EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100792/2017 Hearing at Edinburgh on 23, 24, 25, 26 and 27 April 2018

Employment Judge: M A Macleod
Ms E McArthur
Mr J Terry

Mrs Julie Duran	Claimant In Person
The Scottish Courts and Tribunal Service	Respondent Represented by Mr B Nichol Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims fail, and are therefore dismissed.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 12 June 2017, in which she complained that she had been unfairly dismissed, and discriminated against on the grounds of disability and of sex.

2. The respondent resisted all claims, and for a time disputed the claimant's assertion that she was at the material time a person disabled within the meaning of section 6 of the Equality Act 2010.

3. A hearing was fixed to take place before the Employment Tribunal on 23 April 2018 and the four succeeding days.

4. The claimant appeared at that hearing, and represented herself. The respondent was represented by Mr Nichol, solicitor.

5. A bundle of documents was produced to the Tribunal and relied upon by both parties in the course of the hearing. In addition, the claimant produced a supplementary bundle of documents at the outset of the hearing, without objection.

6. Mr Nichol confirmed that the respondent does not dispute that the claimant was, at the material times, the claimant was a disabled person within the meaning of section 6 of the 2010 Act. The respondent continues to maintain that they neither knew nor ought to have known that the claimant was a disabled person.

7. There were two particular preliminary matters raised at the start of the hearing, by the claimant.

8. Firstly, she wished to call her psychologist as a witness; and secondly, she wished to play the recording of a conversation which she had taken on her phone, the transcript of which has been provided already and produced in the bundle of documents.

9. She submitted that it would be relevant to hear evidence from her psychologist in order to explain why she did not raise a grievance, a point which had been made by the respondent and which was related to her now admitted disability. The claimant did confirm that her psychologist was only available on 23 April 2018, in the afternoon, but could not attend during the remainder of the week.

10. Mr Nichol objected to the witness being interposed, and submitted that the evidence of the psychologist is no longer relevant. He confirmed that it is accepted that the psychologist's report (490ff) is what it bears to be, and that the claimant may make reference to it, but that it is not necessary for the witness to speak to its terms.

11. The Tribunal decided that it would not be in the interests of justice to allow the witness to be interposed on the first afternoon. The primary reason was that the claimant's evidence, which is critical to her claim, would not have concluded by that stage, and the Tribunal was not persuaded that the

psychologist could be meaningfully questioned by any party until we had heard the claimant's full evidence. It was open to a party to call a witness whose evidence is considered relevant, but the Tribunal was not of the view that the psychologist's evidence was essential for the hearing to proceed. She could, if she wished, ask for the hearing to be continued at the conclusion of this diet, based on the evidence led to that point, and the Tribunal would consider the matter further at that stage. It was important in the Tribunal's reasoning that this matter was raised only at the outset of a 5 day hearing, and to allow the application of the claimant to interpose a witness out of order would be disruptive to the hearing, and not consistent with the overriding objective of the Tribunal, which includes the need to deal with matters proportionately and efficiently.

12. At the conclusion of the evidence on 26 April, the claimant did renew her application, in the form of a request to adjourn the hearing to a date upon which the psychologist could be available to give evidence. This was opposed by the respondent. The claimant's explanation was that not only could the psychologist explain why she did not submit a formal dignity at work complaint, but could also explain the impact of all of these events upon her.

13. The Tribunal refused that application. The Tribunal requires to establish, on the evidence, whether the claimant presented a grievance to the respondent, and the psychologist cannot assist with that exercise. If she did not do so, the respondent can only be held to have been at fault in that matter if they knew or ought reasonably to have known that she was suffering from a disability. The reason why she did not lodge a grievance, if it is found that she did not, is irrelevant to the actions and thinking of the respondent.

14. Secondly, the claimant sought to introduce and lodge the recording of a conversation whose transcript was already in the bundle of productions. It was clear to us that the claimant had not previously produced that recording to the respondent and therefore that while they may have seen the transcript, they were not in a position to confirm its accuracy without

listening to the recording, and taking instructions from those involved in the recorded conversation. Given the lateness of the presentation of the recording, and the fact that it would have been disruptive to the hearing to have adjourned in order to allow the respondent to take time to consider it; and in addition, because of the prejudice to the respondent in requiring to deal with a potentially significant piece of evidence on the morning of the first day of the merits hearing, the Tribunal were of the view that it would be unfair to allow that recording to be produced and listened to, and accordingly the claimant's request to allow the recording to be produced was refused.

15. It should be noted that at the conclusion of the claimant's evidence, she was asked whether or not she wished to refer to the transcript which she had mentioned, but declared herself satisfied that in the questioning of her by the Employment Judge she had had the opportunity to give evidence about the exchanges in question, and did not consider reference to the transcript to be necessary.

16. The claimant gave evidence on her own account, and Joseph Robert Moyes (known as "Joe"), Deputy Principal Clerk of Session, gave evidence for the respondent.

17. The issues in this case were not agreed by the parties, but based on the claim submitted by the claimant, the Tribunal considered it necessary to address the following issues:

    i. **Was the respondent aware, or ought they reasonably to have been aware, that the claimant was suffering from a disability from April 2016 onwards?**

    ii. **Was the claimant subjected to harassment by Graeme Brown from April 2016 onwards, on the grounds of sex and/or disability?**

    iii. **If so, was the respondent liable for such conduct on the part of Graeme Brown?**

iv. **Did the respondent subject the claimant to direct discrimination on the grounds of sex and/or disability?**

v. **Did the respondent breach section 80F of the Employment Rights Act 1996 in refusing the claimant's flexible working request dated 17 August 2017?**

vi. **Did the respondent subject the claimant to indirect discrimination on the grounds of sex in refusing the claimant's flexible working request dated 17 August 2017?**

18. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved. It should be noted that the Tribunal heard a very considerable volume of evidence which amounted to background information, relating to events taking place some time before the period which is the subject of the claim as pled, commencing in April 2016. It is not appropriate nor necessary for the Tribunal to make detailed findings in fact about that background evidence, but some findings are made in order to understand the context into which these events fell.

Findings in Fact

19. The claimant, whose date of birth is 7 February 1976, commenced employment with the respondent as a Judicial Assistant on 5 November 2007. The claimant has an LL.B. from Edinburgh University, and obtained her Diploma in Legal Practice from that University. In addition, she has a Masters degree in European and International Human Rights Law from Edinburgh University, and had embarked upon studies towards a Ph.D. when she became pregnant.

20. Before commencing employment with the respondent, the claimant was employed by the Law Society of Scotland, investigating complaints with the Client Relations Team.

21. The claimant suffers from Post Traumatic Stress Disorder (PTSD), as a result of events arising from an abusive personal relationship which

commenced while she was an undergraduate in Oxford University, studying Modern History, a degree she did not complete and following which she undertook her studies for her LL.B. in Edinburgh.

22. The respondent accepts that the claimant's condition of PTSD amounts to a disability within the meaning of section 6 of the 2010 Act, and that she suffered from that disability at all material times during her employment with them. They deny that they knew or ought reasonably to have known that she was suffering from a condition which amounted to a disability at that time.

