegations and states that "As per the legal advice I have been given, there has been ongoing acts of discrimination and that I am within the time limit set for the ET1".

13. In Hendricks v The Commissioner of Police for the Metropolis [2003] ICR 530, the Court of Appeal made plain at paragraph 45 that where a continuing act is alleged, the burden is on the claimant to prove (either by direct evidence or by inference from primary facts) that alleged acts of discrimination were linked to one another and were evidence of continuing discriminatory state of affairs covered by the concept of "an act extending over a period"

14. In the claimant's claim, it is not clear to the tribunal which complaints the claimant says are continuing acts which end in an "in time" allegation of

discrimination. Those allegations which are prima facie in time involve either Miss Kellett (who was, through her role as an independent appeal manager, entirely separate from the other alleged discriminators) or Andrew Neilson (who it has never been alleged was involved in any of the previous incidents managing, as he did, over 150 people spread over separate sites and not being based in Norwich).

15. It is to be noted the claimant has made a large number of allegations against colleagues in relation to acts post dating 27 July 2016 (paragraphs 168 onwards of her witness statement) but these do not form any part of the allegations or issues before the tribunal.

Just and equitable discretion

16. It is true that the question of whether it is just and equitable to extend time it is for the claimant to persuade the tribunal that it is so and the exercise of the discretion is the exception rather than the rule. It is absolutely correct there is no presumption that the time will be extended as set out in the judgment in Robertson v Bexley Community Centre [2003] IRLR 434.

17. The factors set out at s.33 of the Limitation Act, whilst they are not mandatory in terms of a check list have been held by the Appellant Courts to be a helpful starting point for tribunals when considering whether we should exercise the discretion. They are:

    a. The length of, and the reasons for, the delay on part of the claimant;

    b. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the respondent is or is likely to be less cogent than if the action had been brought within the time allowed;

    c. The conduct of the respondent after the course of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purposes of ascertaining facts which were or might be relevant to the claimant's course of action against the respondent;

    d. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

    e. The extent to which the claimant acted promptly and reasonably when she knew whether or not the act or omission of the respondent, to which the injury was attributable, might be capable at the time of giving rise to an action for damages;

    f. The steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice she may have received.

18. As a matter of fact the claimant admitted during the course of cross examination that she was well aware of the three month time limit from at least 1 August 2016 (941). She was receiving advice from her Trade Union which, unusually, she was willing to admit in open court was that her case had "little merit". The tribunal satisfied that the claimant plainly knew about time limits.

The Law

19. Direct Disability Discrimination

    19.1 Under s.13(1) of the Equality Act 2010 ("the Act"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Disability is a protected characteristic in relation to direct discrimination. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

20. Harassment

    20.1 Under s.26(1) of the Act, a person (A) harasses another person (B) if A engages in unwanted conduct related to that person's disability and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to (but not the purpose referred to), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

21. Discrimination arising from Disability

    21.1 S.15 of the Act provides that 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.

22. Indirect Disability Discrimination

    22.1 Under s.19(1) of the Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of B's. disability is a relevant protected characteristic. S.19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic of B's if: (a) A applies, or would apply, it to persons with whom B does not share the characteristic; (b) it puts, or would put, persons with who B shares the characteristic at a particular disadvantage when

compared with persons with whom B does not share it; (c) it puts, or would put, B at that disadvantage; and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

23. Duty to Make Reasonable Adjustments

23.1 The law relating to the duty to make reasonable adjustments is set out principally in the Act at sections 20-22 and Schedule 8. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. 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. The second requirement is a requirement, where a physical feature 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. The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

23.2 A failure to comply with such any such requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person.

24. Victimisation

24.1 S.27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. Protected acts include the bringing of proceedings under the Act; giving evidence of information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

25. Vicarious Liability

25.1 S.109 of the Act states that anything done by a person (A) in the course of A's employment must be treated as also done by the employer and that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the

principal. It does not matter whether that thing is done with the employer's or principal's knowledge or approval, but it is a defence for B to show that B took all reasonable steps to prevent A from doing that thing or from doing anything of that description.

Burden of proof

26. Section 136 of the Act provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, but that this does not apply if A shows that A did not contravene the provision. The recent EAT judgment in Efobi v Royal Mail Group [2017] IRLR 956 has now made it clear that previous authorities in this area have been reinterpreted. The correct position is now that there is no "initial burden of proof" per se on the claimant. The tribunal is required, in accordance with paragraph 78 of the Judgment "To consider all the evidence from all sources, at the end of the hearing so as to decide whether or not "there are facts (as set out in s.36)"

Credibility

27. The tribunal, throughout the hearing, were minded the claimant appeared as a litigant in person and a person with a disability. Understandably the claimant clearly struggled with some of the legal concepts. The tribunal recognised the claimant's disability by providing regular breaks throughout the six days of evidence, she cross examined some 10 witnesses, most of which were holding more senior positions to that of the claimant. The tribunal nevertheless noted the claimant was emotionally forceful with particular Ms Colwell and Mr G White, bordering on aggression towards these witnesses. The tribunal also noted the claimant's ability to recall events and dates, was often at odds with the documentary evidence before the tribunal and other witnesses very clear and precise recollections. The claimant would also allude to documents during the course of the hearing which simply did not exist, or if they did Mr Selwood, Counsel for the respondent, helpfully assisted to track down in the bundle.

