EMPLOYMENT TRIBUNALS

Claimant: **JL**

Respondent: **Department of Work and Pensions**

Heard at: **Middlesbrough** **on 12,13 & 14 February 2019; Deliberations: 15 February 2019**

Before: (1) Employment Judge A.M.S. Green
(2) Mr G Gallagher
(3) Mr S Hunter

Representation

Claimant: Mr J Anderson - Counsel
Respondent: Mr S Redpath -Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The Claimant's claim for victimisation under Equality Act 2010, section 27 is upheld and the Respondent shall pay the Claimant £3,212.60 as compensation for injury to feelings.

2. The Claimant's claims for discrimination arising from disability and failure to make reasonable adjustments under Equality Act 2010 sections 15 and 20 are dismissed.

3. The Claimant's claims for detriment on grounds related to union membership or activities under Trade Union & Labour Relations (Consolidation) Act 1992, section 146(1)(b) & (ba) are dismissed.

REASONS

Introduction

1. The Claimant presented claims for discrimination arising from disability, failure to make reasonable adjustments, victimisation under Equality Act

2010 sections 15, 21 & 27 ("EqA") and detriment on grounds related to union membership or activities under Trade Union & Labour Relations (Consolidation) Act 1992, section 146(1)(b) & (ba) ("TULCRA"). Her claim form was accepted on 20 April 2018. The Respondent does not concede that the Claimant was disabled at the relevant time and has denied liability for all the claims.

2. This was a liability and remedy hearing.

3. We have made an anonymity order under Rule 50 of the Rules of Procedure.

The Claims

4. In the claim form, the Claimant asserted that she is employed by the Respondent as an Administration Officer. She commenced employment on 24 February 2003.

Disability

5. In further and better particulars of claim dated 13 July 2018, the Claimant alleged the following:

    a. She is disabled because she suffered from depression and anxiety triggered by work related stress issues. She has a history of anxiety following an industrial injury in 2015 causing work stress and anxiety. Her disability is evidenced by an occupational health report dated 19 January 2018 [202] (the "Report").

    b. The trigger for the Report was because the Claimant had been off work because of illness over December 2017 and January 2018.

Discrimination arising from disability

    c. The Respondent treated the Claimant unfavourably because of her disability. The Report states her disability should be taken into account when considering her level of sickness with the attendance procedures.

    d. The Respondent issued the Claimant with first written warning under its Absence Management Programme ("AMP") because of her sickness absence in 2017. It should have implemented a Disability Extension Trigger Point ("DETP") under the AMP rather than issuing her with a warning. This was not a proportionate means of achieving a legitimate aim.

    e. She suffered discrimination because she was pursuing her injury benefit claims by a "management statement" post being made and kept in her personnel documents by the Respondent's management.

Failure to make reasonable adjustments

f. The Respondent operated a Provision Criterion or Practice ("PCP") which required employees to attend work, failing which they would receive a warning under the AMP. If the Respondent had implemented a DETP, the Claimant would have avoided receiving a warning.

g. She suffered substantial disadvantage because:

   i. Her personnel record was impacted because it showed sickness absences which could have triggered capability procedures without further adjustment;

   ii. She suffered anxiety and further stress because she feared losing her job.

   iii. She had to pursue a lengthy grievance and appeal process to have the first written warning and failure to allow the DETP adjustment in her circumstances registered.

h. The Respondent should have made the following reasonable adjustments:

   i. Someone with a known disability is likely to have a higher level of sickness absence related to that disability than someone without that disability. The Respondent's management should have taken that into account when considering the Claimant's level of anxiety within the AMP. The Claimant often suffered anxiety which triggered nausea in the morning before work and at times when she felt work pressure. She often worried about whether she could attend and be productive at work. Occasionally she doubted her value and her effectiveness. She worried about what would happen if she suffered a spell of anxiety and would not be able to come to work and whether she might lose her job. If she had a dedicated absence record relating solely to her disability this would support her and reassure her that if she was unable to attend because of her disability, it would not automatically count towards warnings and possible job threat. As an adjustment, this would help the Claimant to manage her condition without added stress.

   ii. A request for a further assessment by a workplace psychologist to assist the Claimant to integrate back into work over six sessions to improve things at work. The Claimant had suffered her disability for several years. She noted the failure of in-house stress plans. Consequently, she read up on the valuable work that the structure of a support from disability employment advisor and a referral to a work psychologist would bring to her situation. This adjustment provides a medical professional within the workplace environment and they work with the Claimant and her manager so that they can work through the barriers and put coping strategies in place to benefit all.