23. The claimant (who was known as Julie Eveleigh at that time) was interviewed for the post of Judicial Assistant (JA) by the then Lord Justice Clerk, Lord Gill, and was successful. Her appointment was confirmed in the terms and conditions of employment produced at 72ff, as a "Judicial Assistant, Pay Band 3 Spine Points 16". She was employed at the Supreme Courts, Edinburgh, and her date of continuous service commenced on 5 November 2007. Her salary was £22,532 per annum. This document dated from June 2008, and confirmed that her appointment was permanent.

24. The claimant was, at the outset of her employment, one of 4 full time JAs. The other JAs were Graeme Brown, Ashley Brown and Katie Pacholek. Ms Pacholek left shortly after the claimant started, in order to commence a legal traineeship. Ms Pacholek was succeeded in her role by Rosie Finlayson, who in turn was succeeded by Erin Paterson. From approximately 2012, the number of JAs was reduced to 3, namely the claimant, Mr Brown and Ms Brown.

25. The JAs were located in a single room in Parliament House. They each sat at a separate desk, and there was a larger table at which to have meetings.

26. The role which they performed was to provide reports to the Criminal Appeal Court, which would be relied upon by the court in producing Judgments in relation to criminal appeals. The JA would receive copies of the case papers, submissions and evidence, and would summarise both the

evidence led and the submissions made, provide some information on the relevant case law and consider whether any further information was required. Some analysis of comparative law may also be required, owing to the frequency of novel points of law arising in appeals. The JA was then required to provide this to the court by way of a succinct summary.

27. The JAs were managed by Gillian Prentice when the claimant commenced, and in early 2012, Joe Moyes took up that position. His office was close to the larger room in which the JAs worked.

28. On 20 August 2008, following a meeting with Ms Prentice, the claimant presented a "Written Record" (132ff), running to 15 pages, in which she complained that she was being singled out by her line manager, and subjected to behaviour of a bullying nature. At that time, and for a short time thereafter, Graeme Brown was the line manager to whom she and the other JAs answered. In the written record, the claimant stated that she wished these matters to be "sorted out on an informal footing", but that if matters were not successfully resolved, "I reserve the right to raise a formal grievance procedure and to use this information in such an action and to add, amend or delete any of the information contained herein."

29. On 21 August 2008, the claimant emailed Ms Prentice at 1509 hours (147) to say:

"Hi Gillian

I met with Graeme this afternoon. It was a very successful meeting and I would hope that we have now sorted out any problems/misunderstandings that we may have had. I'm sorry to have taken up your time. I would be very grateful if you could disregard my written statement of incidents."

30. The claimant subsequently submitted a further "Record of Recent Incident" dated Friday 23 April 2010 (149) in which she raised further concerns about the manner in which Mr Brown would address her and deal with her. She also raised concerns about the "culture" in the office, describing the tension there as being unbearable.

31. The claimant had a number of meetings with Lorraine Wilson, HR Business Partner, and Gillian Prentice, with a view to drawing these matters to their attention, all on an informal basis. The claimant professed not to know what the outcome of this process was.

32. In July 2011, the claimant gave birth to twins, a son and a daughter, some 8 weeks before their due date of delivery. She commenced her maternity leave in June 2011, and returned in July 2012.

33. On 30 October 2012, the claimant's terms and conditions were amended (79) to reflect the change in her working pattern, which was effective from 1 November 2012. She was to work compressed hours of 9 hours 15 minutes on Mondays, Tuesdays, Thursdays and Fridays, with the possibility of voluntary overtime.

34. On 28 November 2013, the claimant sent an email to Joe Moyes, who was now her line manager (154). She had previously requested a short meeting to discuss a matter with Mr Moyes, who had responded to say that he would be willing to meet but had very limited availability. In reply, the claimant said:

"Dear Joe,

It is a very small issue and one with which I am looking for advice more than anything. It is my turn to represent the Judicial Assistants at the special SMT on Tuesday 10 December between 12-2pm. As you know, I am currently seeing a counsellor for post-traumatic stress disorder after what occurred last year. These sessions take place at 12.30 – 1.20pm on Tuesdays and I have been doing this since the middle of September. They have been going really well. I spoke with my counsellor on Tuesday and she is not keen for us to postpone any sessions as it is likely that these sessions will finish completely the week before Christmas and neither of us would like the sessions to continue into the new year. The problem is that I would prefer not to disclose the counselling to the team – it is something I have been doing in my own time, I feel that it is private and I am not sure that, rightly or wrongly, even though it is a medical appointment there is as

much sympathy for this type of thing as opposed to a more physical condition. I am not sure how to handle this and would welcome any advice you may have. I have put a confidential label on this email so I'm happy to discuss via this method if that helps. Sorry to bother you as I know you're really busy.

Kind regards,

Julie"

35. Mr Moyes replied that day, within 10 minutes, to ask if one of her colleagues could substitute for her at the special SMT. He offered to speak to her colleagues if she wished. The claimant then emailed Erin Paterson on 5 December (158) to ask her to go to the SMT on 10 December, explaining that she could not go as she needed to attend counselling in relation to her PTSD. Ms Paterson replied to confirm that she would attend the SMT, and that she would keep the matter confidential.

Review of the Role of Judicial Assistants

36. In May 2014, a report was produced by Ms Prentice entitled "Report: Review of the Role of the Judicial Assistant in the Supreme Courts" (159ff). It was noted, at paragraph 1.4, that the Lord Justice Clerk (Lord Carloway) had recognised in 2013 that the needs of the criminal appeal court bench were changing and that the JAs could be better deployed. A change in their deployment was therefore proposed and a pilot of the new system was implemented.

37. The new system was set out at p165, in paragraph 5 of the report. The new system provided for "pre-court, in court and post court work", and "In essence the intention is that the 'appeal report' produced by the judicial assistant will now form the basis for any opinion to be delivered by the court and as such its content is greatly altered."

38. Paragraph 5.2 noted:

"The Lord Justice-Clerk and DPCJ met with the judicial assistants again, on 26 March 2013, when it was agreed that a phased approach to the new system should be adopted. Phase one would be the implementation of the new style of report, encompassing changes recommended in paragraphs two to five of the note. This continues to be produced pre-criminal appeal hearing. The main difference is that in preparing the new style appeal report a summary and precis is called for rather than repetition of material and the Judicial Assistant is also required to include their legal analysis of the case. The note may therefore be seen as essentially a further revision of the memorandum of instructions in regard to this phase."

39. Paragraph 5.3 went on to define phase two:

"Phase two will implement the changes recommended in paragraph 6 of Appendix E. It is intended that the judicial assistant, who drafted the appeal report, should contact the chairperson of the court that is to hear the appeal, which is the subject of the report, to assist with anything further. Where required by the chairperson, the Judicial Assistant, or, if unavailable, a suitable briefed substitute should sit in on the appeal hearing and produce a first draft of any written opinion to be prepared. This phase brings a new style of working, emphasis and application in relation to the principal duties noted in the job description of the Judicial Assistant. It is noted that instructions for this duty are not included in either version of the memorandum of instructions (annex B and D). The full detail and exact requirements for this phase are yet to be advised."