28. We found on the whole the respondent's witnesses clear, precise, straightforward with no axe to grind. They were able to provide clear recollection of events which they could recall and were willing to concede on matters or meetings they simply could not recall.

The Facts

29. The claimant was first employed by the respondent in October 2008 and remains employed at the date of this hearing within the Openreach Division of BT.

30. Between 11 March 2009 and July 2016 the claimant incurred approximately 36 separate spells of absence, totalling 208 days. The majority by far was before the claimant was diagnosed with MS in January 2016. The

claimant's latest absence started on 19 August 2016 and she returned to work on 13 January 2017 (148 days).

31. On 5 March 2015 Miss Colwell issued the claimant with an initial formal warning in relation to her level of attendance (418). The claimant having had numerous absences from work of which the claimant cited her forthcoming hysterectomy and bladder pinning operation as to the reasons for that absence those absences. Ms Colwell had previously resisted the prompt from BT's Automated Attendance System which triggered the paperwork to invite the claimant to a meeting to consider issuing her with a warning and had done so on six previous occasions, which she could have done on 9 December 2014, 8 October 2014, 7 July 2014, 12 September 2013, 11 July 2013, 24 May 2013.

32. The claimant appealed against the first warning on 9 March 2015 to Mr Dyke who ultimately retracted the warning on appeal. The claimant, despite a number of absences following diagnosis of MS, has had no further warnings about her level of attendance despite BT's trigger which could have been activated on a number of further occasions and, potentially, led to warnings.

33. On 1 April 2015 the claimant's role in sales was to end as was other employees within BT and staff and the site were to be transferred to BT's Openreach. The staff were then given the option of staying in a new role or taking voluntary redundancy. The claimant opted to transfer to Openreach alongside nine of her sales colleagues.

34. Given a potential drop in salary for all the sales team, including the claimant, in anticipation of the Sales Team obtaining a C3 Grade accreditation which would have brought their salary in to line with that which the Sales Team would previously have earned together with their bonus. In order to recognise this BT gave Sales staff a 12 month Sales Transfer Allowance until individuals had obtained accreditation in the C3 Grade and in addition a training grant. It was anticipated with on the job training accreditation could be obtained within 32 weeks.

35. On 16 March 2015 the claimant was absent for over three months following her hysterectomy operation, returning on 26 June 2015. It is accepted at that stage she missed some initial training for the C3 accreditation. The claimant was then absent on paid leave from September 2015 to look after her father and not returning until December 2015. It seems to be agreed that had the claimant not gone off during that period of three months she would have obtained her C3 accreditation.

36. On 11 May 2015 the claimant attended the medical assessment arranged by the respondent (426). Health Management Limited a report was produced. At the time the claimant had been absent since 1 March 2015. The report suggested that the claimant could consider a return to work in four to six weeks time and that in the absence of further health complications a normal level of service and attendance was anticipated. It

concluded that the claimant could continue in her current post with support of temporary adjustments, particularly a phased return, namely two weeks at fifty percent and thereafter two weeks gradual increase to normal hours and no field work.

37. It was on 29 January 2016 the claimant received her unfortunate diagnosis of MS. On that day the claimant was advised by her then manager, Liz Bryant, to take an extended lunch break, given the news the claimant had received that morning. Ms Bryant was also supporting the claimant even though HR were concerned about her level of attendance (484). The claimant was also advised by Ms Bryant to leave work early to discuss her diagnosis with her family as the claimant was clearly upset that day. Later that day the claimant was seen in a local public house with her partner. As a result of which Mr White (a colleague) posted a Facebook entry on that day criticising the claimant (not knowing of her diagnosis) and although not naming her personally, from taking time off work "How dare you have the nerve to leave early to go and spend the next few hours drinking wine with (her) man"…"If you are ok with this level of piss taking out of the people who pay your wages". The claimant apparently did not see the Facebook entry until disclosure during the course of these proceedings. It would also appear that Mr White sent similar texts to the claimant earlier that evening. Mr White was spoken to by Ms Bryant following a complaint by the claimant, about the text messages (498). It would appear that Mr White was spoken to about Facebook and text messages and was reminded of the respondent's policy on social media following which there appears to have been no further complaints raised by the claimant about Mr White making any further text or Facebook entries. Neither did they occur after that date, not that the tribunal have been informed.

38. Between the period 29 January 2016 and 19 August 2016 the claimant appears to have moved job roles on only two occasions. The first from Call Reception Team to the Management of Julie Cullum which had been requested by the claimant (to move away from management of Ms Colwell). (15 July) and from the management from Julie Cullum to Maxine Yallop from 15 August 2016. Both of these moves were carried out at the request of the claimant and, were intended, to assist the claimant.

