



EMPLOYMENT TRIBUNALS

Claimant: Ms R. West
Respondents: MUFG Bank Ltd

London Central

24, 25, 26, 27,28 July 2023
Panel deliberation 31 July 2023

Employment Judge Goodman
Mr P. de Chaumont-Rambert
Ms S. McLaughlin

Representation

Claimant : Amy Stroud, counsel
Respondent : Tom Brown, counsel

JUDGMENT

1. The direct discrimination claim fails
2. The claim of discrimination because of something arising from disability fails
3. The claim of harassment related to disability fails
4. The claim of breach of the duty to make reasonable adjustment for disability fails

REASONS

1. This is a claim for disability discrimination.
2. The full list of issues is appended to this judgment. In summary, the tribunal has first to decide whether the claimant was disabled. The claimant has suffered depression and anxiety. The respondent does not accept that this amounted to disability within the meaning of the Equality Act. The tribunal must decide the point.
3. If she was disabled we have to decide whether there was discrimination. The claimant worked for the respondent bank as a Vice-President in the Change Team. She was signed off sick with depression at the end of April 2021. There is a claim that remarks made by her line manager Sohail Khan shortly after she stopped work were discrimination because of something arising from disability. Then there are claims that the handling of her grievance about Mr

Khan, after she had ceased work, by Stephen Darling, and the handling of her appeal against his grievance decision by Jan Alimonda, were direct discrimination because of disability. Finally there is a claim that at the conclusion of the grievance process there was a failure to make reasonable adjustment for disability by changing her job.

4. The tribunal must also decide whether claims based on events before 2 February 2022 are in time.
5. At a case management hearing in October 2022 the parties were asked to agree a list of issues after the claimant had given further information and ask for a further case management hearing if in difficulty. A list was drawn up and inserted in the bundle. The claimant applied to add a harassment claim. The respondent did not object to that being added, but did object to an extensive amendment of claim made in June 2023. Permission to amend was refused by E J Spencer on 11 July 2023.
6. Last week the claimant sought to make further changes to the list of issues. The respondent objected to three of these. We heard both sides on this before we started hearing evidence, and then decided:
 - (1) we should consider as part of the disability issue whether her condition was likely to recur, because we had general practice records, several medical reports, and the claimant's statement on the impact of disability, and it was for her to prove her case. The claimant had not formally pleaded her condition was long term either, but it was an issue we had to decide, and so was the likelihood of recurrence.
 - (2) we allowed the PCP for reasonable adjustment to be altered to 'working in the change team', not just not 'working with Mr Khan in the change team', as pleaded, because the claimant had made her case clear at the grievance hearing and so the respondent knew what it was, even if not clearly pleaded.
 - (3) we did not allow the addition of the words "without competitive interview" to the adjustment to find alternative work. That was something we should probably consider when deciding whether the adjustment was "reasonable". It was not shown from either pleadings or the contemporary documents to have been a specific issue until now.

Evidence

7. To decide the claims the tribunal read witness statements and heard live evidence from:
 - Rachel West**, claimant
 - Sohail Khan**, her line manager. At the time he was a director, and head of front office change.
 - Rebecca Seymour**, HR Business Partner from October 2021 to October 2022.
 - Stephen Darling**, a Relationship Manager for utility clients, who investigated the claimant's grievance
 - Jane Alimonda**, who heard the appeal against the grievance outcome. She

was Head of Audit for Financial Crime Fraud and ESG at the time, and now works for another bank.

8. There was a hearing bundle of 2,014 pages. Unredacted copies of about 200 pages of this were provided to the claimant on the first hearing day and we adjourned to allow counsel for the claimant time to check the new material with her client.

Findings of Fact

9. The respondent is the London subsidiary of a large bank with headquarters in Tokyo. About 2,000 people are employed in London.
10. The claimant has been employed by the bank since October 2014 as a Vice President in Change Management. (Until a merger in 2018 her job title was director; on merger the job was retitled Vice-President).
11. Initially she worked full-time. She has had maternity leave for two children, born in 2016 and 2018. From March 2019 she has worked part-time, working 28 hours a week over 4 days, from 9-5 for two days and from 7.30 to 3.30 on the other two.
12. She reported to Mr Khan from February 2020. He in turn reported to Blair Robertson.
13. The claimant was able and ambitious. In the year 2019-20 she had made three applications for more senior roles, more, as she put it, to show her ambition and be noticed than because she expected to succeed. The performance appraisal for April 2020 shows her achieving a 4 ('significantly exceeds expectations'), and that both she and Mr Khan saw her on a path to promotion to director.
14. In the coming year, 2020-2021, he wanted her to reduce administration and increase delivery. She had retained responsibility for EMEA strategy from pre-merger, enjoyed the work, and saw it as a link to other parts of the bank and so a pathway to promotion. "Delivery" meant completing chargeable projects. The change team carried "business as usual" staff on permanent contract, and recruited contractors to assist in project delivery. The project work could be charged to budgets.
15. On 11 November she emailed the manager of EMEA strategy saying she would have to bow out, as the project work in Change was ramping up.

The Claimant's health breakdown

16. At the very end of October 2020 the claimant suffered an early miscarriage and took 2 days off work. She told Mr Khan at the time that she had bleeding in pregnancy – it was disputed when exactly he learned it was a miscarriage; in our finding it was not until December. At some stage she told Mr Khan she would not be able to have any more children – he understood from that it had been an ectopic pregnancy, but the claimant says it was not; it may have been a reference to her age.

17. Then on 10 December a friend died after a period of illness, and she took half a day's leave; the following day was the fifth anniversary of her father's death, and at around that time too she heard of the death of a mother of a child at her child's school, and found herself contemplating what would happen if it were her. In early January her father's brother died; she attended the funeral by Zoom on 11 January, taking half a day's leave to do so. Early in January too there was a Covid case at the school, and so her children were both isolating at home for 2 weeks. Naturally this increased the pressure on their parents.
18. This cluster of pressures lowered her resilience and the claimant began to find it hard to manage.
19. On 19 January the claimant and a contractor with whom she worked, Peter Finigan, met Mr Khan to discuss project progress. The claimant experienced Mr Khan "berating" her (or them) for shortcomings. Asked about it a year later Mr Finigan could recall only that projects were often under pressure but nothing more. At the one to one meeting next day with Mr Khan, she was upset and burst into tears. He reported to HR that she had a "lot going on in her personal life and has become bit overwhelmed again (family bereavement, COVID, childcare). She has decided/asked to take rest of the week off so hopefully she will be re-charged next week". She thanked him for his support.
20. On her return on 25 January he asked how she was. She replied she was not 100% and was taking each day as it came. They agreed her health came first. She said the reality right now was that she could not be expected to do 40-45 hours a week on a 28 hour contract, and she needed to be kind to herself. A discussion on how to prioritise her workload commitments followed. This included getting contractors to do 90% of the remaining EMEA strategy work, though it is clear she did not want to lose it. Blair Robertson told Sohail Khan to see that Helen (a contractor) took it on, rather than pushing back to the claimant.
21. On 4 March the claimant signed off on the Salesforce project. Soon after, Mr Finigan had a health crisis and was admitted to hospital, and Mr Khan emailed colleagues saying the claimant would be the "point person" on Sales Force work. The claimant believed she would have to take on the work and felt daunted by additional responsibility; Mr Khan however says this only meant that she would re-route enquiries to others in Mr Finigan's absence. A few days before she had to minute a 10 pm meeting between Tokyo, London and New York, this was not usual, but regarded as necessary.
22. The claimant was due to take a week's holiday at the start of April. She decided to unbook one day of this so catch up. On a couple of other days of the holiday she checked some emails.
23. Back at work, on 15 April the claimant froze when presenting a set of slides at a meeting. She had prepared the deck of slides the previous day, but says she had understood Mr Khan would be presenting (that is disputed) and

would have prepared more if so; as it was she felt caught out.