40. In 2013 there was a considerable backlog of appeals, but by 2017 it had been completely cleared, partly due to the different way of working adopted by the JAs.

Occupational Health Reports

41. In June 2015, the claimant commenced a period of sickness absence. She was referred by Mr Moyes to OHAssist, the respondent's Occupational Health (OH) providers, and a report was produced on 10 August 2015 following a consultation by telephone on that day (126).

42. The report, by Elaine O'Hara, OH Adviser, stated that she had carried out a telephone consultation with regard to the claimant's current absence from work since 9 June 2015 as a result of symptoms of stress. Ms O'Hara reported that *"Mrs Duran is experiencing symptoms of low mood, reduced concentration, poor sleep pattern and fatigue which prevent her from returning to work. During our consultation Mrs Duran did discuss some additional pressures at work in terms of her workload and role in mentoring and training which has appeared to added to her pressure however she also states that at all times she has felt extremely supported by her manager."*

43. Ms O'Hara went on to say that it was her opinion that the claimant remained unfit for work due to her symptoms of stress. She said that the outlook for the claimant was that *"Mrs Duran has been trying to deal with overwhelming personal stress by herself for the past few years. She now realises she needs additional support which she is receiving via her GP. With this and an improvement in her personal circumstances it is the medical expectation that she will make a steady recovery and return to good health over the next few months."*

44. Ms O'Hara also expressed the opinion that the Equality Act 2010 did not apply to the claimant at that time.

45. On 10 May 2016, the claimant attended an assessment by Ms Charlotte Lee, OH Adviser (128). She confirmed that the claimant was fit for work, having returned to work on 4 March 2016 and completed a five week return to work plan. Under "Outlook", Ms Lee reported:

"Mrs Duran's symptoms and resulting absence were related to her personal issues and her reaction to them. With support from her GP she has overcame the effects of the strain and stressors on her. Symptoms may flare up and become worse for a while during periods of major life stresses in the future. Treatment and counselling can help to ease symptoms, and can improve quality of life. However, there is no quick fix or complete cure. I am unable to predict if future absence is likely."

46. Ms Lee also expressed the view that the claimant's recent symptoms were unlikely to be considered a disability because the illness had not lasted longer than 12 months and was not likely to do so. She also said that it was not having a significant impact on her ability to undertake normal daily activities.

47. In response to specific questions put to her, Ms Lee stated that the claimant *"advised that she discussed her working hours prior to returning to work; she is now working 30 hours per week Tuesday through to Friday. I understand that as she has accumulated annual leave to take she is currently also taking a half day each Friday. Mrs Duran reports a successful return to work and does not require any further adjustments."*

48. The claimant did not mention her diagnosis of PTSD to OH at that point. She had been advised by a counsellor that she was not, in fact, suffering from PTSD at that stage, but from stress.

49. On 19 January 2017, the claimant was once more assessed by OHAssist, where she was seen by Ms Lee, following a referral by the respondent. The report by Ms Lee (130) reported that:

"Mrs Duran reports variable mood, anxiety symptoms including panic attacks, disturbed sleep and fatigue. The overriding trigger perceived by Mrs Duran is workplace issues. Mrs Duran advised that she has been bullied at work by a particular member of staff and stated several times that her manager has not addressed the issues. Mrs Duran advised that her manager has denied her flexible working when he had informally advised she could have flexible working; this has caused her issues with child care which in turn have led to an upsurge in symptoms of anxiety and low mood. The triggers for Mrs Duran's symptoms are work related. There is not a 'clinical' fix that will precipitate a return to work. Management may wish to consider mediation to resolve the workplace issues."

50. Ms Lee went on to say, under "Outlook", that although now presenting s a medical problem, this was a management issue, and the symptoms were

not expected to resolve fully until the perceived workplace issues were addressed.

51. She answered the question, "What additional support or assistance could be provided to Julie to aid her return to work?" by saying: *"Management should meet with Mrs Duran and undertake a stress risk assessment to identify the specific workplace issues; that said, Mrs Duran has identified two specific issues: workplace bullying and denial of flexible working. Mrs Duran is unlikely to be able to return to work until these issues are addressed and resolved."*

Flexible Working Requests

52. On 7 April 2016, the claimant submitted a Flexible Working Request form (FWR) (345). In that FWR she requested that her working hours be reduced from 37 hours per week to 30 per week. She also requested that she be allowed to alter the days she worked, and/or the timing of her working hours so as to work approximately 8-8.30am to 4.30pm, Tuesday to Friday.

53. The claimant had raised with Mr Moyes the possibility of making such a request, and Mr Moyes had indicated that he was "minded to" grant it.

54. On 25 April 2016, Mr Moyes, having considered the FWR, emailed the claimant (211) to say:

"Julie,

Your request to change from your current working pattern of compressed and reduce your weekly number of hours to 30 hours per week, Tuesday – Friday has been approved and HR have been advised…"

55. The claimant's working pattern was adapted according to the FWR which was granted on 25 April.

56. On 17 August 2016, the claimant submitted a further FWR to Mr Moyes, by email (244). In that email, she explained the request:

"Dear Joe,

Please find attached my flexible working request, as discussed. As you can see, the hours remain the same (30), but I hope to change my working hours to fit the school hours. I hope to work a longer day on the Monday by using an after school club then. This is due to start on Monday 12 September 2016. Therefore I would hope to leave at 2.40pm on Monday 22 August, Monday 29 August and Monday 5 September and use annual leave to cover the three hours on these three days (nine hours in total). I hope that this is okay. If you are in agreement with this request, I would hope to start this from this Monday even though technically I might not be able to sign in on Mitrefinch on Monday as HR may not have had time to make the necessary changes. I can keep a note and email you about the times I am in and out although I will try to swipe in and out anyway.

Once again, apologies for the delay in getting this to you. I hope it hasn't caused you any inconvenience."

57. The claimant had approached Mr Moyes in advance of making this request. She had told him at the time of making her April request that when the children went to school after the summer in 2016 she may require to adjust her working hours again. She contacted Mr Moyes in the summer, shortly before making the August request, from holiday, and said that she was still awaiting confirmation from the school about the precise availability of the after school club, and therefore she was unable to be precise about which days she wished to adjust.

58. The application was attached to the email of 17 August (351), and read as follows:

"1. I would like to maintain my current number of hours per week, namely 30 hours.

2. I would like to alter the days I work and/or the timing of my working hours so as to work at the following times…

I would like to alter the days that I work in order to accommodate my children attending school. I currently work Tuesday to Friday, 8.30am to 4.30pm.

I would like this to change to:

Monday 8.20am to 5.40pm

Tuesday to Thursday 8.20am to 2.40pm

Friday 8.20am to 12.00pm

3. I would like to do all/some of my work from my home…"

59. The claimant requested that the change to her working pattern should take effect from 22 August 2016. She also stated that she did not think that the changes would have a detrimental impact on the business needs of the team.

60. On receipt of the email enclosing the application, Mr Moyes replied (on 17 August) (243) to say that it had not been possible to "consider and process this application today", but that he would attend to it as soon as possible on his return to work the following week. He confirmed he was "okay with you taking annual leave for the upcoming Mondays".