39. For the avoidance of doubt, all transferees to Openreach were paid a 12 month retained sales bonus. This was incorporated into the claimant's contract (428) and the suggestion it was to be paid until employees obtained C3 accreditation is mistaken. In addition to a sales bonus the claimant and other transferees were paid a training/cover allowance to support them whilst they had yet to achieve the C3 Grade accreditation. As admitted by the claimant this has been paid to her throughout her employment at Openreach and continues to this date to be paid. This is despite an initial expectation that employees would only have 32 weeks in which to obtain the C3 Grade accreditation and a change of a policy regarding backdating of this allowance was expressly overridden by Andrew Neilson in the case of he claimant. An example of more favourable treatment. To be clear the claimant duly agreed the variation of her contract at the time of the transfer

from the Sales Team in BT to Openreach which showed the sales bonus lasted only for a period of 12 months and was not tied to the obtaining of a C3 Grade.

40. In the meantime the respondent sought further medical advice and a report on the claimant's condition. A report was obtained (508 to 510) and received on 11 April 2016. That report recommended a workplace assessment in order to support the claimant at work. A report was then prepared by another organisation "Ability Net" (515 to 527). The claimant having been asked to attend an assessment on 29 April 2016. The assessment described the effect of the claimant's condition on her vision, fatigue, concentration, posture, lighting and general ergonomic matters.

41. In the meantime given the claimant's attendance, the attendance procedure was triggered. It is to be borne in mind there had been no formal warning since the claimant's diagnosis nor was her sick pay reduced. The process being automated on a certain number of absences that then requires a second line manager to arrange a meeting to review the position. Those meetings are clearly designed to explore any support that can be provided to employees and to assist/facilitate a return to work (513) no more, no less. The claimant did not suffer any adverse treatment by way of any formal warning. This was discussed on 16 May with Ms N Hudson. At that meeting Miss Hudson confirmed all the equipment that had been suggested by Ability Net had been authorised and ordered (532). The existing reasonable adjustments which had already been put in place, were to continue. The report had suggested home working on occasions if the claimant was experiencing difficulties on getting to work. When this was discussed between the claimant and Ms Bryant at a Return to Work meeting on 7 June 2016 (553 and 558) the claimant is recorded as saying "Liz doesn't want to consider the possibility of home working at this time as she likes her interaction, with colleagues. Being at home at this stage does not feel a positive move".

42. Subsequently, Mr Neilson, on 20 October 2016 at a second line manager review raised the issue of homework; "If Liz would like to consider we can explore further" (972). Following that meeting home working was arranged and continues today.

43. There was no evidence before the tribunal that any person/manager suggested that reasonable adjustments proposed by the organisation "Ability Net" were either unnecessary or not required for the claimant.

44. It is clear that some of the software adjustments provided for the claimant were causing some problems. That unfortunately is the nature of software. It is clear the respondents provided the appropriate expertise within their organisation to try and address the problems the claimant was experiencing. Given the support the claimant was given during this period and previously by Ms Colwell, it does not suggest any manager or Ms Bryant would have threatened the claimant that her job was at risk. There is no evidence in the

bundle that such a threat was ever made or, indeed, would have been supported by a second line manager at a review meeting.

45. The claimant accepted under cross examination that the respondents were proactive in trying to resolve problems with her software. The claimant further accepted there were no issues with her software during her time at the Call Reception Team as "Work arounds" had been found.

46. The issues the claimant appeared to have with the software it is accepted were ongoing, certainly in July 2016 until 19 August when the claimant again went off on sick absence.

47. There were various roles within call reception and the type of role dictated whether it was possible for this to count towards a person's C3 accreditation. In order for the work to go towards C3 grade accreditation employees had to have capability of switching work. Requirements were put in place for completion of training in order to measure an employee's capability within role. The claimant's transfer to Ms Julie Cullum's management in or about mid-July (586) when the claimant was clearly welcomed to her team, had followed a meeting with Ms Cullum. Ms Cullum clearly went through the learner pathway attached to the email to the claimant at (587) and the claimant confirmed she was confident she would now succeed in obtaining her C3 accreditation. At the same time the claimant had also confirmed that there were no barriers in her achieving her C3 accreditation. Furthermore, the larger 24 inch screens were due to arrive imminently to assist the claimant with her work. It was planned at this stage Andrea Hunt was going to assist the claimant with her training.

48. There is no suggestion and no evidence before the tribunal that either Nicola Hudson or Liz Bryant had ever suggested that the work the claimant had undertaken was not capable of achieving the C3 grade accreditation. In fact Ms Hudson had not had a meeting with the claimant in June or July 2016 and had ceased to manage the claimant and any involvement with the claimant in late May 2016.

49. By July 2016 Ms Cole had not been the claimant's line manager for over a year. Originally, Ms A Hunt was going to train the claimant. This had been arranged by Ms Cullum before she went on leave. However, on 26 July Ms Hunt spoke to Ms Colwell and suggested she was not able to train the claimant believing she was not the best person to do so. As Ms Cullum was on leave at the time Ms Colwell was the only floor manager on that day. Ms Colwell therefore arranged for Mr J Bond to train the claimant that day. It is clear from an email on 29 July (612) that Ms Hunt had to be pulled off the training due to operational needs. Mr Bond was provided to assist the claimant with her training. The claimant, with his assistance, completed block call offs and then completed three block call offs on her own. The email goes on to report that the training of the claimant worked well.

50. It would appear the claimant, during the period February 2016 to August 2016 never specifically raised an issue with her worksheets being in a small

font given the claimant's visual impairment or difficulty with her vision. There is no evidence of any such request from the claimant. Had she done so, as Ms Cullum comments: "I would have provided this". Indeed increasing the font size was apparently a simple adjustment on the equipment provided to the claimant.