Trade union detriment

i. The Claimant is a member of the PCS Union. She was previously a trade union official; she was a representative She has been prevented or deterred from trade union activities or making use of trade union services or being penalised from doing so. She suffered the following detriment:

    i. Mr Moore, the Respondent's centre manager wrote to the Claimant on 2 February 2018 and made comments about the Claimant and her ability to perform trade union activities. He suggested that to do so would provide a less than satisfactory service to the Respondent and to their trade union membership. He remarked on the impact on the Claimant taking personal cases and that it would not be conducive to her health when he had no information to say the Claimant was going to take on personal cases. The impact of the detriment on the Claimant on reading this was to feel intimidated and prevented from engaging in union activities plus a warning if she was to undertake trade union activities how Mr Moore saw its impact.

    ii. In an unsigned document labelled "Management statement" obtained under the Data Protection Act by the Claimant, the document read that the Respondent's management believed this to be a trade union strategy to claim a work stress injury and then to ask for "gardening leave" whilst asking as a reasonable adjustment to have departmental support of a work psychologist via the benefit department's own process called a DEA (Disability Employment Advisor). The policy was clear in that if a work stress injury is identified then a statement is provided by a member of staff. The Respondent's management investigate the incident and provide a statement of their findings. MYCSP is independent and decides after being provided with the facts whether an injury is qualifying and how the absence should be treated. It bases its decision on the evidence from the member of staff and management. In the Claimant's case the evidence supplied by management states that the claim is a trade union strategy to make false claims and have time off and/or not counted as sickness absence. The Claimant did not apply for time off and had not used DEA services. The detriment of this document seeks to prevent the Claimant from asserting her legitimate trade union rights. The fact that it had to be disclosed under the Data Protection Act showed the writer hoped that the case might fail because of the Respondent's information.

Victimisation

j. The Respondent victimised the Claimant by subjecting her to a detriment when she did a protected act. The protected act was

making an allegation that the Respondent contravened EqA and seeking information pursuant to her subject access request under Data Protection Act 1998. The detriment she suffered was knowledge that the management statement could prejudice her claims and the stress/anxiety that this knowledge has caused her.

The Issues

Disability

6. At the relevant time, did the Claimant have a mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day to day activities?

Knowledge

7. Did the Respondent know or could reasonably be expected to know about the Claimant's disability?

Discrimination arising from disability

8. Did the Respondent treat the Claimant unfavourably in respect of something arising in consequence of disability by:

    a. Giving her a warning?

    b. Failing to implement the DETP so that the Claimant did not receive a warning?

    c. The management statement and the placing of it on her file?

9. Was the treatment a proportionate means of achieving a legitimate aim? Namely:

    a. To encourage an employee and manager to work together to remove barriers to work?

    b. Achieve and/or maintain a satisfactory level of attendance?

Reasonable adjustments

10. Did the Respondent have in place a PCP that the Claimant was required to attend work and that it would not implement the DETP?

11. Did this place the Claimant at a substantial disadvantage in comparison to non-disabled persons:

    a. Personnel record impacted

    b. Cause anxiety and further stress

    c. Had to pursue lengthy grievance and appeal process?

12. Did the Respondent undertake such adjustments as was reasonable by taking into account (in effect discounting) disability -related sickness when considering the level of the Claimant's sickness and the provision of a workplace psychologist over six sessions?

Trade union detriment

13. Did the Respondent subject the Claimant to a detriment by any act with the sole or main purpose of:

    a. Preventing or deterring her from taking part in the activities of an independent trade union at an appropriate time or penalising her for doing so?

    b. Preventing or deterring her from making use of trade union services at an appropriate time or penalising her from doing so?

14. The detriments are:

    a. The letter dated 2 February 2018 commenting on the Claimant and her ability to perform trade union activities [211-213].

    b. The Management Statement [268].

Victimisation

15. Did the Claimant do a protected act or acts?

16. Was the management statement influenced by the fact that the Claimant had done a protected act?

Documentation and hearing

17. The parties filed and served an indexed and paginated hearing bundle. One document was tendered at the hearing and was admitted into evidence [519]. The Claimant, Miss Alison Leslie (Team Leader at the Respondent's Seaham Pensions Centre) and Mr Stephen Moore (Unit Leader at the Respondent's Seaham Pensions Centre) adopted their witness statements and answered the questions that they were asked. We discussed making adjustments to accommodate the Claimant's anxiety and depression and it was agreed that the Claimant would be given regular breaks. We encouraged the Claimant to ask to take breaks as and when she required them. During the hearing, the Claimant took several breaks. Mr Anderson produced outline written submissions. The representatives made closing submissions.

Basis of our decision

18. In reaching our decision we have considered all the oral and documentary evidence, the representatives' submissions and our notes of evidence. The fact that we have not referred to every item of documentation in the hearing bundle does not mean that they have not been considered.

Findings of fact

19. The Claimant is employed by the Respondent as an administrative assistant at their Seaham Pensions Centre. Her employment commenced on 23 February 2003.