61. The claimant replied that day to check whether she should continue working Tuesday to Friday in terms of her current working arrangements, or start working on the Mondays and leaving early from Monday 22 August. Mr Moyes confirmed that she should continue in terms of her current working arrangement, taking annual leave if required for child cover, and "we will aim to get things sorted for the week commencing 22nd August".

62. Mr Moyes noted that the claimant was effectively asking for a new working arrangement to be put in place immediately, but he made reference to the respondent's policy on FWRs (123ff) entitled "SCTS Part-Time, Job-share and Flexible Working Policy (revised August 2017). That policy provides that when an application is submitted, the line manager should arrange to discuss it with the member of staff in private as soon as possible after

receiving it. The policy states: *"They can either accept the application or arrange a meeting within 28 days to discuss the potential implications."*

63. The policy goes on, under "4. Refusing Requests", to state:

"Managers must deal with the application in a reasonable manner, and can only refuse a request on one or more of the reasons listed below:

- *the burden of additional costs*
- *damaging effect on ability to meet customer demand*
- *inability to re-organise work among existing staff*
- *inability to recruit additional staff*
- *damaging impact on quality*
- *damaging impact on performance*
- *not enough work during the periods the employee wants to work*
- *planned structural changes."*

64. The claimant's right of appeal was also set out, at paragraph 5 of the policy.

65. On 30 August 2016, the claimant emailed Mr Brown, with copies to Ashley Brown and Mr Moyes (249). In that email, she said:

"…I had intended to speak in person with you about something else but since you have emailed and joe is already included in this conversation it might be best to let you know in writing that I made a flexible working request to Joe and my working week has altered in accordance with that request. I am therefore currently working Mon-Thurs 8.20am-2.40pm and Friday 8.20am-12pm. I am taking three hours of annual leave per week to cover this working arrangement until Monday 12 September. From then I will work until 5.40pm on a Monday. The number of hours that I work per week remains the same, namely 330 hours. I am of course happy to

discuss this further with you in person but thought it might be best if it is put in writing to avoid any misunderstanding…"

66. Ms Brown replied to that email within the hour (249):

"Hi Julie,

I am sorry, but I have been told that your working has not been altered in accordance with your flexible working request. Joe has advised me that your request was formally made on 18th August 2016 and that, until a decision has been made on it, you are taking annual leave to allow you to work the hours that suit you. Joe, can we please have some clarification on what is going on in the office? You are telling me one thing and Julie is telling me another.

Ashley"

67. Mr Brown also emailed that afternoon (253):

Julie,

I agree with Ashley. I was told by Joe at 9.30 this morning that a decision still has to be taken on the request that you submitted earlier this month. Your email does not reflect my current understanding of the situation. Clarification on this point would be welcome; indeed is required.

Graeme"

68. Mr Moyes considered the application, and then met with the claimant on 9 September 2016. Following that meeting, he wrote to the claimant to advise her of his decision to refuse her application, by letter dated 23 September 2016 (355).

69. In that letter, Mr Moyes said:

Dear Julie

Application to vary working hours/pattern in terms of the part-time, job-share and flexible working policy

I refer to the above and to our meeting of Friday 9 September 2016 which you chose to attend unaccompanied to discuss your application to vary your current part time working pattern.

I advised you that after careful consideration of your application, I was minded to refuse said application however I did agree to give further consideration to whether it would be possible to reconsider said application on an interim basis. Having reconsidered your application and further exploration of the possibility of granting same for an interim period, regrettably, for the reasons noted below, I am unable to agree to this and your application must be refused:-

1. Planned structural change

Plans were proposed, by Lord Carloway, the then Lord Justice Clerk, to amend the Judicial Assistant job role, to include additional responsibilities for the judicial assistants to liaise with the judiciary in advance of any appeal hearing whether any further research is required; that the judicial assistants attend said appeal hearing to note parties submissions and assist with the drafting of court opinions, if required, together with other proposals for additional responsibilities for the role.

Following recent discussions with Lady Dorrian, Lord Justice Clerk, Her Ladyship has confirmed that it is her intention that this amendment to the job role be implemented as soon as possible, with the likelihood that it will be introduced for an interim period between October and December 2016, with a subsequent review carried out at the conclusion of this period.

Whilst the specific implementation date has not been known, you have always been aware that this change to your job role was likely to be taken forward in the very near future.

As a result of the planned structural change to the job role, each of the judicial assistants will require to be available, for the judiciary and appeal court business, every Tuesday – Friday, between the usual court hours

of 10.30am – 4.00pm. As a result of the terms of your application, you would not be available between those hours on each of those days and the burden of attending court hearings scheduled for a full day, or longer, would fall on the remaining judicial assistants.

2. Damaging effect on ability to meet customer demand

With the proposed changes to the current Judicial Assistant job role, as detailed above, soon to be implemented and the fact that Appeal Court business is scheduled Tuesday – Friday, around a normal court day between the hours of 10.30am – 4.00pm. In terms of your application you would be potentially unavailable for each day that the Appeal Court were to sit (Tuesday – Friday) after the hours of 2.40pm Tuesday – Thursday and after 12.00pm every Friday. Thus you would be unable to guarantee your availability to the judiciary for any full day (or longer) court hearing and potentially not be available to liaise with the judiciary, if required, after an appeal hearing.

There are issues also with periods of annual leave for other team members. If, for example, the court requested assistance during a 2 day appeal hearing which coincided with annual leave for your colleagues and if your application were to be granted, then we would be unable to provide a satisfactory service to the judiciary.

3. Inability to re-organise work among existing staff

For the reasons explained under numbers 1 and 2 these additional responsibilities to the judicial assistant job role will have an impact on the team and given the terms of your proposed application the burden would fall on existing team members to take those appeal hearings scheduled for a full day or longer, which may also result in those team members dealing with the more complex appeal hearings and would also remove any flexibility currently available within the team.

In terms of said policy you have the right to appeal this decision. Any appeal must be done in writing, lodged within 14 days from this date and

should be addressed to Graeme Marwick, Principal Clerk of Session & Justiciary."

70. The claimant did submit an appeal, by way of a document dated 6 October 2016 (361ff).

71. In her appeal, she asserted that when she returned from sick leave in March 2016, she contacted her line manager, and advised him that her circumstances had now changed. She was now a single mother with sole responsibility for the care of two children, then aged four. She said that her own family lived in the south west of England and therefore could not help her with childcare, and that due to her changed circumstances she could no longer work full time.