24. On 21 April the claimant spoke to her GP about low mood. The GP noted symptoms of menorrhagia and flooding and arranged blood tests. The doctor's notes recount the personal difficulties, but say nothing of any work pressures.
25. On 22 April the claimant met Mr Khan for her end of year appraisal. He reported to HR following that meeting:
"as we discussed/suspected the personal challenges she experienced from back end of last year continue impact her health (and work). So much so she admitted to have 'feeling overwhelmed time to time' and has recently booked herself into her GP for counselling. I have helped her as much as I can and will continue to support her but I would appreciate if you/HR (maybe occupational health) can assist her. We agreed that she should have a follow-up with you. As you are aware, she has frequently broken down on 1-2-1's with me, including this year end. When she first joined my team she had aspirations for D pathway, now she admitted 'it's about survival'. I really feel for her and she needs our support. She went into a lot of detail re her challenges which I can explain offline, but its best if you speak to her".
26. He went on that after discussing her promotion pathway, they had not discussed the detail, given how she was feeling. He added that over the last year he had lightened her load, given her time and support and as much time off as she requested, but he was not sure if this was enough, and she would benefit from extended time out or additional support.
27. The claimant spoke to HR on 28 April, who recommended that she see her doctor, and use the bank's employment assistance programme to get some counselling. Her doctor referred her to a counsellor on 4 May. The claimant was signed off work from 5 May, having in the interim prepared detailed handover notes for the temp she understood would be covering her absence. Initially the absence was to be 2 weeks, but in fact the fit note was then extended repeatedly. She has never returned to work.

The May 2021 telephone calls

28. After her absence began there were two telephone calls between the claimant and Mr Khan which form the claim of unfavourable treatment because of something arising from disability.
29. On 20 May HR warned Mr Khan that although the claimant expected to return in a week or two, that was unrealistic, and they had told her they would probably get a temp in. On 24 May the claimant was told by the GP to take further time off, and next morning she sent the fit note to HR, having informed them the day before, and having said she would log on next day to send Sohail Khan some handover notes.
30. Mr Khan was due to speak to all his team members on 28 May to inform them of their annual bonus figure. These calls had to be short and pre booked to

make sure that all the team got their figures more or less at once. HR asked the claimant if she preferred to get the figure by telephone call or by email.

31. As the claimant sent him the handover notes on 25 May, she added that she was happy to have her bonus results either way. Mr Khan replied asking if she was free for a chat; she agreed. Neither side made a note of the call. The claimant said later, in the written grievance she filed in December 2020: “he told me senior management would not want a lot of chopping and changing – if he was putting a new person in, my role might not be there on my return”. At the time, just after the call, she just emailed Mr Khan: “some notes in the attached, as per our chat. As I said, I am happy to link up with my cover if they want me to talk through”, but nothing more. In tribunal she spoke of having made a note in a (hitherto undisclosed) notebook. When this was produced it showed diary notes while she was at work, but none after she stopped in early May. On an unrelated day (8 May), among a sequence of blank pages, she had written “chopping and changing”, but nothing more. Once she said she made this note during the call, once that she made it later, so we are not even sure she made it on the day of the call. We conclude there must have been some discussion of who would be covering while she was away. We do not know if she was asked how long she might be off; nothing indicates she was. We know HR had prepared Mr Khan for a longer absence.
32. On 28 May they spoke a second time. This was the call arranged to deliver the bonus figure. In her December grievance, the claimant said “during this call he complained to me about how my being off was affecting his budget numbers, as he was having to fund my temp replacement.” There was no earlier note of this comment. At the time she seems only to have conveyed how unexpected the figure was and how pleased she was.
33. She said she found Mr Khan’s comments in both calls “extremely stressful”, but she did not communicate this at the time, nor when she mentioned the call in an email on 23 June when she told HR she had spoken to her doctor and therapist the previous day, who thought it best she wait another month, adding that that aligned with Sohail’s thoughts, as: “when he called to communicate my bonus he was very clear I should wait until I feel I was 100%”.
34. Questioned about what was said and what she felt about it, the claimant said she did not at the time see the comments Mr Khan made as unfavourable or hostile. It was during her weekly sessions with a psychotherapist that she began to appreciate that it was Mr Khan who was causing the problem; she came to understand that she felt under pressure to get back to work.

Management of absence and discussion of return to work

35. The normal drill was for the claimant to update HR on her absence, but she and Mr. Khan spoke briefly on 1 July, in the absence on holiday of the HR contact, about a further extension to her sick leave. It seems to have been an innocuous call; there is no complaint about it. Believing the HR contact to be on holiday for an extended period, Mr Khan asked her to update him direct. She asked HR if they would continue the liaison, so she need not speak to Mr

Khan direct. Thereafter she and Mr Khan did not speak. When a month later (on expiry of her fit note) he texted to ask how she was, she asked that from then on they communicate through HR. The explanation for this is that the HR contact who was leaving was using up annual leave before her termination, and did not update her successor, so Mr Khan did not know who the claimant should speak to, and the claimant's earlier request for liaison through HR, rather than with Mr Khan direct, had not been passed on to Mr Khan.

36. Thereafter the claimant's absence was followed up by the HR replacement, Chandni Kareer, until at the end of November the claimant met Rebecca Seymour, a more senior member of the HR team, who had just joined the company and was taking over management of her case. Both asked the claimant if she would like to enter mediation with Mr Khan. On both occasions she refused.
37. Blair Robertson also reported to HR at the end of November on a conversation it had with the claimant about coming back to work. He had stressed that she should make sure she was better before she returned, and did not otherwise press the point. She had asked whether the firm would need to table new opportunities for her to consider". He said could discuss that when she was better. Much of the conversation was taken up with the claimant's grievances about Mr Khan; a Mr Robertson said he would wait to see the detail of what she was saying in the written grievance before commenting.
38. The claimant had now been absent from work for six months, and her company sick pay was expiring. She had been encouraged to make a claim for income protection under the group income protection policy administered by insurers. In this connection Dr McLaren, the treating psychiatrist who had first seen the claimant on 5th August 2021, prepared a report for the insurer, dated 6th October 2021. He diagnosed a recurrent depressive order of moderate severity with a background of anxiety traits. She was being treated with an antidepressant, and continuing to receive counselling. He expected her to make a full recovery in three to six months.
39. The insurer accepted the income protection claim for a further six months on 26 November. One of their conditions was that with the current prognosis of fitness for a return to work in 3-6 months, she should during this period have regular meetings with a vocational rehabilitation consultant, Alex Freeman. They were concerned: "whether Rachel is engaged in the idea of a return to work. There are comments relating to enjoying spending extra time with her children and potential workplace issues. This means that (the insurer) are concerned that if they put the claim into payment, will Rachel actually be motivated to return?"
40. The claimant met Mr Freeman for discussions about her plans on 6 January 2022. She told him that she did not want to work "in her current team or for her current manager". At the next meeting at the beginning of February they could draft a return to work plan. On 31st January the claimant said that she

planned to use up accumulated annual leave for the second half of February and all of March, with the intention of returning to work on the 4th of April, after a return to work programme.