51. The claimant raised a grievance (602) on 27 July 2016 about allegations of Ms Colwell ostracising and bullying the claimant. The claimant also raised a further grievance against Gary White on 9 August (624-638) claiming that she was harassed by him and in which she raised a number of matters, both historical in 2015 and more recent although not previously raised as an issue with management, save the events involving Mr White in January 2016 (the text message and Facebook entry). Ms Kellett, a senior partner manager within the respondents, was tasked with investigating the claimant's grievance. Ms Kellett had not previously met the claimant and did not work out of the Norwich site. The claimant was invited to attend a grievance fact finding meeting on 5 September at which the claimant was accompanied by her Trade Union representative. Ms Kellett was supported by Helen Greenbanks from HR.

52. The respondent's policy is that once a grievance is raised, the employee/any managers should not discuss the grievance at all with colleagues in or about the work place.

53. Ms Kellett interviewed the claimant and then interviewed the following:

- Ms Colwell
- Mr White
- Mr Bond
- Ms Bryant
- Ms Button
- Ms Cullum
- Mr Dyke
- Mr Mattysovsky

54. The claimant requested Ms Kellett interview a Carol Wilkinson who was a third party trainer not employed by the respondent. Ms Kellett approached Ms Wilkinson by phone and indicated, perhaps not surprisingly, that she did not wish to get involved bearing in mind she was not an employee of the respondent.

55. The interview with the claimant proceeded on 5 September and took place at the Norwich office. The claimant/her Trade Union representative from the transcript of the meeting, makes no complaint about the room or its size or location. The claimant's grievance was lengthy and therefore it was not surprising the meeting took a couple of hours (727 to 779). When the claimant became tearful a break was arranged. The room had been chosen by Ms Kellett to accommodate the claimant, particularly near a lift, kitchen and near the toilet to accommodate any difficulties the claimant may have.

56. The transcript from the hearing does not in any way suggest the meeting was conducted by Ms Kellett in an aggressive or over bearing manner. Indeed, Ms Kellett was concerned when the claimant indicated she felt, at times, suicidal and asked about support for the claimant and indeed offered the BT counselling service. The interview, given the length of the claimant's grievance, took a long time as Ms Kellett found it was difficult to ascertain from the claimant what the major issues were and what actually happened from a factual point of view. Ms Kellett perceived the claimant felt the whole team in Norwich was against her.

57. On the same day Ms Kellett sent to the claimant, at 9:04pm (781) an email questioning whether the claimant was feeling better, summarising the key points Ms Kellett felt the claimant wanted investigated and believing the claimant was keen to get the investigation underway as soon as possible, asked the claimant to confirm the key points of the investigation and to reply by 9:30am the next day. The claimant was unable to respond within the timeline but at the same time acknowledging the need to get the investigation underway and did indeed respond to Ms Kellett later in the day.

58. Ms Kellett, an experienced employee of the respondent with some 29 years, had previously investigated many grievances. Ms Kellett completed her investigation without delay and produced her outcome and rationale on 23 September into the 11 main areas of the claimant's grievance (911 to 919). Ms Kellett's conclusion was;

> "This case has been a complex one to investigate due to a lack of any specific or written evidence. I have had to rely on witness statement, of which I've interviewed seven people, and used my own personal judgment based on a balance of probability. With this in mind, I have found no evidence to suggest any bullying and harassment by Michele Colwell. Nor have I seen or heard anything that would be mistaken for inappropriate behaviour. From the interviews I have held and the additional witness statement, Michele has demonstrated over and above that she has been supportive and caring manager not just to Elizabeth but to the rest of the team.
>
> Michele appears to have gone over and above the duty of a Line Manger on numerous occasions. This includes making contact with Elizabeth every day while she was absent looking after her father every day, and I note that Michelle was not her manager at the time. Neither was Michelle her manager on Elizabeth's 40th birthday in August of last year but still arranged a collection from the Team for her and presented a balloon and gift to her.
>
> Michelle invited Elizabeth to her Team's Christmas party as Elizabeth didn't know many on her own team well. Michelle held the whole meal back as she refused to start without Elizabeth who arrived late.
>
> I do not believe therefore that, apart from the claim of bullying against herself, Michele would allow any other personal team member to ostracize Elizabeth or to proceed with a campaign of exclusion.

> Michelle states that she was on leave after the grievance had been raised and had a call at home from a witness stating that Elizabeth had approached another witness stating that she was raising a grievance and was involving this person as a witness. The witness then went to another team member who called Michelle to let her know. Michelle stated she was very upset and this had spoiled her leave.
>
> I note that at a face to face interview, the witness stated he had witnessed how Elizabeth had shouted and been rude in his opinion to Michele when she was trying to aid her in some training for her role which meant the witness would be training Elizabeth.
>
> With reference to the complaint against Gary White, I concluded that I cannot find any evidence of bullying and harassment. Gary appears to work very singularly and comes to work and put his headphones on which means he is becomes quite unapproachable. Elizabeth has not been singled out in this behaviour and, although in my opinion this seems inappropriate for the team member to conduct his work in this way, does not constitute bullying against Elizabeth or anyone else.
>
> Elizabeth also stated in her complaint that in addition to the above she was being ostracised by members of her team and this included having door slammed in her face. All internal doors are heavy and I feel you will be unable to slam a door in someone's face.
>
> Decision
>
> Following a thorough investigation taking into consideration all the information available I have found no evidence to uphold the grievance relating to bullying, harassment and victimisation. Neither is there any evidence of a campaign to ostracise Elizabeth"

59. The claimant was informed of the outcome of her grievance by letter of 23 September (924). Although the claimant was informed of her right of appeal the claimant nevertheless did not take this option up. The claimant's reasoning for not appealing (940) "I do not believe I would get a fair and unbiased appeal should I make one…Believing witnesses have colluded against her".