72. She went on to say, in paragraph 2:

"I therefore discussed with my line manager the possibility of returning to work on a part-time basis of 30 hours. This was to consist of working Tues-Fri 8.30am – 4.30pm (when the children would be in nursery) but with the understanding that I would take annual leave each Friday afternoon and so leave at 11.40am on a Friday….Beyond the phased return however, it was specifically agreed I would be able to immediately start working the new hours in accordance with my flexible working request without there being any formal agreement in writing, that is a formal letter of agreement from my line manager and an official letter from HR notifying me that the changes had been processed amending my terms and conditions of employment…"

73. In paragraph 3, the claimant asserted:

"During this same discussion in March, I explained that my children would be starting school in August and that I was concerned that I would have to make a further flexible working request to reflect those changing childcare needs as, in terms of the policy, there is only supposed to be one application per year. The reason for that change was that they would be in school for four and a half days of the week rather than the three and a half days of the week that they were in nursery and that those hours would be

considerably shorter. I explained in detail that it is very difficult to organise childcare in Edinburgh, particularly afterschool provision as only a limited number of providers pick up from any one school, and there were and continued to be waiting lists for all afterschool providers that pick up from the children's school. I explained that I would need to specify the afterschool provision that I required, go on a waiting list and would find out at a later date whether I had been successful. I explained in detail that I would hope to work the same number of hours, namely 30 hours, but I would hope to be working over five days instead of four to reflect the school hours. This would consist of one longer day leaving at 5.40pm, three days leaving at 2.40pm and Friday leaving at 12.00pm in order to pick my children up from school. I explained that I would need to organise the childcare for this as after school club childcare is only available from certain providers is very popular and therefore there is pressure for spaces. I am a single mother with no family in the area so it is very important that I sort out childcare as early as possible. My line manager said that he was minded to agree the request and that I should move ahead with sorting out the arrangements. This was in March 2016. At no point was I told that I should endeavour to arrange childcare to cover Tues – Fri 8.30am to 4.30pm."

74. The claimant went on to explain in detail her concerns about the refusal of her application. She stated (in paragraph 9) that *"My line manager said that he would look into granting the flexible working request for a temporary period, for example three months (I did not however agree to this as my position has always been that it was already granted)."*

75. An appeal meeting took place on 27 October 2016, chaired by Graeme Marwick, at which the claimant attended and was accompanied by Brian Carroll, her PCS union representative.

76. Following the meeting, Mr Marwick confirmed his decision by letter dated 11 November 2016 (393).

77. In this letter, Mr Marwick stated:

"With regard to the likely changes to the Judicial Assistants' role and the timeline over which it had evolved, you stated that you and your colleague Judicial Assistants considered the changes to be permanent although little information had been received to confirm this, or the timeline to be used.

I advised that we were at the pilot stage with a number of further stages to go through before any change could be made permanent. The pilot is as per the proposals and criteria by Lord Carloway (the then Lord Justice Clerk), now Lord President and has been agreed by Lady Dorrian, Lord Justice Clerk. The pilot will run until the 31 December 2016 and an evaluation will follow.

We then discussed how you thought your flexible working application could be accommodated and what was leading you to believe that this flexible working application had already been granted.

Your fundamental point was that the application for flexible working had been agreed following submission of the application and discussion with your line manager, Joe Moyes, immediately prior to your children starting primary school on 17 August 2016. The issue as far as you are concerned is that on 17 August your line manager told you to take the annual leave required for the week 17-19 August and then to work in accordance with your requested change of hours from Monday 22 August. You further made the point that you have continued to work those hours since Monday 22 August.

During the discussion you stated that you had known in March 2016 of the general work pattern you would require from August and had discussed this with your line manager on 4 occasions over the 5 months period and that your line manager was minded to agree the flexible working request.

Your line manager does not accept this account of events and states that he was only advised of the required working pattern arrangements in August when you submitted the flexible working request application.

Returning to your position that your flexible working request has already been granted due to your having worked those hours since 22 August with your line manager's permission. I made clear that your line manager's position is that he appreciated the difficult situation you were in on 17 August given your children were starting primary school and that you had no access to other cover. He therefore allowed the change in hours at that time, but advises that no decision had been reached at that point. This position is in the email to yourself on 17 August where he advises that 'it has not been possible for me to consider and process this application today' and asks that you continue to work as per your current arrangement taking annual leave if required for child cover…

A meeting was then held with you on the 9 September and your application was refused as per letter to yourself on 23 September 2016. I therefore do not accept that your application was agreed. You have continued to be able to work to the work pattern in recognition of the difficulty in relation to organising childcare and in order to fully consider your appeal which was lodged with me on the 7 October 2016.

Unfortunately, for the reasons provided in that letter of 23 September 2016 (planned structural change, damaging effect on ability to meet customer demand and inability to re-organise work amongst existing staff), I uphold the decision to refuse your flexible working application at this time.

I understand the impact that this decision will have for you and would like to discuss a possible interim solution to allow arrangements to be put in place to enable you to return to your current contractual working pattern."

78. The application and appeal having been refused, that FWR process was concluded.

Allegations of Bullying – April 2016 onwards

79. Over a period of time prior to April 2016, the claimant had had difficulties in her relationship with Graeme Brown, to the extent that when it was possible to do so, Mr Brown would work in the library, away from the general office.

She found him to be very critical of her timekeeping, and regularly questioned her arrival and departure times, notwithstanding that her flexible working request had been granted in April.

80. Mr Moyes was aware, after he took over the position of line manager for the JAs, that there was friction between them, but took the view, in general terms, that these matters were to be resolved among the staff themselves. He was aware, in particular, that Mr Brown was frustrated at the lack of progress in the change of roles for the JAs, on the basis that he saw this change of role as an opportunity to obtain an upgrade in his position. On 10 June 2016, Mr Brown emailed the claimant (221) to say: *"You're perhaps not aware as you were off when they took up their posts, but the two law clerks are both solicitors (not advocates) who were in civil practice. They are one and two years qualified, respectively. I'm getting increasingly tired of seeing people who are less qualified and less experienced than me getting grade 7 posts within SCTS. The JEGS exercise will hopefully address this but the first stage has to be getting the questionnaire out."*

81. The JEGS exercise was a review in which the grading of posts was being considered by the respondent, including that of JAs. The questionnaire referred to was a questionnaire to be issued to the Judges in order to establish what their needs were and how they wished the JAs to be involved in criminal appeals.

82. On 15 June 2016, the claimant emailed both Mr Brown and Ms Brown (225) to say that it appeared to her from an email of his that *"we are moving to phase 2 of the LJC's memo when as far as I was aware Joe is due to write a report on this? I am just a little unclear…As far as I can see, we are not currently fulfilling phase one of the memo of instruction. I'm not sure that we are capable in terms of resources to move to phase 2 as yet. Hopefully we can have a meeting about his and the questionnaire soon."*

83. Mr Brown's reply, that day, said:

"Well, I've agreed with Joe that I'll be sitting in on appeals more often – and indeed have been doing this in certain appeals over the past year (in

addition to all the work I did on drafting opinions for Lord Gill). I'm doing this with a view to discussing same with the JEGS assessor. I'm unaware of any further report on phase 2 being prepared by Joe. The way I left things with Joe is that the questionnaire goes out to the judges and the JEGS exercise is then started. In the meantime, I continue to sit in on the appeals in which I prepared reports.