The Grievance

41. During the meeting with Ms Seymour at the end of November the claimant asked about making a grievance. She was sent the procedure. She lodged a grievance on 19th December 2021.
42. The grievance starts:

“the below table outlines a course of conduct which started following my miscarriage in November 2020. I believe the below represents a breach in duty of care. I was extremely vulnerable during multiple bereavements - the addition of further stress was wholly inappropriate. This not only breached duty of care, but was not in line with the position shared by MUGF or the head of change”.
43. There followed her timeline of events. She said that on 21st September she had told Chandni Kareer that she was uncomfortable about returning to Sohail’s Khan's team, as: “I did not feel that duty of care had been complied with”. She was surprised that her HR predecessor had not told her this. She added that in November 2021 a colleague had told her that Sohail Khan said that “project management work was outside of my comfort zone”. She felt Mr Khan was undermining her professional competence saying this.
44. Steven Darling was appointed to hear it. It was the first time he had heard a grievance. He had only recently been trained. He made a list, as a structure for discussion, of what he considered to be five key points: that there had been a breach of the duty of care by Mr. Khan; that she felt under pressure to take on additional work; that comments were made by Mr. Khan which she found stressful; that she was not comfortable communicating with him while she was off sick; she was not comfortable returning to her current role.
45. He interviewed her on the 12th January 2022. There are a number of points in her grievance which he did not follow up on in the interview, including working while on holiday, the freezing episode on 15th April, being asked to make comments on her appraisal on a Friday, which was not her working day, and taking time off after the 19 January “berating” episode. The claimant said the grievance should not be split up into points, as “everything together is a course of conduct”. He did note her reluctance to work with Sohail Khan again – she said she had been off for 6 or 7 months, she had children, and “I can’t put myself back in that position”. She complained Ms Seymour had “pushed” mediation: “nothing can be said that will make me feel comfortable working for Sohail again”.
46. Next day he interviewed Blair Robertson, then Peter Finigan, and on three separate occasions (due to shortage of time) he interviewed Mr Khan, who also sent a written timeline and a number of documents.

47. Mr Darling composed an outcome letter, which was sent to the claimant on 8 February 2022. On breach of duty of care, he concluded, referring to comments made by Mr Finigan and Blair Robertson, that Mr Khan had been supportive and that there had been discussions about relieving the pressures. He did not accept that she had been under pressure to take on additional work, for example, when in March 2021 Mr Finigan was ill. On stressful remarks by Mr. Khan, he found that she had not been berated on the 19th January, as Mr Finigan did not recall this. He also seems to have conflated the conversations on the 25th and 28th May, reporting that Mr Khan was not handing her work on to a temp but recruiting a permanent member of staff, and that this had no effect on her bonus. In this context he commented: "I appreciate that you are under a great deal of strain in the last 14 months which may have contributed to your perceptions of your interactions with Sohail".
48. On the question of interaction with Mr. Khan while she was off sick, Mr Darling conceded that HR had failed to ensure continuity as they should have done.
49. He concluded with recommendations for a return to work, noting:
"You no longer wish to work with the Change team and you most certainly do not wish to work with Mr Khan in the future".
50. He recommended she work with Rebecca Seymour to find other work within the bank:
"identifying roles that may be available that would suit your skillset and (she) can assist you with the application process".
51. The claimant had a further meeting with Alex Freeman on 10 February. She told them she was not being given another role. She had to return to work or apply for another "looking for vacancies on the Internet". She is not currently inclined to do that. She did not think another manager would want to take her if she was facing back in "and therefore she thinks you may need to return to her current role, get up to full time and then apply to change roles". As for the plan to return to work on the 4th of April, she had just realised that this coincided with the school Easter holiday, so she would be taking more leave and looking to return to work about 20th of April 2022.

Grievance appeal

52. On 22nd February 2022 the claimant lodged an appeal against the grievance outcome. In a six page letter she complained of inaccuracies and omissions in the investigation of the grievance. She particularly objected to Mr Khan's account being preferred to her own. There was much detail about why the offers of help were inadequate. For example, it was said that in December 2021 he should have realised that she needed more than the one or two days away that she had thought sufficient. Mr Khan micromanaged her slide decks at the end of her working day. He had known about the miscarriage. She rejected the suggestion that she preferred to do strategy, rather than allowing other people to take this over. At this point there emerges an argument that was in evidence at the tribunal, that 80% of her job consisted of strategy,

because if, on merger, she had been required to do more than 20% project work they would have had to advertise the job for other staff too. However, the claimant was unable to point to any document or source from which she obtained knowledge of this policy, and the HR witness in the hearing denied there was such a policy. The claimant produced a detailed analysis of the tasks being done in November and December 2020 by an assistant on strategy. She objected that the assistant provided in early 2021, Dan, was a drain rather than a help. Mr Khan should have recognised that she should not have to cancel holiday at Easter to catch up. She was being expected to take over a lot of Salesforce tasks. She agreed that she had hired people, but they were for salesforce work, not the basic strategy task.

53. She particularly objected to the comment in the outcome letter about her memory of events at the time of the berating episode: "I take offence to the statement included in the outcome letter, which seems to echo SK. SD states: "I appreciate that you were under a great deal of personal stress in the last 14 months, which may have contributed to your perceptions of your interactions with Sohail". I feel that this is harassment and discrimination arising from my disability, as my word is not being trusted as much as SK's because of my protected characteristic or a consequence of it." This of course is the remark on which the direct discrimination claim is based.
54. She went on to the question of working on Friday when she was a part-time worker, no mention in the outcome letter of what happened on 25th May, and Mr Khan insisting that she organise cover, rather than take it on himself when she became too ill in April to continue.
55. Finally she complained about the limited resolution offered about her return to work: "the vague and basic two options presented to me are unhelpful... I am now a disabled employee due to your breach of duty of care by my employer, when it was known that I was struggling with long hours, heavy workload, and grief." She asked for adjustments, namely "a detailed and planned arrangement for my return". "I will likely be returning to the change management team in April, my recent absence will count against me in relation to being appointed to any new roles. Therefore I will need significant support in place around my return, including a series of workplace mediations, a graduated return to work programme supported by occupational health, reasonable adjustments on an ongoing basis to accommodate my condition, and protocols in place to ensure no further personal injury caused to me."
56. Jane Alimonda, also recently trained in grievance procedures, but with the assistance of members of the HR team, was appointed to deal with the appeal. She summarised the appeal content under three headings – material inaccuracies in the investigation and outcome letter, lack of evidence to substantiate what Sohail Khan said, and failing to investigate key elements of the grievance. She interviewed the claimant on 23 March, and Mr. Khan on the 28th, and briefly on 30th March. On 31st of March she met Mr Darling. She also reviewed the documents. She covered areas not touched by Mr Darling. The claimant conceded that everyone unbooked holiday from time to time and said it was not a question of normal practice, but whether she should have been

allowed to do it when she was vulnerable. She also agreed that she had not been asked to do handover notes, under this because she was conscientious. The claimant had now seen the statements and documents provided by others to Mr Darling. Mr. Khan took issue with some of the points made by the claimant about workload and explained what he had done.

57. On the 27th April 2022 Jane Alimonda wrote rejecting the appeal. She did not find that the bank had breached the duty of care towards her. She had reviewed the documents from Mr Khan and the evidence of Mr Finigan and Mr Robertson and concluded that Mr Khan had been supportive. There are specific findings about the attempts made to get assistance with her work, in November 2020, and January and February 2022. Mr Khan had not asked her to give up a day's holiday. She concluded that if there was discussion on 25 May about cover, as suggested in 26 May email) this was well intended, and not malicious. As for 15 April, she did not complain about it at the time. While Mr Khan would benefit from feedback on limiting the workload of part-time staff, the claimant herself had volunteered to be flexible, which may have confused the picture. The claimant also said that she arranged a detailed handover "off my own back", but Mr Khan was to be counselled about letting employees do this when they were under stress.

58. She concluded with a recommendation about finding work. She encouraged the claimant to attend an appointment with occupational health, as recommended in their report the 23rd February 2022, to monitor her phased return and to support adjustments. She would also have the support of the HR business partner Rebecca Seymour, and her line manager Sohail Khan. She should discuss the adjustments she would like with them. If she still wanted to look for an alternative role, she repeated Stephen Darling's recommendation to contact Rebecca Seymour, "to arrange a meeting so she can support you with identifying roles which will suit your skill set..".

Return to Work Plans

59. The claimant had had a further meeting with Alex Freeman, the rehabilitation consultant, on 7th March. They had discussed how to phase her return to work. She still intended to return to work on the 4th April and then take some more leave. She would also like to work from home for the first two months, (though Alex Freeman doubted the medical basis for this). They agreed a timeline, with a return to work on the 4th April, building up to 28 hours a week by 30th May.