20. The Claimant has a mental impairment. It is common ground that she suffers from stress, anxiety and depression. It is long-term. By a letter dated 20 September 2018 [421], her GP practice confirmed that she had suffered from stress at work and anxiety for several years. This has affected her mental health and she required Cognitive Behavioural Therapy and counselling. She took 10 mg of the antidepressant, Amitriptyline, at night between August 2015 and January 2018. From June 2018 onwards she has been taking 15 mg of Mirtazapine. As at 20 September 2018, she was currently working with a psychologist. Her GP believes that the Claimant suffers from a chronic disability, but she is unable to assess whether it had a substantial effect on her ability to perform normal day-to-day activities. The Claimant's GP records reflect the longevity of her condition [374-420].

21. Dr John, a clinical psychologist, assessed the Claimant on 23 March 2018 and prepared a written report on 25 April 2018 [239]. She assessed the Claimant on the Beck Depression Inventory to determine her level of depressive feelings. The Claimant scored 21 placing her within the range of moderate depression. She also assessed the Claimant on the Beck Anxiety inventory and placed at 13 indicating that she suffers from mild anxiety.

22. Despite the Claimant's mental impairment, she can drive short distances and uses public transport [244]. She has social relationships with her family and mother-in-law from which she gains great enjoyment. She goes to bingo. She enjoys walking. Although she is unable to eat food in the company of her friends because she feels nauseous and is often sick, she does eat with her immediate family. Workplace issues trigger her anxiety attacks. The Claimant told the occupational health professional that she was able to undertake all her activities of daily living [202].

23. The Claimant made a Civil Service Injury Benefit Claim on 7 October 2015 in relation to work related stress [87-100]. She prepared a personal statement about her claim [84-86]. As part of her claim she stated that she wanted her period of absence to be treated as a qualifying injury because of continuous failure in the Respondent's duty of care in removing reasonable adjustments afforded under EqA.

24. Her claim was refused but subsequently upheld on appeal on 14 October 2016 [117].

25. The Claimant took sickness absence leave between 18 January 2017 and 26 January 2017 because she was suffering from shingles.

26. By a letter dated 20 March 2017, the Respondent confirmed that the Claimant's working hours were reduced from 30 hours per week to 18 hours per week with effect from 27 March 2017 [118].

27. On 21 March 2017, the Claimant applied for an injury benefit award to MyCSP as she had to reduce her hours because of ongoing and significant health concerns following an injury at work which is accepted to have happened on 30 June 2015. She submitted her personal statement to the Respondent in support of her claim [120].

28. The Claimant's application for the injury benefit award and supporting sensitive medical documentation went astray in the post. Although it was eventually tracked down in the Respondent's Dead Letter Office, not all the documentation was found. This caused the Claimant significant stress and anxiety and she made numerous enquires regarding the documentation and its whereabout.

29. The Claimant re-submitted her injury benefit award application, and this was accepted for assessment as confirmed by Jan Smith on 13 October 2017 [193].

30. The Claimant was signed off sick between 22 December 2017 and 2 January 2018 for work related stress and anxiety. Her GP signed her off work from 20 December 2017 until 3 January 2018 [195].

31. Miss Leslie wrote to the Claimant on 2 January 2018 to arrange a meeting to discuss her sickness absence [196]. She wrote to the Claimant because the Claimant would have been absent for 14 days by 5 January 2018. The letter was triggered by the AMP. She invited the Claimant to attend a meeting on 8 January 2018 and notified her of her right to have a trade union representative or work colleague attend the meeting. She notified the Claimant that if her attendance remained at an unacceptable level her continued employment with the Respondent could be affected. The Claimant notified the Respondent that she would not be attending the proposed meeting because she had not been given the requisite five days' notice as per the Respondent's guidance [197].

32. The Claimant attended a "welcome back" meeting with Miss Leslie on 5 January 2018. Notes of the discussion were taken [200]. It was agreed that the Claimant would attend an occupational health assessment. During that meeting, the Claimant raised her concerns again about the loss of personal documents relating to her injury benefit application. She notified Miss Leslie that she was suffering from high blood pressure and her GP was concerned that she might have a heart attack or a stroke. This was the reason why she had been signed off sick. She also notified Miss Leslie that she had been prescribed amitriptyline and was feeling calmer as a consequence. She told Miss Leslie that one of the side-effects of that drug was tiredness and fatigue. The Claimant had also requested ADE a referral and Miss Leslie agreed to research the correct process.

33. On 9 January 2018 Miss Leslie invited the Appellant to a meeting on 19 January 2018 to discuss her sickness absence. She notified the Claimant that she had been absent on two occasions for 10 days between 2 January 2018 and 1 January 2017 which meant that she had reached or exceeded her Trigger Point of five days under the AMP. Miss Leslie had to consider whether any formal action was appropriate [198].