I'm afraid that I have to strongly disagree that the office is 'not currently fulfilling phase one of the memo of instruction from the LJC' (last line of your note). I've been fulfilling – and in fact have been going beyond – what is required by phase 1 for some time now…"

84. The claimant emailed Mr Moyes on 12 July 2016 (231), attaching the chain of emails including the foregoing, and saying: *"As mentioned to you, the offer of being in court and noting parties' submissions and the offer of further research is something that we have not previously done and I would argue is not within our current job role. I am concerned that it may lead to an expectation on the part of the judges as to our role and those that do not offer this additional resource outwith the job role may be looked on less favourably. I am also concerned as to the offer of help without checking with the other members of the team. I strongly feel that we do not know as yet if we are capable of moving to phase 2 and that therefore there are many issues that should be addressed before any member of the team moves forward on this front such as resources, training, whether the judges even want this additional help, structure of the team, place in the organisation etc. More broadly than that, there seems to be a disagreement within the team as to our current job role and what is and is not expected of us. I am also concerned that the additional help offered appears to be designed to influence any JEGs exercise when the exercise will be based on what the job role entails rather than any additional work that we may undertake over and above that role description."*

85. Against that background of disagreement between the claimant and Mr Brown as to the implementation of the changed job role, the claimant

emailed Mr Moyes on 20 July (237) to draw certain matters to his attention. She forwarded an email which Mr Brown had sent to her that day (238):

"Julie,

I'm just back from the [redacted] appeal hearing. Dave Cullen was the clerk and he's asked to see you about the report you did for Smith (presumably George Donald Smith) being heard tomorrow. Can you look in past his office this afternoon please? Also, have you contacted the bench about this, and do you intend to sit in on the appeal?

Graeme"

86. In her email to Mr Moyes, the claimant said:

"I remain very unhappy about the current situation in the office. As I already explained in detail to you, I do not think that one person should be allowed to unilaterally extend the job role and take on self-imposed additional responsibilities unless it is for a development reason for that particular individual and recognised as such. It potentially leads to an expectation on the part of the judges that this will be done in all cases and also from the person undertaking the work that everyone else should be undertaking this additional work too. The clear assumption in this email is that I should have contacted the bench and that I should be sitting in on the appeal. Yet that is something akin to phase 2. Our job description has not changed. It has always been the case, and can be seen from IPR objectives in other years, that sitting in court and noting argument etc is something to be undertaken where time allows and has always been viewed more as something that it would be useful to do and that we would like to do; it is not something that is or has ever been part of our job description…

The other thing about the email is that it is supervisory in tone, when he is not my line manager, and he has cced it to you as thought you need to be made aware of something that I am doing wrong and cced Ashley in as though it is a team problem. Graeme has already taken me to task with regard to my change of hours, which I did not think was any of his business,

or the fact that he was not consulted about it, which again I did not feel was any of his business given that I was not consulted (and don't think I needed to have been) when Ashley changed her hours, when Erin moved her work place to Glasgow for a couple of days of the week or when Graeme was allowed to change his working hours. I appreciate that you have suggested some team building exercises and am happy to attend whatever might help. I just wanted to convey that I am finding it very difficult."

87. Mr Moyes replied on 20 July (237) to say that had he been around when he received Mr Brown's email, he would have hoped to reassure the claimant that he would be speaking to Mr Brown about it, without the need for the claimant to have drafted her response. He continued: *"Your understanding of the current position, as stated in your email, is quite correct. There are a number of matters that require to be addressed/resolved before we know what, if anything, the new JA role will be."*

88. On 18 August 2016, the claimant emailed Mr Moyes (245) to ask for information as to the up to date position with regard to the job role, saying that it is generally accepted that moving to phase 2 represented a change of job role due to additional responsibilities and changes to the nature of the duties.

89. She concluded that email by saying: *"I was told this morning that the team are now undertaking phase 2 and that this was agreed whilst I was on annual leave. So I just wanted to clarify – are we now undertaking phase 2 and if so, what does phase 2 entail – what are the precise duties and responsibilities of this new role?"*

90. Ms Brown herself then emailed Mr Moyes and the claimant, that same day (245), to say: *"I would welcome a meeting with both you and Julie about this as there appears to be a gulf between us. My understanding is that we've been told to go ahead with 'phase 2' as it is inevitable and we might as well jump in. Julie doesn't know what 'phase 2' entails. I feel there is little point in Julie and I discussing it between ourselves as we both have completely different ideas about what is going on. I would really appreciate it if you*

could clarify it for both of us, preferably at a meeting together, so there is no room for any doubt."

91. On 30 August 2016, the claimant forwarded to Mr Moyes an email she had received from Mr Brown in which he insisted that if the professional titles of those who have access to the S Drive were to include "Sheriff Principal" or "Sheriff", he would appreciate it if he were accorded his title, of Dr Graeme Brown (247). The claimant said:

"Dear Joe,

One of the examples given on our website of bullying is being excessively critical of minor things. I think that this email falls into that category. There is no mention of what I am trying to do, namely set up a new folder, or comment about that. Instead the focus is the designation I have used on an internal email to our team. The email hasn't even been sent externally or indeed out of the team. The list is one given to me by the typing pool (and then checked against a list of sheriffs that Fiona gave me). There is actually nothing wrong with any part of the email that I sent. It took me a while to realise that I hadn't even done anything wrong in the email that I sent. And now I have apologised when I haven't actually done anything wrong in the email. In addition his email doesn't even sign off, it is merely an instruction as to what to do. And once again you and the rest of the team have been cced in in order to make me feel that I have done something wrong.

I'm sorry to bother you with this as you have so much work to do without this. Ultimately I just wish it wasn't happening.

Kind regards,

Julie"

92. Mr Moyes considered that this was pettiness between two colleagues, demonstrating the breakdown of their relationship. He did not regard it as an important matter and felt that this was capable of being resolved between them.

93. Mr Moyes met with Lady Dorrian on 5 September 2016, and emailed the JAs on 6 September (263) to confirm the position:

"I can…provide you with an update following my meeting with the LJC yesterday. Her Ladyship indicated that, notwithstanding the fact that she/we only received one further completed questionnaire (from Lord Brodie), she is keen to progress to stage 2 of the 'new role'. The LJC has requested the following take place between September and November 2016:

- *Reports be prepared for all solemn conviction appeals, granted leave to appeal, with hearings scheduled between September and November (as proposed recently by Ashley)*

- *A draft note be prepared, to accompany your appeal reports, setting out what additional services you will now provide ie further research or attendance at the appeal hearing to take notes etc, or indeed both of these functions…*

- *We will need to agree a mechanism to monitor the uptake of these additional services…"*

94. On 14 November 2016, the claimant emailed Mr Moyes to request a meeting with him to discuss the decision refusing her flexible working request (316). She then emailed again, on 16 November 2016 (315), in which she said:

"As you are aware from emails and meetings we have had, I have raised dignity at work issues with you. you said in the last meeting we had in August when we discussed my flexible working request that you would speak with Graeme. I do not know if you have done so. Since then I have been pressured into discussing my flexible working request and appeal in spite of attempting to state that it was private and confidential and that he should speak with you about it and then last week and this harassed as to what the decision is. I have explained that I need to speak with you first before discussing with anyone else as I have no idea what the decision

means. It raises more questions than it answers I have been told that I have taken too much time off to look after my children when they were ill and that he and Ashley were very disappointed and upset at my behaviour as it meant that they have had to work longer hours…I am also constantly told that I should not be leaving at 12pm on a Friday or 2.40pm in the week. That I am somehow working less than other members of the team. This had created an intolerable atmosphere. I have been working in the library this week as a result…"

95. The claimant went on to say that she could not work Tuesday to Friday until 4pm owing to the needs of her family, and asking if she could have a meeting to discuss this with him.