60. The next review dates were put off by the claimant, but they did meet on the 29th April, two days after the grievance appeal outcome. Asked if she was going back to work, the claimant replied that having just heard that her appeal had not been upheld she had: "no option but to go down the legal route". Although she understood the insurer was unlikely to pay for her continuing absence (they had agreed to continue paying until the appeal had been decided), she planned to see her GP and be signed off sick again.

61. At this point Alex Freeman's involvement ceased: "to enable Rachel and her

employer to resolve the situation between them”.

62. On 27th April, the day the appeal outcome was sent, Rebecca Seymour wrote to the claimant, inviting her to discuss the return to work on a phased basis, “and any other support we can provide”, suggesting a call on the morning of 29th April.
63. The claimant did not reply or attend. On 3rd May she took two steps. First she contacted her GP, who signed another fit note, extending her sickness absence to 20th May. The reason given, as before, was depression and anxiety. As on all previous notes there was no mention of whether she was fit to work with adjustments. The claimant’s second step that day was to approach ACAS for early conciliation.
64. Rebecca Seymour responded to the claimant on 9th May, acknowledging she was not returning to work, but asking if she was interested in pursuing mediation, for which they would use an external provider, and whether there was anything else she needed in the short term by way of support.
65. She added that they were checking with the insurer whether her income protection could be extended to cover the renewed sickness absence. By mid-May she had obtained a commitment from the insurer to extend income protection to the end of the month, but they did then cease paying. (The claimant appealed this decision but the insurer declined).
66. On 11 April, Rebecca Seymour had written to the claimant telling her that some Vice-President roles had become available in Eileen’s team within Change. They would be advertised within the next week; if that was something she would be interested in, she was encouraged to look on the internal website. On 20 April Rebecca Seymour followed this up. The claimant responded that she needed the outcome of the grievance appeal before she could consider her next steps. On 11 May, Rebecca Seymour contacted the claimant again to say that the Vice-President roles were “both at interview stage now and I don’t want you to miss out if you would be interested”. She volunteered that they could take account of her being signed off work in terms of any process.
67. The claimant did not answer and made no further contact with Rebecca Seymour. On 13 July 2022 she presented her claims to the employment tribunal.

Disability

68. As a preliminary step we consider whether the claimant was disabled within the meaning of the Equality Act.

Relevant Law

69. Disability is a protected characteristic under the Equality Act. By section 6 of the Equality Act 2010,

A person (P) has a disability if—

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

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

70. What is meant by "long term" is stated in schedule 1, paragraph 2:

2(2) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months....

2(3) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

71. Disability must be assessed as at the time of the discriminatory acts alleged – **Mc Dougall v Richmond Adult Community Centre (2008) IRLR 227**. The tribunal must assess all the evidence, and make its own judgement, while taking account of any medical evidence. It must ask itself five questions: (1) was there an impairment, (2) what were its adverse effects, (3) were they more than trivial (4) was there a real possibility that they would last more than 12 months, or that they could recur, (5) what did the respondent know, and what steps should the respondents have taken to find out more – **Sullivan v Bury Street Capital (2012) IRLR 159**.

72. "Likely" means not whether recurrence is more likely than not, but whether something "could well happen"- **SCA Packaging v Boyle (2009) UKHL 37**.

Disability -Factual Summary

73. As noted, the claimant had become tearful at meetings at the end of January 2021 and at the end of year review at the end of April 2021. She saw her doctor about low mood.

74. The first psychotherapy session was 17 May 2021. Mr Beard wrote a report for the insurer on 20 August 2021. He described a history of struggling with a mental health for some months, and being signed off work "following a number of work-related stresses". After taking absence, she had found it difficult to function, and found herself ruminating on the miscarriage and bereavements. She suffered low mood, low-energy, and poor self-esteem. In "June and July" she had felt pressured by communications from her boss. Her mood had deteriorated, and in July he had referred her to Dr McLaren (psychiatrist) for assessment.

75. Dr McLaren wrote a report for the claimant after their first consultation on 5 August 2021. As far as we know this was not seen by the employer until these proceedings. She had reported last being happy in the summer of 2020. Difficulty had started with the miscarriage at the end of October 2020. She was worried about work and losing confidence just before she went off sick at the end of April 2021, and that it was her boss who "actually had to say to you to go and see your doctor". She was grieving for the lost baby, and feeling she might not conceive again. She struggled to sleep. They had moved house in June 2021, and she had got very low at that point. He also

discussed the medical history. She had had no serious illness or operations in the past. She had had bulimia in her late teens, and a suicide attempt then. She had reported postnatal depression, undiagnosed at the time, after the birth of her first child, which was by forceps, not long after her father had died. After her second child, she became very anxious and had had CBT over eight months, without medication.

76. When the GP wrote a referral to the counsellor in May 2021, she mentioned low mood in the last few months, with miscarriage in October and more recent deaths. In addition she had returned to self-inducing vomiting which she had not had since her teens. There were no suicidal thoughts. A list of past problems made no mention of post-natal depression or other mental health difficulty.
77. Dr McLaren's report for the insurer, and reported by them to the respondent, is dated 6 October 2021 and an edited version of the earlier report: he first saw her on 5 August 2021 when she had reported "struggling with her mood and anxiety since the summer of 2020". She had lost confidence about her capacity to cope at work. As of August 2021 she was feeling tired all the time, self-critical, low in mood and hopeless. He diagnosed a depressive episode of moderate severity in a recurrent depressive disorder, against a background of trait anxiety. She had tried to self-medicate with alcohol but this was not the primary problem. She also had a history of bulimia nervosa. Dr McLaren had started her on an antidepressant, initially effective, but changed to another at the beginning of October because of significant side-effects. She had been having EMDR in psychotherapy which was helpful. He planned to review her in 4 weeks and expected her to make a full recovery and return to full-time employment in 3 to 6 months.
78. In February 2022, anticipating the return to work, the respondent got a report from occupational health doctor, Dr H Saini, who had been asked to advise on return to work after a period of sickness. Dr Saini reported the claimant was feeling better. Her mood was positive though she was disappointed with the outcome of the grievance, was sleeping well and had some anxiety about her return to work. She had completed her therapy and continued on medication. The claimant had experienced a moderate depressive episode, triggered by a combination of reported work and personal stressors and it was her opinion that she was fit for a phased return to work, over a period of eight weeks, where practical, working from home. Her workload should be reviewed regularly to check she was not becoming overwhelmed. She also recommended "dialogue with the business and mediation with her manager", as "ongoing interpersonal relationship difficulties would have the potential to be detrimental to her mental health".
79. As we know, at this point the claimant had told Alex Freeman she was intending to return to work on 4 April. This was postponed to the grievance appeal outcome, and she has not returned.
80. There is a further report in October 2022 from Dr Saini. She said the claimant was much better "and in my opinion she is fit for work", although she

remained away because “she feels she has been discriminated against by the business, and that there is a breakdown of trust”.

81. In March 2023 Dr Saini prepared a further report. The claimant was fit to return to her previous role but given the breakdown of the relationship and trust with her manager and the risk to her mental health, it would not be advisable to do so.
82. The claimant had prepared an undated (but probably December 2022) witness statement on the impact of impairment on her ability to carry out day-to-day activities. She describes low mood, feeling tired and irritable, struggling to manage everyday stresses, flashbacks and uncontrollable thoughts, anxiety and loss confidence self-criticism reduced appetite hopelessness and occasional panic attacks. On the current antidepressant (as from October 2021) the symptoms were significantly reduced. The eye movement desensitisation and reprocessing (EMDR) therapy had been “particularly helpful”. That had ended in January 2022. She had also had acupuncture, and a long period of abstinence from alcohol. She continued to limit consumption of alcohol and caffeine. She had lost confidence because of the extended period out of the office. Until she was moved from working under Sohail Khan she was, she said, unable to return to work.