34. The Claimant attended an occupational health meeting with Claire Stone of OH Assist on 19 January 2018. This resulted in the Report [202]. Ms Stone concluded that, in her opinion, the Claimant's anxiety depression was likely to be lifelong and require continuing treatment to control the effects of the illness. The Claimant could suffer relapses from time to time and these would be unpredictable despite her having treatment. She also advised that the Claimant might require further absences from work during severe flareups. She was not prepared to conclude whether the Claimant was disabled because she regarded this a matter for a tribunal to determine. However, on her interpretation of UK legislation, she believed that the Claimant's anxiety and depression was likely to be considered a disability because it had lasted longer than 12 months or was likely to last longer than 12 months. At this stage, the Claimant had not given her verbal consent to release information to the Respondent.

35. The Claimant attended an absence review meeting with Miss Leslie on 23 January 2018. Notes of the meeting were taken [205-207]. During that meeting, Miss Leslie raised the point that she believed that the Claimant had exceeded her absence trigger under the AMP. She had taken 10 days sick leave in the relevant period when her trigger point was 5 days. The total number of absences had exceeded her trigger point of five days under the AMP. The parties were to discuss what the Respondent could do to help the Claimant to get her sickness into better shape, to decide what support was needed and to consider whether a warning was appropriate. During that meeting, the Claimant referred to her absence in January 2017 because of suffering from shingles. Initially she did not know that she had shingles and thought she was suffering from a water infection and she believed that it was unfair for her absence to be counted under the AMP.

36. On 30 January 2018, Miss Leslie wrote to the Claimant [208]. She summarised what was discussed at the absence review meeting on 23 January 2018 and the fact that she had exceeded her trigger point. She decided to give the Claimant a first written warning under the AMP and would monitor her attendance for six months from 30 January to 29 July 2018. She warned the Claimant that if her attendance was unsatisfactory during that review, her case would be considered again which could result in a final written warning. Sickness absences of 3 days or more during the review would be unacceptable. She also warned the Claimant that if her attendance was satisfactory during the review, it would be monitored for a further 12 months starting from 30 July 2018 and ending on 29 July 2019. If the Claimant was issued a final written warning, she was at risk of being dismissed if her attendance continued to be unsatisfactory. She notified the Claimant of her right to appeal. Miss Leslie knew the Claimant had attended an occupational health assessment. She knew that the Claimant had not given her consent to the Report being released. She knew that the Report was coming and that it would go to the Claimant's manager, but she decided to issue the first written warning without the benefit of medical information set out in the Report and she acknowledged in her oral evidence that had she seen the Report she would probably have offered the Claimant DETP.

37. On 30 January 2018, the Claimant sent an email to Miss Leslie and Ms Joanne Fraser. She copied the email to Ms Fiona Rochester [519]. The email covered several topics. She complained about the time it had taken for her to have an occupational health referral. She complained about the

fact that she had not been given support from a work psychologist. She referred to the fact that her stress and anxiety at work forced her to reduce her hours. She referred to the fact that her mental health had deteriorated. She referred to the fact that the Respondent had allowed her personal information and medical information to be disclosed unknown third parties. She went into some detail about the issues that she believed had cause this information to go astray. She accused the Respondent of failing in its duty of care and accusing her of being a liar. She referred to the fact that she had been criticised because she had sought advice and guidance from a DEA. She simply wanted the Respondent to support her and she accused it of continuously failing to do so. She referred to the fact that the Report recommended that she attend a psychologist. She referred to the fact that she was a person who was covered by EqA and this was a reasonable adjustment that had been recommended. She stated that she had suffered a relapse and had been off work because of anxiety and work stress. Her GP fit note covered the delays caused by the Respondent in her injury benefit application and the errors relating to it. She said that she had suffered several anxiety attacks leading to her absence. She requested that should be given special leave with full pay until the reasonable adjustment of the psychologist sessions commenced. She invited the Respondent to reply in writing.

38. Mr Moore and Miss Leslie attended a management meeting some time before 4 February 2018. The meeting took place before Mr Moore moved jobs. The meeting was one of a series of regular case conferences to discuss employees' attendance records. During the meeting, the Claimant's attendance was discussed. As a result of the meeting, a "management statement" was prepared [268]. The management statement was intended to be sent to the third party assigned with the task of assessing the Claimant's injury benefit claim. It was not intended to be seen by the Claimant. The Claimant only became aware of this document after submitting a Freedom of information request to the Respondent. The management statement was a collaborative document. Mr Moore wrote the final paragraph.

39. The management statement said:

> *This is the third application submitted by this member of staff, and we are now of the belief that it is becoming a vexations [sic] claim.*
>
> *The primary argument she raises is about delay (and the loss of paperwork). Throughout the process we have constantly kept [the Claimant] appraised of the position regarding checking for the papers (contacts documented) and could not have done anything further on a practical search level.*
>
> *Relating this episode to dealing with external customers we would acknowledge the loss, prepare duplicates, and resubmit. That would not necessarily attract any consideration of a punitive award.*
>
> *For the third IB application we now appear to be criticised for finding the papers and advising [the Claimant] of this fact. She is unwilling to accept that the Departmental Information Security Policy applies to anyone who has a business need to handle DWP information, including all DWP*

employees, agents, contractors, consultants and business partners. No evidence exists that would lead us to believe that other than legitimate staff come into contact with her file work.