60. The claimant, in an email of 25 September, indicated she was now taking legal advice (941) and was contacting ACAS "Because of the time constraints of three months less a day it may be prudent to register for early conciliation".

61. The claim was then referred for an updated OH report on 29 September and the Occupational Health report dated 10 October (959) was produced. Given the claimant had now been off since 19 August, a second line manager's review had now been triggered. Mr Neilson wrote to the claimant on 4 October inviting the claimant to review to take place on 20 October (967). In the letter to the claimant Mr Neilson was concerned about the claimant's health and absence and explained that the meeting was to explore support which would assist the claimant's return to work, address any issue that may prevent her return. The aim of the meeting was to

facilitate a return to work and develop a plan which could lead to a sustained improvement in the claimant's attendance pattern.

62. The claimant responded on 10 October (966) requesting that the meeting be deferred on her GP's advice. Mr Neilson responded on the same day (965):

> "Hi Elizabeth,
>
> Thanks for your email. I'm really keen we should meet this week for SLMR as I want to make sure you are getting all of the help and support you need to help you back to work. The SLMR is there to make sure any further interventions or support happen and that as your second line I fully understand what barriers are in the way of you returning to work and subsequently we work on a plan together to support you through that return.
>
> In my view it is not helpful for your stress and anxiety to defer as this means the SLMR continues to hang over you and we lose a week's potential support for you.
>
> Let me know how you would like to proceed.
>
> Regards,
>
> Andy Neilson SLL Infrastructure Solutions New Sites"

63. The meeting took place finally on 20 October and a summary of that meeting is to be found at 970 to 976. At that meeting it was discussed about the claimant's return to Kiln House or whether another site would assist the claimant eventual return to Kiln House where the claimant had originally been based. Mr Neilson raised the possibility of homeworking and emphasized this was in response to the claimant's health and not because of any perceived grievance or issues the claimant had at Kiln House. Home-working would be considered as a reasonable adjustment if the claimant wanted to explore this further. The fact that homeworking would not affect the claimant's ability to obtain her C3 accreditation.

64. The claimant's return to work occurred in January 2017 mostly working from home doing light administrative duties and postcode blocking.

Conclusions

Substantive allegations

The allegation on 29 January 2016

65. This is alleged that Ms Bryant refused the claimant's request to go home after a hospital appointment where she was diagnosed with MS. It is said that Ms Bryant told the claimant she couldn't afford another absence. The claimant asserts this amounts to a breach of s.13, s.15, s.20 and s.26. What is clear is that Ms Bryant suggested to the claimant to take an extended lunch break. It is also not in dispute that shortly after the claimant returned from lunch the claimant was allowed to leave work two hours early

and this was not recorded as a sickness absence. It is also undisputed that some three days later Ms Bryant recorded that the claimant had been told she will support her with future hospital/doctors appointments and any adjustments required. Set that against the fact that there is no record of the claimant ever being told that she "cannot afford another absence" and nor does the claimant raise that in any of her grievances.

66. On the above facts it is clear that the respondent did make reasonable adjustments on the day. The claimant was allowed to leave work early and that was not recorded in the absence record. There is no record of any complaint about this matter until it is first raised in the claimant's ET1. This claim on any account as advanced by the claimant must therefore fail. Particularly as it is unclear how the claimant alleges she was treated less favourably than either an actual or hypothetical comparator given that the claimant was in any event granted permission to leave work early.

The allegation on 29 January 2016 regarding Gary White text and Facebook entry.

67. The claimant suggests that these two incidents amount to harassment because of her disability. It is true that both these incidents occurred outside the course of employment. It is accepted that acts committed at social events which are arranged by the employer can form part of the wider definition of course of employment and are capable of falling under the harassment provisions of the Equality Act 2010.

68. The mobile phone text in question sent by Mr White at 19:43 hours (495) and accepted by the claimant were sent after she had left the public house. Similarly the Facebook posting question was sent just before midnight, clearly neither of those wrote in the course of employment and the tribunal questions whether they were sufficient to give rise to the elements of the respondent's being vicariously liable. We think not.

69. Even if the tribunal were wrong, and were to accept the respondent's were vicariously liable for the acts of Mr White. Firstly it appears the Facebook entry was not ever seen by the claimant at this time or thereafter until disclosure during the course of these proceedings. It is therefore difficult to see how that can amount to harassment. In so far as the text is concerned it is difficult to understand how any of that conduct can be related to the claimant's disability. And it is of course relevant that Mr White did not have knowledge of the claimant's MS at the time he sent the text messages. These claims must therefore fail.