Disability – Discussion and Conclusion

83. After considering the evidence of the claimant and the documents, there was no doubt that at times the claimant’s illness was substantial, at least from the end of April 2021, until then she had been tearful on at least two occasions (end January, end April), and taken two days off in January but there is no evidence that she impaired substantially or at all in normal day to day activities. She was much improved by October 2021, when a full return was expected in 3-6 months. She considered herself fit to return to work and discussing when this would be when she saw Alex Freeman in January 2022. Dr Saini on 12 February 2022 considered her fit to return to work, with a phased return to build up her hours.
84. On that analysis, the claimant’s substantial impairment lasted less than 12 months.
85. The tribunal has two issues still to consider. The first is the effect of treatment, given that at that date she was still taking the antidepressants, and we have little or no information about whether she has tried to do without it, or indeed continues to take it on a regular basis, or whether there would be substantial impairment without it. We have on this is the report Dr McLaren sent to her GP when he was not going to follow her up that had invited her to get in touch if you needed a review, advising her to stay on the antidepressant before considering reducing or withdrawing. We have no evidence about whether her ability to carry out normal day-to-day activities will be impaired if she were not taking medication.
86. The other issue for us is whether, given the ‘substantial’ period lasted less than 12 months, that effect is “likely to recur”. The claimant relies on Dr

McLaren's opinion that she had a recurrent depressive disorder. In our finding, Dr McLaren might mean no more than that she had had low mood following the birth of her two children. These episodes were limited, and linked to specific life events. There was no other history of depression or mental health apart from the short lived episode in her late teens. He had not been asked whether the current illness was "likely to recur".

87. Our assessment of the evidence of the likelihood of recurrence, is that although the claimant made no mention of pressures at work when seeing her own GP at the end of April, from about July 2021, markedly so in November 2021, she had come to believe that Sohail Khan was responsible for the breakdown, and she did not wish to work with him again. The complicating factor is that the claimant herself appears to have been ready to return to work at the beginning of January 2022, even within the Change team, though contemplating moving elsewhere in due course. What changed this for her was first the adverse grievance outcome, and then the adverse grievance appeal. She put off any return to work until she got the grievance outcome, then extended that until the appeal outcome, then started tribunal proceedings. Her contemporary communications in this period indicate to the tribunal that she would only return to work if the respondent *admitted* that her illness was caused Sohail Khan - by his course of conduct and their breach of a duty of care. That suggests that she was fit for work, but did not wish to work with Mr Khan unless it was agreed that he was to blame for her ill-health. The refusal even to contemplate mediation is unattractive. It suggests that the claimant had simply decided she would not work with him. The question however, is whether if the claimant had returned to work with Mr Khan her symptoms would have recurred. Dr Saini, at any rate in February 2022, considered her relationship with Mr Khan had "potential" to be detrimental to her mental health.

88. But for the suggestion that returning to work with Mr Khan meant that her symptoms were likely to recur, we would have concluded that her refusal to return to work was not because she continued to be impaired by depression and anxiety, or that these were likely to recur, but that she had simply decided not to work with him unless the respondent admitted there had been a breach of their duty of care for her, and that he had caused her illness by the way he managed her workload. We would not have concluded that her condition was likely to recur, and we would have concluded that she was not disabled.

89. Dr Saini's view suggests however that the illness was likely to recur if she worked with Mr Khan. The puzzling element is that she continues to be signed unfit for work – with no mention of any adjustments - through depression at a time when she does *not* work with Mr Khan. There is no suggestion that any other factor would make the impairment recur.

90. We concluded, with some anxiety, that she was disabled.

Discrimination because of something arising from disability

91. Section 15 concerns Discrimination arising from disability

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

92. The claimant relies on her absence from work because of anxiety and depression as the “something arising in consequence” of disability. It is argued that Mr Khan, by referring in the conversation of 25 May, and to the impact of a replacement in his budget” treated the claimant unfavourably by putting pressure on her to return to work.

93. At the time of this treatment, May 2021, Mr Khan did not know that the claimant was disabled, only that she had had a breakdown in mental resilience because of miscarriage and bereavements. The claimant herself believed it was short-term absence, though Mr Khan had been warned by HR that it might be longer than that, but no one knew that it would last as long as it did. Could Mr Khan reason with have been expected to know that her mental impairment was so long lasting as to amount to disability? We cannot make that finding. Only six months later, her own psychiatrist thought that she was likely to make a recovery and return in 3 to 6 months. As of May 2021 it is doubtful that anyone would have predicted such a long term impairment.

94. Despite that we consider what occurred on 25th and 28th May, and whether that amounted to unfavourable treatment. At the time, the claimant and Mr Khan enjoyed a good working relationship. The claimant herself agrees but it was not until about July, and following therapy, that she identified him as the problem. The isolated note in her workbook on “chopping and changing” could have been made at any time in later weeks as condition went downhill and she reflected on past events. Although there is little information about the content of the conversation between them, we concluded that there is no evidence that Mr Khan put pressure on her to return. He had been warned by HR that it is likely to be longer term than the claimant thought. They were already planning how to cover her work. He knew from having had to manage undergoing cancer treatment that cover for long-term illness would not be taken out of his own budget. She was sending him handover notes, it is doubtful that pressure to return to work was the purpose of his call. Our reading of events is that the claimant, a highly conscientious performer, conscious of the recent deterioration in her ability to manage work, was the person worried that if she did not return to work soon there might be no job to return to. This worry came from her, not from Mr Khan. Nor is there any sign that she was unhappy about the call on 28th of May. On her own evidence in the email a month later, Mr Khan told to stay off as long as she needed. As the specific purpose of the call was to tell her the bonus result, it is unlikely that he used the call to ask about which she was coming back, and far more likely that it was she who raised the it.

95. Even if he had known, or should have known, that her illness was likely to be long-term and that she was disabled, we would not have found that she was unfavourably treated by having to take time off sick.

Harassment – Law, Discussion, Conclusion

96. The same two calls are in the alternative alleged as harassment. Section 26 Equality Act 2010 sets out that:

- (1) A person (A) harasses another (B) if-
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) The conduct has the purpose or effect of-
 - (i) Violating B's dignity, or
 - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
-
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

97. On 26(4)(c), **Richmond Pharmacology v Dhaliwal [2009] ICR 724** stresses that while “it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the... legislation...) it is also “important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase...If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.”

98. Our conclusion on the evidence is that in neither conversation in May was anything said that the claimant, at the time, considered to be creating an “intimidating, hostile, degrading, humiliating or offensive” environment for her. Not until July had she reached the conclusion that Mr Khan was creating a hostile environment by pressurising her to come back to work. She did not complain about it until the grievance in December 2022. Neither in July, nor in May 2021, did we think it was reasonable to consider that his conduct had that effect. She was, unasked, producing handover notes. She had agreed to both calls. If he said anything at all about the arrangements for covering her work when she was away, it was more likely than not that it was she who initiated the conversation, and he was attempting to reassure. She cannot reasonably have viewed this as hostile or intimidating. That interpretation arose from her own fears and lack of self-confidence, and several weeks later when her condition had gone downhill and she had moved house. Managers dealing with staff absent from work through stress are sometimes counselled as a matter of prudence to avoid discussion of a return to work to avoid the suggestion of pressure, but that does not mean that any discussion is pressure to return. He was well aware she was unwell, that she might be away longer than she [predicted], and it was he who had reported to HR that she needed help. We do not find that he said anything that could reasonably be interpreted as pressure to return.