We appear to be victims of a widening TU strategy that is following a standard pattern; absence recorded as work-related stress, IB application, the DEA referral sought, seeking gardening leave until the processes resolved. We are taking this matter up with our HR Business Partner but wish to make you aware.

40. Given the subject matter of the management statement, we think it is reasonable to infer that it was written in response to the Claimant's email of 30 January 2018. Her email provides context for the management statement.

41. Having heard his oral evidence we find that Mr Moore accepted that the Claimant had only made two injury benefit claims and not three, as asserted in paragraph 1 of the management statement. Paragraph 1 is, therefore, factually incorrect. He accepted that the word "vexations" should be read as "vexatious". He accepted that it was a serious allegation to make against the Claimant. He knew that the Claimant believed she was disabled and was asking the Respondent to make reasonable adjustments. He knew that she was protected by the EqA. In relation to paragraph 1, Mr Moore accepted that the Claimant had done nothing wrong and there was no basis for labelling her behaviour as vexatious. He also accepted that if the Claimant had not been so vociferous regarding her request for reasonable adjustments, her claim that she was disabled and protection under the EqA, this paragraph would not have been written. He accepted responsibility for the paragraph relating to the alleged trade union strategy and told the Tribunal that he had no evidence at the time for alleging that the Claimant was involved with the alleged trade union strategy. We also accept the Claimant's evidence that she was upset when she read the management statement because it contained factual inaccuracies. She was not part of any wider trade union strategy and she felt discriminated against. She felt personally violated and victimised. There was no basis whatsoever for the Respondent to accuse her of acting vexatiously.

42. The Claimant appealed her first written warning.

43. The Claimant had been a representative for the PCS union for 13 ½ years. She had stood down in 2017. She was considering putting her name forward either to be a representative for the union or to be the Assistant Branch Secretary. On 30 January 2018, nominations for representative and other positions in the union had to be submitted. She applied for the positions of branch secretary and branch chair and she spoke to different members about this. It was agreed that it would be better for her to apply for the position of Assistant Branch Secretary. It was common knowledge at the Respondent that she was interested in becoming involved with the union again.

44. Mr Moore replied to the Claimant's email of 30 January 2018 in a letter dated 2 February 2018 [211-213]. He confirmed that he had the Report. He then addressed the various items raised in the Claimant's email. In the final

paragraph of his letter, under the heading "Duty of Care" he said the following:

> *Your own email makes reference to "deterioration in your mental health", and we will make every reasonable effort to support you. I do however have significant concerns though when I hear (but not yet confirmed officially) that you are seeking to take on additional TU responsibilities.*
>
> *Recognising that TU representatives play an important role and integral to that (as with management) is the potential to deal with some traumatic, complicated, and upsetting personal casework. I cannot see how exposing yourself to this (if this is the case) can be conducive to facilitating an improvement in your well-being, nor indeed ensuring the broader community within Seaham have the appropriate level of service that they deserve.*
>
> *I would want us all to reflect on my stance and have some frank and open discussions how we take this forward.*

45. In paragraph 4 of his witness statement Mr Moore explains why he referred to the Claimant's proposed trade union activities in his letter. He knew, unofficially, that the Claimant was considering putting her name forward to the union. He claimed that he was concerned about the potential stressors that might arise from the claimant taking on additional duties. This was especially so if those duties involved complex, conciliatory and often emotive personal cases. He claimed that because a stress reduction plan was in place, a psychologist report had been requested and mediation was on offer he felt concern and a duty of care towards the Claimant. He did not want her to expose herself to additional stressors by taking on such additional work because it would not be conducive to facilitating an improvement in her well-being. Having heard his oral evidence we find that he accepted that in writing to the Claimant in these terms he was deterring or discouraging her from becoming involved with the trade union.

46. The Claimant was very upset by Mr Moore's letter. She considered the letter as a threat to undermine her and her trade union activities. She believed that Mr Moore was not concerned about moving forward getting her reasonable adjustments in place and was selectively trying to curtail her trade union duties. She had not discussed her plans with her manager, and she felt intimidated by the remarks. The letter had been left on her desk and when she read it, her mental health deteriorated. She felt victimised by the letter. No one discussed the issue of union membership with her. After the Claimant read the letter, she emailed Mr Moore to request a meeting with him. The meeting request was declined because it was on too short notice and Mr Moore suggested that the Claimant should liaise with Joanne McAvinnie to sort out a mutually convenient date.