The allegation February 2016 – the claimant was moved to a new role on Stores helpdesk without her agreement and little training.

70. It is difficult to understand how the claimant advances this, particularly as she relies on indirect discrimination, discrimination arising from disability and s.20 failure to make reasonable adjustments. The fact of the matter is that between the period 29 January 2016 and 19 August 2016 the claimant on the evidence before this tribunal moved job roles on only two occasions.

The first was from Call Reception Team to the management of Julie Cullum which had been specifically requested by the claimant as she wanted to move away from the management of Ms Colwell. There was then the move from the management of Ms Cullum to Miss Yallop from 15 August 2016. Both of these moves we repeat on the evidence before this tribunal at the request of the claimant and were intended to assist the claimant. Where training was required, training was provided. The claimant clearly was never left to fend for herself so to speak in these new roles. It is therefore difficult to see how the claim of failure to implement reasonable adjustments gets off the ground. The tribunal further cannot identify a provision, criterion or practice which put the claimant at a disadvantage. The move cannot fall within discrimination arising from disability as the moves were requested by the claimant in any event. These claims must therefore fail.

The allegation 31 March 2016 – that all contingency pay and benefits ceased

71. This claim is advanced as a claim under s.13, s.15, s.19 and s.20. The claimant seems to advance a case that no consideration to continue contingency payment following the transfer to Openreach was given to the claimant. On the evidence before the tribunal it is simply not the case that the claimant's contingency pay ceased. All transferees to Openreach were to be paid a twelve month retained sales bonus upon transfer (1178), this was clearly incorporated into the claimant's contract (428), and the claimant's assertion that this was to be paid until C3 accreditation was obtained is patently incorrect.

72. The retained sales bonus the claimant and other transferees were also paid "a cover allowance" to support them whilst they were not on a C3 grade. The claimant accepted that this has been paid to her throughout her employment at Openreach and continues to be paid to this day. This is despite the initial expectation that employees would only have 32 weeks to obtain the C3 grade accreditation (1240), and a change of HR Policy regarding the back dating of this allowance was expressly overridden by Mr Neilson in the case of the claim (951) therefore far from representing any breaches under any sections of the Equality Act because of the protected characteristic of disability the claimant can be said to have had more favourable treatment. There clearly was a reasonable adjustment, the respondent continued to pay the cover allowance well past the date on which it should have ceased. In so far as the claimant believes that the retained sales bonus should have continued to be paid, the claimant clearly agreed a variation to her contract in which such a bonus was to last only 12 months and was in no way tied to obtaining the C3 grade. These claims therefore fail.

The allegation 27 April 2016 – attendance procedure trigger

73. The claimant advances this as breaches of s.15, s.19 and s.20. The claimant seems to be suggesting that the automatic trigger for the attendance procedure should not have been implemented without consideration of the claimant's disability related sickness absences.

74. Again it is not clear how the claimant advances this given the fact that the claimant throughout her employment has suffered no detriment or unfavourable treatment of any kind whatsoever due to the attendance procedure being triggered. She has not been the subject of any initial formal warning since the diagnosis of her MS in January 2016, and nor has her sick pay ever been reduced. The claimant seems to misunderstand the process where a second line manager review is triggered which is designed to "explore any support I can provide which will assist you in a return to work" (513). From such meetings rather than employees being given an immediate warning, the purpose of which is to explore any adjustment which will facilitate an individual or the claimant's return to work.

75. The only time prior to the claimant's diagnosis in January 2016 that she was ever given originally a first warning was by Ms Colwell after she had previously ignored six automated triggers for attendance procedure and although a formal warning was given, when the claimant appealed that was overturned.

76. It is simply fanciful to suggest that the claimant has in some way been treated either less favourably, been put at a disadvantage because of some provision, criterion or practice, or there has been a failure to make reasonable adjustments. It is simply not borne out on the facts and this claim must therefore fail.

The allegation 29 April 2016 – ability net recommendation said not to be necessary

77. This appears to be advanced as a breach of s.15 and s.20. The suggestion is that although the respondent arranged for an assessment to be undertaken in respect of adjustments that might assist the claimant, the claimant was told that many of the recommendations were not necessary. The reality of the situation is the assessment listed approximately three adjustments that had already been made (517) and contained a large number of suggested adjustments (521). Following a second line manager's review in early May all the adjustments were authorised and ordered on 16 May 2016 (537).

78. There is simply no evidence before this tribunal that any of the recommendations were said to be by any manager not required or not appropriate. That is not borne out by the facts as all recommendations were ordered and authorised. Again it is simply misunderstood by the claimant as to how this claim is advanced or has any bearing or merit. The claim therefore fails.

The allegation 7 June 2016 – incompatible software

79. The claimant advances this on the basis of s.15 claim, s.20 and s.26. The claimant seems to assert that the software purchased as reasonable adjustment was not compatible with the system. Further that the claimant

was told by Ms Bryant that her job was at risk if she could not work with the adjustments in place, whether or not they were working.