99. The harassment claim does not succeed.

Time limits in the section 15 and harassment claims

100. We also concluded that the claims arising from the two telephone calls in May 2021 were presented out of time. The Equality Act provides that a claim must be presented within three months of the act complained of, unless there is conduct extending over a period, and it is brought within three months of the end of that period, alternatively, if it is out of time, but it is just and equitable to allow them to proceed out of time.
101. On whether it is just and equitable to extend time, in **British Coal Corporation v Keeble (1997) IRLR 336**, it was suggested that employment tribunals would find the list of relevant factors in the Limitation act illuminating, but in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**, tribunals were told not to use **Keeble** as a comprehensive checklist but to focus on the length of delay and the reason for it, and any other factor that might be relevant to why the claim was late. **Ahmed v Ministry of Justice UKEAT/0390/14** explains: “It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice which each party will suffer as a result of granting or refusing an extension. Relevant matters will generally include what are known as the “Keeble” factors.”
102. There was no conduct extending over a period. There is no complaint about Mr Khan after May 2021.
103. The claims are out of time and we considered whether it is just and equitable to allow them to proceed. The claimant has not explained why she delayed presenting these claims. Even if we take into account that she was not properly aware that Mr Khan was putting her under pressure until July or so, and that she was suffering from depression, we know she was well enough to talk to Ms Kareer in September 2021, that Dr McLaren considered that much improved and likely to return to work when he wrote his report at the beginning of October, and that she was well enough to talk to Ms Seymour and Mr Robertson at the end of November 2021, and then to set about drafting a multipage detailed and coherent grievance. Importantly, the respondent is prejudiced by the delay. The grievance presented at the end of December was the first indication to them that these telephone calls required investigation. As we know there is little or no contemporary note, not even the claimant’s workbook is helpful, and Mr Khan is at a substantial disadvantage in accounting for the conversations which he thought were friendly and collegial. It is not just and equitable to allow the claimant to present an old claim when the evidence is made weak by the passing of time.

Direct Discrimination because of disability

104. Direct discrimination is defined in section 13 of the Equality: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
105. The claimant relies on a hypothetical comparator, that is someone who was away from work ill for some time, but not disabled, and had raised a grievance and an appeal.

106. In deciding why an employer acts as he does, in Equality Act claims the employment tribunal must have regard to the special burden of proof. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides at section 136:
- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(2) But subsection (2) does not apply if A shows that A did not contravene the provision.”
107. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is “in no sense whatsoever” because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.
108. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not “without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent” committed an act of unlawful discrimination”. There must be “something more”.
109. The first complaint of direct disability discrimination is about Stephen Darling including in the outcome letter of 8th February 2022 the comment that the claimant being subject to personal stress may have contributed to her perceptions of the interactions with Sohail Khan. The second complaint is that Mr Darling preferred Sohail Khan’s word over that of the claimant on whether people had been hired specifically to take out work away from her. The claimant had said that no one was hard to support her. The third complaint about Steven Darling investigation is that he failed to take into consideration the claimant’s offer to provide evidence from her GP “both to confirm the points made regarding her disability and support the fact that returning to SKs team would be inappropriate”.
110. The remark complained about is made in the specific context of understanding what had happened in the “berating” meeting in January 2021. Mr Darling had taken evidence on this from the three people present – the claimant, Mr Khan, and Mr Finigan. Only the claimant recalled anything untoward. Given that there is no suggestion that Mr Finigan was wrong, it was not unreasonable to conclude that she had not proved that she had been “berated” at that meeting. He did not need to conclude that her evidence was unreliable because she had been subject to a lot of stress. The remark may have been no more than a clumsy attempt to explain that he was not “berating” her, though it may have felt like that to her because she was feeling vulnerable. We did not conclude that this was less favourable treatment of the claimant than someone who was not suffering from depression and anxiety.

92. He would have said that about someone who was ill for a shorter term, not disabled.
93. The remark does underlie the next allegation, that Mr Darling preferred Mr Khan's evidence is that of the claimant when it came to deciding whether he had or had not hired people to reduce our work load.
94. The employment tribunal is here conscious that we are not required to decide whether the grievance outcome was correct, only whether it was tainted with discrimination because of disability. We must also be careful not to make findings about whether Mr Khan was at fault in managing her workload, because it is plain the claimant still considers he was responsible for her breakdown in health. She has always spoken of the respondent's breach of a duty of care, which is the legal basis of a personal injury action in negligence. The time limit for bringing an action in the court has not yet expired. It is not for this tribunal to make factual findings which may bind the court in an as yet unpleaded personal injury action where reasonable foreseeability of injury will be in issue.
95. We observe that even after hearing a great deal of evidence about workload and various tasks the picture of the claimant's workload, and what help was available at various times, remains confusing. There was the hiring of people in November 2020 for the long-term. Then there was an issue on exactly what part strategy did play in her workload, with the claimant's ambivalence about handing this work back, which had apparently been the plan in the autumn of 2020, when she valued doing it because she saw it as useful on her long-term plan for promotion, and her position on appeal and in the tribunal hearing, which was that 80% of her workload was strategy rather than projects. Her workload shifted during this period. It was clear that the team could hire contractors to cover temporary pressures and shortages, and the claimant had authority to do this. There was dispute on whether Dan was an adequate assistant, on whether Salesforce came to an end in March or not, and whether she or Mr Khan should have tried harder to get contractors Helen or Alex to take on strategy work when the claimant was under pressure. Mr Darling did not get to grips with this complexity, and Mr Khan seems to have been confused on when the November 2020 recruitment took place, but neither can we, after hearing cross examination. It was suggested to Mr Darling on behalf of the claimant that he should have gone back to the claimant after interviewing Mr Khan to check with her the detail of what he said about getting help with workload. He answered that was not the process he was advised to follow. This tribunal observes that it is not common practice to do this in grievance processes, except perhaps if some entirely new matter is raised. Mr Darling did grasp that Mr Khan had been sympathetic, and had tried to help. He did not get into whether his attempts had been effective. He did not consider whether Mr Khan should have known better than the claimant that she was struggling more than either of them appreciated, but he was investigating a grievance, not deciding a personal injury claim. If we focus on the core criticism, which is that he did not investigate thoroughly because he had already concluded that the claimant's perception was skewed by her being subject to a lot of stress, we did not agree.
96. When making our assessment of the reason why Mr Darling did not deal with some issues, as well as why in some other issues he preferred Mr Khan's evidence to that of the claimant, we think the following facts are relevant. Mr Darling lacked experience of handling grievances. He relied heavily on HR support. We also observed in tribunal that he reads slowly, mouthing the

words as he does so, and could not recall some detail at all. He may have found remembering every single issue and event in such a long and complex grievance difficult, regardless of the claimant's disability. When the claimant was interviewed by him on specifics, she had considered every point to be part of a course of conduct, it was "all cumulative stuff". There was his confusion about the calls of 25th and 28th May (one call or two). His finding that remarks in the call concerned bonus not budget seems to have arisen from a misunderstanding by his HR adviser of what the claimant was saying about the effect of her absence- on bonus rather than budget – which came neither from the claimant or Mr Khan. That reflects his ability, not the claimant's disability. It was not error arising from preferring Mr Khan's evidence. Mr Khan had given a lot of explanation, and also supplied a lot of contemporary emails on particular points, so it was not unreasonable to heed what he said. When Mr Darling did make his finding about the berating episode in January 2021, with its reference to the claimant's personal stress as a reason why she had misremembered what happened, he had a third party's evidence on the point. He was not preferring Mr Khan to the claimant because of her disability.

97. We concluded that if he did prefer Mr Khan's account of how the claimant's workload was managed, it was because the issue was complex and there was more explanation of detail from Mr Khan than from the claimant. While suspicious that the reference to her being under stress was something from which we could infer in the absence of explanation that disability was the reason for not preferring the claimant's account, we did not make that inference. It was limited to a case where Mr Khan's recall was supported by another party present. On other matters Mr Darling read had emails and listened. We concluded that any failure in the grievance to reach a conclusion on the particular matter was down to Mr Darling's lack of experience in exploring the complexity. It was by and large a conscientious investigation. It was reasonably thorough, though it did not cover everything she had raised. There was evidence for his conclusions. They were not tainted by discrimination.
98. The other allegation of less favourable treatment because of disability concerns Mr Darling not taking up the claimant's offer to supply evidence from her GP. After their meeting to discuss the grievance she emailed him to say that at her morning checkup on the 14th of January the GP "mentioned that if required she could write a GP support letter. This would reinforce the point that I have raised regarding my mental health and stress how it is not appropriate for me to return to my formal role stroke manager". The claimant agreed when giving evidence that the GP had not been present at any of the meetings with Mr Khan and would only be reproducing her account. She also agreed that she could have asked the GP to write a letter anyway. Mr Darling said he did not ask the GP because when the claimant explained her health, he took what she said to be truthful and correct. She had told him how she was struggling at work and bursting into tears. He did not consider he needed additional medical evidence to believe her on this.
99. We did not consider this to be less favourable treatment. The respondent already had medical evidence in the form of the report from Dr McLaren. Mr Darling's grievance outcome letter acknowledged that she did not want to work with Mr. Khan. If the respondent wanted evidence on the causation of her disability, it would have been better to ask Dr McLaren, or another psychiatrist. The GP's only source of information about the cause of the

claimant's illness came from her own notes (which made no mention of work in April 2021), or from the claimant herself, and Mr Darling had spoken to the claimant.