47. The Claimant submitted a grievance on 12 February 2018 [214-215]. The subject matter of a grievance was disability discrimination arising from failure to consider DETP when applying departmental attendance Management policy. She also believed that she had been refused the right to ask questions and seek clarity on these and other relevant points pertinent to ongoing health. The Claimant attended a meeting on 23

February 2018 with Joanne McAvinnie, Joanne Fraser (notetaker) and Sue Smith (the Claimant's trade union representative). It was agreed that the Department would source and pay for a work psychologist to work with the Claimant and her manager.

48. The Claimant met a work psychologist on 23 March 2018.

49. The Appellant's appeal against her first written warning was rejected on 23 March 2018 [232-233].

50. On 16 April 2018, Miss Leslie rescinded the Claimant's first written warning [237-238]. She did this following the introduction of the revised policy and she reviewed the original decision and confirmed that she had decided to rescind the warning. The reasons for her change of decision were:

    a. The absence from 18 January 2017 until 23 January 2017 for shingles, whilst not on the list of communicable diseases, there was a chance that a further bout may occur. That had not been the case to date.

    b. Prior to her absence for shingles, her attendance had been good. Her last absence was over two years ago in 2015.

    c. She understood from guidance and advice received from CSHR that she had made an error in calculating the trigger point following her change of work pattern during the transition period.

    d. It would have been perverse, unfair or disproportionate to give a warning considering the exceptional nature and/or circumstances of the absence and her otherwise satisfactory attendance record.

    e. She decided that the absence for shingles should be set aside and the AMP amended to reflect that. A DETP was not required as her current absence total was three days. Consequently, she had not exceeded her current trigger point of five days. A DETP would be considered for future absences

51. The Claimant has not taken any sick leave since returning to work in January 2018.

52. The Claimant is the Branch Secretary for the PCS union. She took up her position in July 2018. She is actively involved with her duties. There is a facilities time agreement with the Respondent. She gives herself 20 days for her union activities and has a set number of hours. She delegates some of her hours to other trade union representatives. She has not received any criticism from her managers relating to her union activities. The Respondent has not prevented or hindered her in the execution of her duties.

Applicable law

Disability

53. EqA section 6 provides:

A person (P) has a disability if-

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

54. EqA section 212 provides that "substantial" means more than minor or trivial.

55. The EHRC code provides guidance on the meaning of substantial. It says:

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist between people.

Account should also be taken of whether a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or because of a loss of energy or motivation.

56. In **Goodwin v Patent Office 1999 ICR 302, EAT**, he EAT gave tribunals guidance on the proper approach to adopt when applying the Disability Discrimination Act 1995 provisions. This guidance remains equally relevant today in interpreting the meaning of EqA, section 6. The EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):

    a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')

    b. did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')

    c. was the adverse condition substantial? (the 'substantial condition'), and

    d. was the adverse condition long term? (the 'long-term condition').

Victimisation

57. EqA, section 21(1) provides:

A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

58. It follows from section 27 (1) that a claimant seeking to establish that he or she has been victimised must show two things:

    a. That he or she has been subject to a detriment; and

    b. That he or she was subjected to that detriment because of a protected act.

59. There are several types of "protected acts" including:

    a. Doing any other thing for the purposes of or in connection with EqA;

    b. Making an allegation (whether or not express) that A (the alleged victimised) or another person has contravened EqA.

60. When considering detriment, the EHRC code states:

    The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

61. The EHRC code provides a useful summary of treatment that may amount to detriment:

    Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance -related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

62. As this summary indicates, detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. In **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 HL**, the House of Lords considered the meaning of detriment and established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The House of Lords felt that an unjustified sense of grievance could not amount to a detriment but did emphasize that whether or not a claimant has been disadvantaged is to be viewed subjectively. The test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be reasonable in the circumstances.

63. Victimisation claims are subject to the shifting burden of proof set out in EqA section 136. This provides that the initial burden is on the Claimant to prove facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has contravened a provision of EqA. Once the Claimant has established a prima facie case, the burden passes or shifts to the Respondent to prove that discrimination did not occur. If the Respondent is unable to do so, the Tribunal is obliged to uphold the discrimination case. The standard of proof is the balance of probabilities.

64. EqA section 119 (4) provides that the Tribunal may award compensation for injury to feelings. We are reminded that in **Prison Service and others v Johnson 1997 ICR 275 EAT,** the EAT set out the following guidance:

    a. Awards for injuries to feelings are designed to compensate the injured party fully but not to punish the guilty party.

    b. An award should not be inflated by feelings of indignation at the guilty party's conduct.

    c. Awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.

    d. Awards should be broadly like the range of awards and personal injury cases.

    e. The Tribunal should bear in mind the value of everyday life of the sum they are contemplating and the need for public respect for the level of the awards made.