80. It is acknowledged as is often the case with software that there were problems with the compatibility of some of the claimant's software. However, with the respondent's resources they endeavoured to source a solution. Indeed the claimant acknowledged during cross examination that the respondent was trying to ensure that issues with her software were fixed. The claimant also accepted that the problems had largely not been an issue during her time whilst she was with the Call Reception Team as "work-rounds" had been found (586). When the issues arose when she moved to another team in July, again attempts by the respondent were made to address those issues and continued throughout the period up and until 19 August when the claimant went off on long term sick leave.

81. Again, the tribunal have some difficulty understanding how there has been a failure to implement the reasonable adjustments, clearly there were problems with software but the respondents were making every reasonable effort to solve the problems. They were clearly not discriminating against the claimant because of her disability and it is frankly difficult to understand how the problems which were clearly not intended can amount to harassment of the claimant. These claims must therefore fail.

The allegation April 2016 to October 2016 – home-working

82. The claimant asserts this was a claim under s.15, s.19, s.20 and s.26. It seems to be the case that the claimant is alleging that it was recommended that she work from home in April 2016 and was not implemented until October 2016. The claimant asserts had she been able to work from home she would have had less periods of sickness absence.

83. Here is where the documentary evidence before the tribunal is of great assistance. The claimant's "return to work2 documentation in June 2016 sets out quite clearly "Liz doesn't want to consider the possibility of home-working at this time as she likes the interaction with her colleagues" (554). Further, when the claimant's second line manager Mr Neilson met on the 20 October it's apparent that home-working was raised not by the claimant but by Mr Neilson. "If Liz would like to consider we can explore further" reference to home-working. It is quite clear on the documentary evidence before this tribunal that the claimant did not raise home-working as an issue during any period from January 2016 to October 2016. When it was raised and offered by the respondent ultimately the claimant took that option and she continues with that option up until this hearing. It is therefore difficult to see again how the claim for failure to make reasonable adjustments can be advanced given the evidence. How the harassment claim gets off the ground. What the PCP the claimant complains of given the reality of the situation. The tribunal cannot see again on the evidence that the claimant was discriminated as a result of something arising from her disability. These claims quite simply fail.

The allegation June to July 2016 – attaining the C3 grade

84. This seems to be advanced under s.15, s.19 and s.20. The suggestion is there was a requirement to do training in a certain way, insisting that the claimant completed training within set timescales with no accommodation made for the claimant's disability.

85. It is not entirely clear to the tribunal exactly what it is that the claimant is complaining of. It is clear on the facts that originally Miss Hunt had been tasked with training the claimant, there were no timescales. This had been arranged by Ms Cullum before she went on leave. However, on 26 July Miss Hunt spoke to Ms Colwell and suggested that she was not able to train the claimant as she did not believe she was the best person to do so. As Ms Cullum was on leave Ms Colwell was the only floor manager on that day, she arranged for a Mr Bond to train the claimant. It is clear that in any event Miss Hunt had to be pulled off the training which she in fact started due to operational needs. Mr Bond assisted the claimant in completing blocked calls and then the claimant herself completed three blocked calls on her own and there is evidence that this training worked well.

86. It is therefore confusing to the tribunal as to exactly how this allegation is advanced, if any of her training to enable her to attain the C3 accreditation was delayed for any reason then the respondent continued to pay the "cover" allowance pending the accreditation. Indeed the claimant's own evidence was that had she not been off from September 2015 to December 2015 when she had to look after her father she would have obtained the C3 accreditation in that period. It is therefore difficult to understand quite what the claimant alleges, and how this claim is advanced. The claim therefore fails.

The allegation June to July 2016 – work not acceptable.

87. This seems to be advanced as a s.15, s.19 and s.20 claim. The claimant asserts that at a meeting which she was unable to identify the date of, to discuss C3 grade accreditation that she was told that her work was not acceptable and capable of achieving the grade.

88. If it is the meeting with Julie Cullum around 15 July the documentary evidence does not support the claimant's assertion. The reason being an email from Ms Cullum following that meeting on 15 July (586) said:-

> "Thank you for you input today and welcome to my team.
>
> I'm happy that after walking through the learner pathway with you that you feel confident that you will succeed in obtaining your accreditation. Thank you for confirming that you feel there are no barriers in the way of doing this. I understand that your 24" screen will arrive next week.
>
> As discussed Andrea Hunt will support you with your training and I will review your progress with you on my return from AL.
>
> Hope you enjoy your leave Liz

Kind regards

Jules"

89. There is no evidence anywhere from any witness or the documents that the claimant was ever told that her work was not up to standard. This claim simply has no merit in it.

The allegation February to August 2016 - worksheet

90. This is advanced under s.15 and s.20. The claimant asserts that she was provided with worksheets in small font despite the respondent's knowledge of the claimant's visual impairment. Again the tribunal are troubled by this as the evidence is that the claimant did not ask for any documents or worksheets of any kind to be provided in a larger font until August 2016 when the claimant started her planning role. She was then on long term sick leave from 19 August. The managers at the time being questioned, there were no remaining issues during her time at Call Reception Team as "workarounds" had been identified. Furthermore simply increasing the font size on the screen was apparently a simple adjustment on the equipment provided to the claimant in any event. The claim therefore fails.