100. In any case, we can see no reason for finding that if the claimant had not been disabled, Mr Darling would have taken her up on the offer to get a letter from the GP.

101. The final allegation of direct discrimination is about Jane Alimonda's appeal, in particular that she believed Mr Khan's statement on 28th (pleaded as 23rd) March 2022 that a number of people had been hired to take her work away, despite the claimant telling on the 23rd of March that nobody was hired to support her. The real picture was complex, and having reread the notes of both interviews, we conclude that Ms Alimonda did explore the complexities, and that Mr Khan had gone into detail. It was not a superficial exercise. If she preferred one version to another, it was not because she thought the claimant was unreliable because she had disability. It may have been because the claimant from time to time conceded that she had volunteered to work and had not been asked to unbook holiday, or prepare handover tasks, and in discussion her complaint became that people should have recognised that she was more ill than she knew at the time. We cannot see that Ms Alimonda's conclusions were actually wrong, so we do not conclude that there was less favourable treatment than a hypothetical non-disabled comparator.

102. The claim of direct discrimination because of disability does not succeed.

Reasonable Adjustments for Disability

103. The Equality Act provides that there are circumstances where an employer must make reasonable adjustments for disability. The duty is set out in Section 20, which provides that:

“where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

104. By Section 21, a failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments, and the employer discriminates against a disabled person if A fails to comply with that duty in relation to that person

105. A substantial disadvantage is one which is more than minor or trivial.

106. Where redeployment is the adjustment, **Archibald v Fife Council (2004) IRLR 261** confirms that can be without a competitive process, and in **X v HR Rail SA (C-485/20) EU: C: 2022:85** where a worker was found to be incapable of performing the essential functions of his job due to a disability, it was held he must be assigned to another position for which they have the necessary competence, capability and availability, unless that would impose a disproportionate burden on the employer.

107. In **Hill v Lloyds Bank plc [2020] IRLR 652** the EAT held that the employer was liable for a failure to make reasonable adjustments when its employee, suffering from depression who had taken sick leave due to the

alleged bullying and harassment of the two managers above her, was denied an undertaking by the employer that she would not have to work with them.

108. The provision criterion or practice relied on originally in the list of issues is the requirement to work under Sohail Khan's management. The claimant was allowed to add to this a further requirement "to work in the change team". We accept that the expectation at the conclusion of both the grievance and the grievance appeal was that she would return to work with Sohail Khan, or in the change team under a different manager (which we take for Rebecca Seymour's mention of two vice-president roles available in Eileen's team).
109. Did this put her at a substantial disadvantage? On the evidence of Dr Saini's report, returning to work where she would report to Mr Khan would put at a substantial disadvantage, as it was likely to trigger a recurrence of her illness. It is far less clear that a post in the change team not reporting to Mr Khan would have the same result. It is possible that she would have to liaise with other team leaders from time to time, which may have involved coming across Mr Khan, but far less clear that this would have triggered a recurrence of her illness. She said nothing to Rebecca Seymour about this when the vice president roles reporting to Eileen were drawn to her attention. In this respect we do not conclude that there was a breach of the duty of care when they suggested two posts in the Change team not reporting to Mr Khan.
110. If she was at a substantial disadvantage in respect of either criterion, the claimant contends that reasonable adjustments would have been to move her to another team, to move her to report to another manager, and to consider other options for employment namely, planning or business management roles, internal audit and human resources. We did not allow the proposed late amendment to add the words "without competitive interview". The respondent had not been able to bring evidence on that point. The question of what reasonable adjustment was reasonable was at large, as well as whether the respondent had refused to make one.
111. The core of the dispute is this. The claimant says the respondent should have moved her to another job without discussion. Respondent says that they were open to finding her a job where she did not have to work with Mr Khan or even in the change team, and that she had been invited to contact Rebecca Seymour about this. When they spoke of helping her with their application process, they did not mean that it would be a competitive process, whether within or without the organisation. It meant there had to be some process. They needed an application form, or CV, to look at her experience and decide whether it is relevant for particular vacancy. The claimant might say that they knew her employment history, but from the respondent's point of view they needed to assess whether it was adequate for a post at vice president level.
112. The only evidence put about help with working outside the change team was that claimant had difficulty accessing the website (it may have been a password problem) and Rebecca Seymour had advised her to ask the IT team to help, and when they were not able to solve the access problem, she had not gone back to Rebecca Seymour, and just left it. The claimant did not say explicitly when this happened. It could be a reference to the Vice President roles she was told about at the end of April 2022, but she could mean something happened later. Whenever it happened, the panel's view

was that the respondent had opened the door to making adjustments by discussion with Rebecca Seymour, and the claimant had done nothing about it. She had cancelled a meeting on 29 April, and not picked it up. Rebecca Seymour will have had to be careful about pressing for another meeting once the claimant was away from work sick, but did make a cautious approach on 11 May about the available vice president roles within the change team. Had the claimant gone back to her, the panel could then have examined what happened, or what the respondent required, and made a judgement on whether that was reasonable in the circumstances.

113. The claimant's case, was that she should not be required to talk to Rebecca Seymour about it at all. The respondent should simply have written offering her an available post without any process. She has listed a number of roles she could have performed if they had been offered to her, but did not, as far as we know, ever ask the respondent about them.
114. The panel finds that this was not a reasonable expectation. If she was to be moved to a vacant post, there had to be some process. It need not be competitive, it could be some kind of job matching, or what other employers call a "managed move". Respondent would have to discuss with the claimant the sort of job she wanted, and what her experience was. The panel also agrees with the respondent that HR would have to discuss with the manager of the post before they allocated it to her, to check that her part-time and adjusted working hours could be accommodated.
115. Examining the conclusion of the grievance letter and the grievance appeal, the claimant may have been put off by it even being suggested she should to return to work in the change team, with or without adjustments, but in neither letter did the respondent close the door to a job elsewhere. In both letters she was invited to contact Rebecca Seymour about an alternative. Jane Alimonda was specific about "assisting her with an application process". On both occasions she assumed the process would have to be competitive. Because she did not approach Rebecca Seymour we have no evidence whether this would have been the case, but we do know that on 11 May 2022 Rebecca Seymour was suggesting that they could adjust the interview process for the vice president roles in Eileen's team even though the claimant was off sick, suggesting they could well have found her a job without competition if her experience fitted.
116. Although the claimant was signed off sick, we have no evidence that depression or disability prevented her making contact. Our understanding of the medical evidence is that the claimant was fit for work, provided she did not have to work with Mr Khan. She asserted this much later in a letter of 18 May 2023 to Rebecca Seymour's successor, saying, (in the context of a request to pay her salary from May 2022 to the date she took up another post): "(the bank) need to just assign a role to me". She would not be applying for a role. "I was not on sick leave, I was signed off sick because (the bank) refused to make this reasonable adjustment and therefore discriminated against my disability".
117. There was a further report from Dr Saini in March 2023. As before she said the claimant was fit to return to work in her previous role, but it would not be advisable because of the breakdown of trust with her manager and the risk

to mental health. If operationally feasible, they should consider supporting her in finding role without contact with the previous manager. The claimant commented on this report that it was accurate, she was excited to get back to work, all she wanted was to continue to develop her career away from a manager who compromised her health.