65. **Vento v Chief Constable of West Yorkshire Police (No 2) 2003 ICR 318, CA**, set down three bands of injury to feelings awards, indicating the range that is appropriate depending upon the seriousness of the discrimination in question. Injury to feelings encompasses subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

Trade union detriment

66. TULCRA, section 146(1) states that:

> *A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place the sole or main purpose of:*
>
> *…*
>
> *(b) Preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,*
>
> *(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so*

67. In **Ministry of Defence v Jeremiah 1980 ICR 13**, the Court of Appeal to a wide view of the wording of detriment. It simply meant "putting under a disadvantage". Brightman LJ stated that detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. Subsequent cases have established that detriment covers such things as failure to promote, refusal of training or other opportunities, disciplinary action and reductions in pay, as well as general unfavourable treatment. Indeed, the wide scope of "detriment" is

such that there are very few instances where the acts or failures to act complained of were not held to amount of detriment. The Claimant must establish that the Respondent has subjected her to a detriment as an individual.

68. Before the Tribunal can uphold a detriment complaint it must be satisfied that the Respondent's sole or main purpose in subjecting the Claimant to a detriment was to prevent or deter the Claimant from taking part in union activities or making use of union services. The focus is not on whether the Claimant was subjected to a detriment because of her union membership or activities, but instead on what purpose the Respondent was seeking to achieve by subjecting the Claimant to the detriment.

69. TULCRA section 148 (1) provides that:

> *On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.*

70. If the Claimant can show that she has been subjected to a detriment and the Respondent is unable to satisfy the Tribunal as to its purpose, the claim will be made out. In **Yewdall v Secretary of State for Work and Pensions EAT 0071/05** the EAT set out what it considered to be the correct approach for the Tribunal to adopt. The Tribunal must ask itself:

    a. Have there been acts or deliberate failures to act on the part of the employer?

    b. Have those acts or omissions caused detriment to the claimant?

    c. Where those acts and omissions in time?

    d. In relation to those acts proved to be within the time limit, and which cause detriment, has the claimant established a prima facie case they were committed for the purpose prescribed by section 146?

    It is only after the last question has been answered in the affirmative that the burden of proof transfers to the employer to show the purpose behind its acts or omissions.

71. TULCRA section 149(1) provides that if the Tribunal finds a complaint of detriment under section 146 (1) it must make a declaration to that effect and it may make an award of compensation to the Claimant. An award of compensation is what the Tribunal considers just and equitable having regard to the infringement of the complainant's right by the Respondent's act or failure to act, and any loss which is attributable to the Respondent's act or failure to act. There is no statutory to the amount of compensation can be awarded.

Application of the law to the facts

Disability

72. Although the Claimant suffers from a mental impairment (anxiety and depression) which is long-term, we are not satisfied that she has

established that has a substantial adverse effect on her ability to carry out normal day to day activities. When making our findings of fact, we reviewed all the relevant evidence including, but not limited to, the Claimant's disability impact statement and the medical records and reports. Paying due regard to the guidance set out in the EHRC code, whilst we accept that her condition has some impact on her normal day-to-day activities it is not substantial. The EHRC code lists examples of normal day to day activities and with these in mind, we noted that she enjoys walking, her social life with her immediate family and the fact that she eats with them. She socially interacts with her mother in law and goes to bingo with her weekly. She drives a car, albeit for short distances, and she uses public transport. In this regard she told Dr John that she would prefer to travel to Newcastle by train. We accept that the Claimant does not eat with people outside her immediate family because of problems with, and the embarrassment of, nausea and being sick. Nevertheless, she eats with her immediate family. There was nothing to suggest that she does not cook. All the things that we have identified above are normal day-to-day activities. Finally, when she had her occupational health assessment on 19 January 2018 she was reported as saying that she was able to undertake all her activities of daily living. Having assessed the evidence, we conclude that she is and was not disabled at the material time.

Discrimination arising from disability

73. Because the Claimant has not established that she is disabled, her claim for discrimination arising from disability cannot succeed.

Failure to make reasonable adjustments

74. Because the claimant has not established that she is disabled, her claim for failure to make reasonable adjustments cannot succeed.

Victimisation

75. The Claimant made a protected act when she complained to the Respondent that it had breached EqA. She referred to EqA in her 2015 injury benefit claim. Furthermore, she set out her allegations regarding breach of the EqA in her email of 30 January 2018. There was a management meeting during which Mr Moore, and Miss Leslie discussed her claims which resulted in the management statement. This was a document intended to accompany the Claimant's injury benefit claim and it would have been reviewed by the third-party assessor in determining whether to allow her claim. The document was never intended to be shown to the Claimant and she only discovered its existence as a result of filing her freedom of information request on the Respondent. It is an inaccurate and disparaging document. In particular:

    a. The management statement specifically addresses the Claimant's injury benefit claim. She has been identified.

    b. It says that she made three claims when in fact she had only made two claims and submitted one appeal.

c. She is accused of acting vexatiously. The Oxford dictionary definition of vexatious is:

> *Denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance to the defendant.*
>
> *'a frivolous or vexatious litigant'*