96. Mr Moyes did not reply directly to that email, because the appeal against his decision was ongoing and therefore he had little to add at that stage.

97. However, he met with the claimant on 23 November 2016. They discussed the ongoing issues within the office between the claimant and Mr Brown. Mr Moyes told the claimant that he "had had things up to here", said quite forcefully, because he was frustrated at the state of their relationship. He repeated that he had stressed before at IPR (Interim Performance Review) meetings that it was up to each of them within the team to start working together to resolve their differences.

98. He considered that he was "piggy in the middle", and that neither person was right nor wrong, but that the disagreements between them continued to cause disruption within the department. He also felt that the claimant and Mr Brown were both senior employees, who were not acting as good role models for the remaining staff who could observe their conduct towards each other. He was keen to try to arrange mediation, or some form of team building, to find a way forward.

99. Mr Moyes took the view that the disputes between the claimant and Mr Brown amounted to "petty squabbles". He recognised that the claimant felt bad, but he also considered that it was reasonable to expect that each of

them would stop blaming each other, and work according to the values of the organisation by being courteous, and working to provide a good service.

100. Mr Moyes had a "number of conversations" with Mr Brown, over a period of time, in which he told him that he needed to moderate his behaviour, not just in relation to the claimant, but also to other colleagues and to himself. He believed that Mr Brown's behaviour was unacceptable, and that he would become focused on a certain matter, to the extent that he could not see past it nor accept any other perspective. He told him that it was inappropriate for him to take note of when the claimant arrived or left, as that was nothing to do with him.

101. On 24 November 2016, the claimant attended at her General Practitioner (413), following which she was signed off work due to ill health until 8 December 2016, with a diagnosis of stress at work.

102. On 29 November 2016, the claimant attended at her General Practitioner (413), where it was noted that *"has had agreement re hours taken away, bullying at work, feeling anxious and panicky at work, needs med3 and review 1/52".*

103. The claimant remained absent from work until 4 October 2017, when she commenced work as a Wellbeing Officer, based at Chesser House, Edinburgh.

104. She raised Employment Tribunal proceedings on 22 April 2017, having notified ACAS of the intention to claim on 10 February 2017, and having received the Early Conciliation Certificate from ACAS on 23 March 2017.

105. The claimant understood that she had three months within which to present a claim to the Employment Tribunal, commencing on 11 November 2016, the date upon which Mr Marwick confirmed his decision on her appeal against the refusal of her FWR. She checked the ACAS website for information and it confirmed that she had three months within which to contact them in relation to early conciliation. She sought advice, informally,

from a friend whom she described as “a principal in an employment law firm” about her claim, but did not discuss time limits with that solicitor. She did not give any thought to the process of raising a claim in relation to events which took place some time before the 3 months period started, but she understood that where there were separate but related events, that would form a continuous series of acts, or a course of conduct.

106. Her entitlement to statutory sick pay expired in March or April 2017. Her previous long absence from work had exhausted much of her entitlement to contractual sick pay.

107. The claimant was contacted by Lorraine Kelso, of the respondent’s Human Resources department, in connection with a position she thought the claimant may be interested in taking up, managing the Evidence and Procedure review. Ms Kelso arranged for the claimant to be interviewed for that position in August 2017, and although she was unsuccessful, she was retained as a reserve candidate.

108. Ms Kelso continued to ensure that the claimant received circulars showing the current vacancies within the Scottish Government, supporting her in seeking to find another position in which to work. In September 2017, Lisa Sellars, Director of Human Resources, contacted the claimant with a view to offering her the position of Wellbeing Project Manager, and having discussed this with Ms Sellars, the claimant accepted appointment to the role, working 28 hours a week on the same payscale on which she had been employed as a JA. Although this position does not fit with her specific career, the claimant has found the work satisfying and enjoyable. It is currently a secondment, which, as at the date of the Tribunal hearing, had been extended until May 2018, and probably beyond that date.

Submissions

109. The claimant presented to the Tribunal a written submission, which has been read and taken carefully into consideration by the Tribunal. Its terms are summarised very briefly here.

110. The claimant argued that the respondent knew, or ought reasonably to have known, that she was suffering from a disability, namely PTSD, from November 2013.

111. She then submitted that her condition was not treated seriously by the respondent. Despite her treatment being exhausting, no reasonable adjustments were made by the respondent. The respondent failed to carry out a risk assessment, or make a proper OH referral to investigate the condition.

112. Having referred the Tribunal to a number of authorities, she submitted that the respondent was aware, in 2015, of her earlier diagnosis of PTSD but had chosen to ignore it. She invited the Tribunal to find that she was not only a disabled person but known to be a disabled person by the respondent.

113. The claimant then submitted that she was subjected to bullying and harassment on her return to work in 2016, following an 11 month sickness absence, by Graeme Brown. She said that she raised the issues with the respondent on a number of occasions, in meetings, telephone conversations and emails. She maintained that she had raised the concerns under the Dignity At Work policy with her line manager under paragraphs 6.4 and 6.7 by speaking to him or emailing him.

114. She submitted that she had raised her concerns with Mr Moyes on 20 July 2016 (237); 30 August 2016 (247); 16 November 2016 (315) and on a number of occasions in meetings, namely in May, June and July 2016 when one to one with him, and in a team meeting of 12 July 2016. She also referred to telephone calls on 9, 17 and 30 August, and 7 September; a further one to one meeting on 9 and then 23 September, telephone calls on 4, 12 and 26 October, and 1 and 2 November 2016; and in meetings on 16 and 23 November 2016.

115. She argued that the respondent accepted that these raised dignity at work issues, and provided a picture of an escalating situation having increasingly adverse effects on her. She submitted that the behaviour of

Graeme Brown fell within the definition of harassment in section 26 of the 2010 Act. That harassment, she submitted, emerged from "a compelling account" in her own evidence of how the bullying and harassment of Mr Brown was related to her absence from the office with stress and PTSD symptoms, and also her flexible working arrangements. Mr Moyes regularly told her that he was dealing with the situation, and she considered that she had taken the necessary first step in a complaint of unacceptable behaviour.

116. She then argued that the respondent owed her a duty of care to provide her with a safe working environment, and failed to fulfil that duty of care. Given her diagnosis of PTSD, a reasonable adjustment should have been made with regard to investigating the bullying claims as soon as possible.

117. She noted that the respondent has argued that she failed to take matters up with Mr Brown and failed to submit a formal grievance. She considered that in the first instance she followed the Dignity at Work policy by contacting her line manager, who failed to act on the allegations of unacceptable behaviour made. She then submitted that if it were to be found that she had not raised a grievance, (which she disputes), her condition of PTSD prevented her from complying with the terms of the Dignity at Work policy. The policy fails to address the needs of a person suffering from a disability, and operates harshly in relation to a disabled person without the allowances and adjustments required by the 2010 Act.