The allegation 5 September 2016 – grievance hearing and follow up

91. This is advanced under s.15, s.19, s.20 and s.26. The claimant asserts that the meeting was too long, it was held in a small room without air conditioning and little privacy. Finally the line of questioning was said to be pressurised and aggressive. If one looks at the grievance hearing transcript (727-779) there is nothing to suggest that the claimant was either pressurised or the manner of the meeting was conducted in an aggressive manner by Miss Kellett. Indeed the claimant's Trade Union representative made no complaints at any stage during the course of the meeting that there were problems with the room, the air conditioning, its privacy or that the meeting was being conducted in an unhelpful and aggressive manner. Indeed the claimant was allowed a break whenever she requested one. Furthermore the claimant accepted in evidence that Ms Kellett and the HR representative Miss Greenbanks were genuinely concerned for her and indeed Miss Kellett talked about BT's counselling that was available to the claimant.

92. The claimant has also touched upon the fact that following the meeting Miss Kellett sent a summary of what she believed were the claimant's allegations and core grievances, and asked for the claimant to respond by midday the next day. Miss Kellett accepts in evidence that looking back she would not impose the same deadline again, but she was concerned that the claimant wanted the investigation to proceed without delay and was therefore keen to move matters forward. The claimant's claims on the evidence before us that there was a failure to make reasonable adjustment in respect of the room clearly is not substantiated. There is no evidence that the claimant suffered discrimination as a result of something arising from her disability during the grievance hearing. Furthermore there is simply no evidence that

the claimant was in some way harassed during the course of the grievance meeting.

The allegation 10 October 2016 – Mr Neilson's second line managers review meeting

93. The claimant advances this under s.19, s.20 and s.26. The claimant asserts that following the quest to hold a meeting the claimant sent Mr Neilson an email requesting the meeting be deferred on the claimant's GP's advice. The response from Mr Neilson was "not helpful for your stress and anxiety to defer the meeting", that is what the claimant complains of. It is clear from the letter written to the claimant by Mr Neilson the reason for holding the second line manager's review, it was not a meeting in which the claimant was going to be formally warned. It was meeting to consider how the respondents could best facilitate the claimant's return to work. Whether indeed there was any further adjustments that the respondents could make in the light of the claimant's disability. What Mr Neilson genuinely felt was to defer such a meeting would understandably cause the claimant and indeed any other employee to become anxious and concerned about the meeting. Indeed he concludes his letter explaining the purpose of the meeting and wanting the meeting to be held sooner rather than later by saying "let me know how you would like to proceed". The claimant clearly was not under pressure to attend the meeting, far from it. It is simply difficult again to understand how the respondent can be accused of the failure to make reasonable adjustments. The letter written by Mr Neilson which explains clearly the purpose of the meeting cannot by stretch of the imagination be described as harassing. Finally it is difficult to understand what provision, criterion or practice the claimant claims put her at disadvantage by holding the meeting and holding it sooner rather than later.

94. There is an additional allegation in the first preliminary hearing that there was "a failure by the respondent to ensure continuity of her management and her job role which put her at a disadvantage", again it is unclear under which section the claimant advances this allegation. It can only relate to a period between January 2016 and August 2018 (2016?). During that time the claimant moved job roles on only two occasions. Firstly from the Call Reception Team to the management of Julie Cullum (15 July 2016) and then from the management of Julie Cullum to Maxine Yallop's team (15 August 2016). The tribunal repeats for the avoidance of doubt both these moves were carried out upon the request of the claimant and were intended to assist the claimant in moving forward.

95. To conclude the tribunal could not find on any section advanced by the claimant that she has suffered discrimination at the hands of the respondent because of her disability. It is clear the respondent has are and beyond what is reasonable in providing reasonable adjustments, the claimant has not been subjected to any detriment, indeed far from it on occasions she has had more favourable treatment with regard to pay being continued in the cross over period from BT to Openreach. On the evidence before this tribunal one could not find or infer any harassment, or victimisation. The nearest one gets is the text message sent by Mr White outside the course of

his employment and he was spoken to in no uncertain terms following it. The Facebook entry, clearly the claimant cannot rely upon that in circumstances where she did not even see that entry until disclosure in the course of these proceedings.

Time Issue

96. Even if the tribunal were to conclude (which we don't) that the allegations of the claimant going back amount to continuing acts, and therefore fall within time the claimant has addressed those to which it was agreed would start from January 2016.

97. However, if they were single acts which the tribunal concluded on the evidence before them they were, the tribunal then have to ask whether it would have been just and equitable to extend time in any event. Given the fact that the claimant was clearly aware of the three month time limit from at least 1 August 2016 (941) as the claimant admitted having received advice from her Trade Union about the claim and time limits. Therefore, there is no reason why at that stage the claimant could not have issued her claim which would then have brought a number of the allegations in time. The tribunal are concerned the longer one leaves allegations the more chance that the evidence is either lost or people move on into new jobs outside the respondent. There is no conduct that can be ascribed to the respondent that prevented the claimant from bringing her claim. The claimant clearly was fully aware of her rights, certainly around August and probably prior to that date. Therefore even if the tribunal were wrong on their conclusions on the factual allegations the tribunal would not have extended time on the just and equitable principles. Accepting the fact of course reasonable adjustment claims are continuing acts.

_____
Employment Judge Postle

Date: 15/2/18……..

Sent to the parties on: .....

.....
For the Tribunal Office