This is a very serious allegation without any evidential basis. Quite the contrary, the Claimant was exercising her right to submit an injury benefit claim and it should also not be forgotten that she had succeeded with a previous claim in 2015 where she proved loss based on a work-related stress claim. In other words, she had sufficient grounds for winning and it cannot be said that she was simply acting to annoy the Respondent. Furthermore, she was justifiably upset by the Respondent losing her sensitive personal data relating to her second claim.

d. The management statement also suggested there was a wider trade union strategy to encourage un-meritorious claims. There was absolutely no basis for this. Mr Moore admitted that there was no evidence that the Claimant was involved with any such strategy. It was a baseless allegation.

e. The management statement misrepresents the Claimant and paints her in a poor light. It suggests that she tends to make unmeritorious claims to annoy the Respondent. It is prejudicial to the Claimant and we think it is reasonable to infer that it could have undermined her injury benefit claim resulting in it being rejected. Indeed, on Mr Moore's admission, there no basis whatsoever characterizing the Claimant in those terms. He admitted that that she not been so vociferous, paragraph 1 of the management statement would not have been written. Effectively, she was being targeted for asserting her rights.

76. The management statement was generally hostile towards the Claimant. She was upset by it. Her injury benefit claim could have been prejudiced. We believe that it was reasonable for the Claimant to perceive the management statement in the way that she did. She did not have an unjustified sense of grievance. She has established her prima facie case and the Respondent has failed to establish that discrimination did not occur. The Respondent victimized the Claimant.

Trade union detriment

77. The management statement and the letter of 2 February 2018 amount to deliberate acts on the part of the Respondent. The letter specifically deters the Claimant engaging in trade union activity. Mr Moore accepted that in his oral evidence. Although the management statement never intended to be seen by the Claimant, it provides important context in understanding Mr Moore's mindset. He was hostile to the union. He alleged that it was engaging in a strategy of encouraging unmeritorious claims for injury benefit and garden leave of the kind exemplified by the Claimant. He had no

evidence for this and yet he made the allegation. His letter of 2 February 2018 purported to have been written because of the Respondent's duty of care and his concerns that the Claimant was taking on work with the union which could harm her mental health. That does not sit well with what he said in the management statement. At its highest, we believe that all that can be said was that Mr Moore felt some concern for the Claimant but his principal motive for deterring her from engaging in trade union activities was his hostility towards the union and the purported "wider strategy". Notwithstanding this, we do not believe that the Claimant suffered detriment because of this. She was not stopped from becoming the Branch Secretary and the Respondent has done nothing to stop her from exercising her duties since being elected. She has not been prevented or deterred from making use of union services. She has not been penalized from participating in trade union activities or from using trade union services.

Remedy

78. The Claimant has claimed £3,000 injury to feelings. The Respondent has countered this and has proposed £900. Both amounts are within the lower **Vento** band. The Respondent argues that her injury to feelings should be limited to her reaction to the first written warning which was limited by the fact that Miss Leslie rescinded that warning. It was also suggested by Mr Redpath that there were several sources of upset and anxiety which were not limited to problems that the Claimant had at work. He also submitted that in her evidence, the Claimant accepted that a first written warning was a possible outcome to her period of absence. Consequently, any discriminatory act causing her injury to feelings was negligible as it was predicated on a single event. He accepted that any award made would be tax free. Mr Anderson submitted that the Claimant had made a modest claim for injury to feelings and she should be given credit for that fact. The figure that she had proposed included causation. It was a matter for the Tribunal to consider.

79. We have no doubt that the Claimant was very upset by the way she was treated. The management statement caused her great offence and she felt victimised and violated by the Respondent's behaviour. When she gave her evidence about how she felt, she frequently broke down in tears. On one occasion, she was almost hysterical and required to take a 10-minute break to compose herself. We formed the impression that the Claimant was not "playing to the gallery". Her upset was genuine, heartfelt and palpable. We accept that her quantification is modest and realistic, and we have no difficulty in agreeing that it would be just and equitable to award her £3000 for injury to feelings in respect of her victimisation claim. We also note that Mr Anderson seeks interest on the award at 8%.

80. The Tribunal can award interest on awards of compensation made in discrimination claims under EqA 2010, section 124 (2) (b) to compensate for the fact that compensation has been awarded after the relevant loss has been suffered. Interest can be awarded on an award of compensation for injury to feelings. The applicable rate of interest is 8%. Interest is awarded on injury to feelings from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation. Interest runs from the "mid-point" date of the date of calculation. The mid-point is calculated as the date halfway between the date of the discriminatory act

and ending on the calculation date (usually the judgment date). Interest accrues from day to day and is simple rather than compound.

81. The injury to feelings award is £3000. We have set 31 January 2018 as the discriminatory date. The total number of days between this and the judgment date is 388. The calculation date (mid-point) is 13 August 2018 (i.e. 194 days). 194 x 0.08 x 1/365 x 5000 = 212.60

Employment Judge Green

Date 22 February 2019