118. We know, because they have been included in the bundle although there is no witness evidence to deal with what happened after Rebecca Seymour ceased to be involved with the claimant's case, that in about April 2023 she had sent HR a CV, and that they were exploring whether she wanted to look at contractor posts or temporary VP posts, "if your skill set aligns the requirements of the temporal role". She was sent a list of temporary and permanent roles currently open. When the claimant said she should just be assigned a job, she was told on 15 June 2023 that it was not clear on what basis she felt she should be given another role without going through the application process, and if she had concerns, she should let them know. When she complained that treating her like anybody else who could apply for a job was not a reasonable adjustment for disability she was told that there must be *some* process. She had not expressed interest in any of the roles identified, so they were not clear if they were suitable. She was asked if a job in strategic planning would be of interest, or if she wanted the conversation with the hiring manager.
119. The pleaded case is about events up to the employment tribunal claim being presented. There has been no amendment. The recent evidence is some indication of what would have happened had the claimant made contact earlier. It was not Rebecca Seymour's evidence that to get a new job outside the change team there had to be a competitive process. It is not clear even now that there must be a competitive process, only that there must be a process of identifying interest so they can assess whether the skills relevant. Our conclusion was that it was the claimant who was being unreasonable in the first half of 2022. The respondent has not breached its duty to make reasonable adjustments to disability. They opened the door to adjustment by inviting discussion on moving to another role. It is the claimant who has failed to respond, and her failure to do so is not because she is mentally impaired from doing so.

Employment Judge Goodman
11 August 2023

JUDGEMENT AND REASONS SENT to the PARTIES ON

14/08/2023

FOR THE TRIBUNAL OFFICE

**APPENDIX
LIST OF ISSUES**

Preliminary

1. The heads of claim pursued by the Claimant are:
 - a. Direct Disability Discrimination
 - b. Discrimination Arising from Disability
 - c. Failure to Make Reasonable Adjustments
 - d. Harassment

Time limits

2. Pursuant to the time limits set out at section 123(1) Equality Act 2010, and having regard to the commencement of ACAS early conciliation, does the Tribunal have jurisdiction to consider any of the Claimant's complaints under the Equality Act 2010 which are alleged to have occurred before 2 February 2022? In particular:
 - a. Did the Claimant bring the relevant complaint within three months starting with the date of the act to which the complaint relates (or in such extended period having complied with any obligation to carry out early conciliation with ACAS)?
 - b. Do the alleged contraventions of the Equality Act 2010 relied upon by the Claimant (or any of them) amount to conduct extending over a period for the purposes of section 123(3) Equality Act 2010? If so, did that act extending over a period end on or after 2 February 2022?
 - c. If not, does the Claimant satisfy the Tribunal that it would be just and equitable for the Tribunal to extend time so as to consider the Claimant's complaints, pursuant to section 123(1)(b) Equality Act 2010?

The Claimant's Claims

Disability

3. Did the Claimant have a mental impairment at the material time? The Claimant claims that she suffers from depression and anxiety.
4. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
5. If so, were any such effects long term? The Claimant claims that such effects started as early as November 2020, but in any event from 29 April 2021. At the material time:
 - a. Had such effects lasted for at least 12 months?
 - b. Were any such effects likely to last at least 12 months?
 - c. Were any such effects likely to recur?
6. Were any measures being taken to treat or correct the impairment?
7. But for these measures, would the impairment have been likely to have had a substantial adverse effect on the claimant's ability to carry out normal day-to-day

activities?

8. Did the respondent have knowledge of the claimant's disability? The claimant asserts that respondent ought reasonably to have known as the claimant repeatedly informed SK of her struggling, her extended period of sickness absence and letters from the GP detailing her diagnosis

Direct Disability Discrimination

9. Did the Respondent subject the Claimant to less favourable treatment?
 - a. By the inclusion of the comment in the grievance outcome letter dated 8 February 2022 that the Claimant had been subject to personal stress that may have contributed to her perceptions of her interactions with SK?
 - b. The respondent taking SK's word over the claimant's on the following occasions during the grievance process with no evidence in support of SKs word and without investigation:
 - i. The grievance investigation officer, Steven Darling of the respondent, on 12 January 2022 leaving SKs's statement that a number of people were hired specifically to take the claimant's work away from her, despite the claimant on 12 January 2022 telling Mr Darling that nobody was hired to support her
 - ii the appeal investigation officer, Jane Allen wonder of the respondent, on 23 March 2022 believing SKs's statement that a number of people were hired specifically to take the claimant's work away from her, despite the claimant on 23rd of March 2022 telling Ms Allen under that nobody was hard to support her, and
 - iii the grievance investigation officer, Steven Darling of the respondent, on 12 January 2022 failing to take into consideration the claimant's offer on 14 January 2022 to provide medical evidence from her GP during the grievance investigation process is to confirm the points made regarding the disability and support the fact that returning to SKs team would be inappropriate.

10. If so, was the alleged unfavorable treatment because of the Claimant's alleged disability?

11. If so, did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators?

The Claimant relies on a hypothetical comparator. The characteristics of a hypothetical comparator relied on by the Claimant are a non-disabled person in the same/similar role as the Claimant, whose material abilities (including state of mental health, sickness, and absence from work) were materially the same as the Claimant's abilities, who raised a grievance.

12. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's alleged disability?

13. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Discrimination Arising from Disability

14. Was the Claimant treated unfavourably because of something arising as a consequence of her alleged disability? The Claimant claims that as a result of her alleged disability, she was signed off sick from work and her absence from work arose in consequence of her disability.

15. The Claimant claims that as a result of being signed off sick, she suffered the following alleged unfavourable treatment:

a. A telephone conversation on 25 May 2021, where SK informed the Claimant that management did not want “chopping and changing”, which made the Claimant feel like her job would not be there when she returned;

b. A telephone conversation on 28 May 2021, where SK discussed how the Claimant being off was affecting his budgets, which made the Claimant feel guilty about being off sick;

16. If the Claimant’s treatment was because of her absence from work and was unfavourable, was the allegedly unfavourable treatment a proportionate means of achieving a legitimate aim?

Harassment related to disability

17. Did SK, in a telephone conversation with the claimant:

a. On 25th of May 2021 inform the claimant that management did not want “chopping and changing” which made the claimant feel like a job would not be there when she returned

b. On 28th of May 2021, discuss how the claimant being off was affecting his budgets which made the claimant feel guilty about being off sick?

18. If so, was any such conduct related to disability?

19. If so, did any such conduct have the purpose or effect of:

a. violating the claimant’s dignity; or

b. creating for the claimant an intimidating, hostile, degrading, humiliating or offensive?

Failure to Make Reasonable Adjustments

20. Did the Respondent apply to the Claimant a provision, criterion and/or practice (“the PCP”), namely:

a. requiring the Claimant to work under SK’s management?

b. Requiring the claimant to work in the Change team?

21. Did the application of any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

22. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant claims that the Respondent could have:

a. Moved the Claimant to another team;

b. Moved the claimant

c. Considered other options for employment within the Respondent, namely Planning/ Business Management Roles, Internal Audit, Human Resources. Did the Respondent not know, or could the Respondent not reasonably be expected to know, that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Remedy

23. In the event that the Claimant’s claim succeeds in part or in full;

a. Is the Claimant entitled to an award for injury to feelings, if so, what level of award should be provided?

b. Should the Claimant be found a new role within the Respondent, or a

redundancy payment if no new roles can be identified?

c. What losses has the Claimant suffered as a consequence of the dismissal? Is it attributable to the Respondent, and has the Claimant taken reasonable steps to mitigate their losses?

d. To what extent should any award be adjusted in light of the following;

i. Whether a fair procedure would have made a difference to the outcome?

ii. Whether the Claimant is, or has been, fit to work or otherwise?

iii. Whether there has been fault/contributory negligence by the Claimant?

iv. Whether the Claimant was in breach of the ACAS Code of Practice by failing to raise matters promptly?

v. Whether it is just and equitable in all the circumstances to award any compensation?