118. She made reference to section 39(2), section 15 and section 19 of the 2010 Act. The claimant argued that the steps which she was or would have been required to take under the Dignity at Work policy were discriminatory. She was incapable of approaching the aggressor if that is what the policy required her to do. She maintained that the Tribunal is required to assess whether the unfavourable treatment complained of with regard to the policy is a proportionate means of achieving a legitimate aim, under section 15 of the 2010 Act.

119. She went on to suggest that it was reasonably foreseeable that altering her job role and making her undertake additional responsibilities five months after returning to work without giving reasonable notice and without consultation would worsen her mental health condition to a substantial degree.

120. With regard to her FWR, she submitted that she understood that there was agreement to change her hours, which came into being on 22 August 2016. She said that she was entitled to rely on the verbal and written informal agreement of Mr Moyes, and that she began to work in performance of that altered agreement with the knowledge of Mr Moyes, and without any objection by him. She therefore argued that the request had already been granted by Mr Moyes, and that had it not been, it was reasonably foreseeable that there would be a recurrence of her illness.

121. The claimant submitted that the respondent at no point raised an issue in terms of section 80F(4) of the Employment Rights Act 1996 during the application process and therefore, since they acquiesced in the making of the second FWR, they cannot now argue that she was not entitled to make such an application.

122. The claimant also argued that her claim was presented in time, as a continuing course of conduct had taken place in relation to her treatment by Mr Brown and the complaints raised in relation to that treatment.

123. In any event, she submitted that if her claim were presented late, it would be just and equitable to allow it to proceed in all the circumstances.

124. The claimant invited the Tribunal to uphold her claims against the respondent, and to award her compensation in relation to the financial loss, psychiatric harm and loss to her reputation and career as a result of the treatment received.

125. For the respondent, Mr Nichol presented a very short skeleton submission, to which he spoke. Again, a brief summary is set out here.

126. He observed that the claimant's submissions made reference to a number of claims which were not before the Tribunal, namely breach of contract, personal injuries, section 15 and sections 20 and 21 of the 2010 Act claims, and a safe working environment.

127. He argued that there has been no evidence at all that Mr Brown was aware that the claimant was suffering from a disability, and Mr Moyes was not aware, nor should he be said reasonably to have been aware, that the claimant was a disabled person. The 3 OH reports mention nowhere that the claimant was suffering from PTSD, since the claimant did not tell the OH Advisers of that diagnosis. The only reference to PTSD came in an email, very briefly, in 2013 (154).

128. With regard to the allegations of sex discrimination, it is clear, he said, that the issues between the claimant and Mr Brown went back some years, and were not previously related to children or childcare issues.

129. With regard to the allegations of bullying, it is clear that there was friction in the team caused by Mr Brown's desire to regrade the role by moving to phase 2 of the new system. The claimant was refusing to take part, and reverted to a working pattern which Mr Brown and Ms Brown understood had been the subject of an unsuccessful application by the claimant. Mr Nichol submitted that while the respondent did not condone the behaviour of Mr Brown, it was not due to sex or disability. If the Tribunal were to find that she was treated less favourably due to childcare commitments, that does not amount to a protected characteristic under the 2010 Act.

130. It is not disputed, he said, that the claimant raised dignity at work issues with Mr Moyes, but he understood them to be informal and that was how he dealt with them. She failed at any stage to present a formal grievance. Had she done so, her complaints could have been formally addressed.

131. The claimant complains that she made a FWR on 17 August and that it was agreed that day, which Mr Nichol argued was not a credible position.

She was allowed to work in the new arrangement while the appeal process continued and an interim solution was put forward to her, which she rejected.

132. Mr Nichol pointed out that section 80F of ERA governs the process of FWR, and states that an employee may not make a further application within 12 months of their previous application. Accordingly, the Tribunal has no jurisdiction to hear this complaint. There is no complaint that the process was not followed, nor that the reasons given were not valid. It appears, he said, that the claimant is seeking to make a breach of contract claim, for which there is no basis in the pleadings.

133. He submitted that there was no indirect discrimination by the respondent in relation to this application process.

134. There is no evidence that there would be any group disadvantage to women in this matter.

135. Mr Nichol submitted that there should be no extension of time granted to the claimant to present her claim in this case. The claimant has a law degree and a legal practice diploma, and carried out legal research for the judiciary in her role as a JA. She also took advice from ACAS and from a friend who ran an employment law practice.

136. Finally, Mr Nichol submitted that Mr Moyes gave his evidence in a credible and reliable, and that in the event of any conflict between his evidence and that of the claimant, Mr Moyes' evidence should be preferred.

137. Mr Nichol invited the Tribunal to dismiss all claims made by the claimant.

The Relevant Law

138. Section 80F of the Employment Rights Act 1996 provides, in sub-section (1), that a qualifying employee may apply to his employer for a change in his terms and conditions of employment, if the change relates to:

i. *"the hours he is required to work,*

ii. The times when he is required to work,

iii. Where, as between his home and a place of business of his employer, he is required to work, or

iv. Such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations."

139. Section 80F(4) provides:

"If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made."

140. Section 80G(1) provides:

"An employer to whom an application under section 80F is made –

(a) shall deal with the application in a reasonable manner,

(aa) shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies –

i. the burden of additional costs,

ii. detrimental effect on ability to meet customer demand

iii. inability to reorganise work among existing staff,

iv. inability to recruit additional staff,

v. detrimental impact on quality,

vi. detrimental impact on performance,

vii. insufficiency of work during the periods the employee proposes to work,

viii. planned structural changes, and

ix. such other grounds as the Secretary of State may specify by regulations."

141. The right to make a complaint under this heading to an Employment Tribunal is set out in section 80H(1):

"An employee who makes an application under section 80F may present a complaint to an employment tribunal –

(a) that his employer has failed in relation to the application to comply with section 80G(1),

(b) that a decision by his employer to reject the application was based on incorrect facts, or

(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b)."

142. Section 13 of the Equality Act 2010 provides that *"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."*

143. Section 19 of the Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Discussion and Decision

144. In this case, the claimant sought, during her submissions, to invite the Tribunal to address a number of complaints which, as Mr Nichol pointed out, had not been notified to the Tribunal nor to the respondent, and accordingly, the Tribunal will only address those claims which were included within the ET1 and of which the respondent has had fair notice.

145. For the avoidance of doubt, we noted that the claimant, in the course of her submissions, referred to claims under section 15 and sections 20/21 of the 2010 Act, namely discrimination arising in consequence of her disability, and failure to make reasonable adjustments. Neither claim has been pled in this case, and accordingly there is no basis upon which the Tribunal can address them.

146. In addition, the claimant referred to the respondent having failed in its duty of care towards her, causing her injury and loss which was reasonably foreseeable in all of the circumstances. Again, this is outwith the scope of this hearing, both because the claimant has not given fair notice of such a claim in her pleadings, and also because such a claim belongs in the civil courts as a personal injuries claim.

147. Finally, there is a suggestion that the claimant is seeking to bring a claim of breach of contract, in relation to the refusal to grant her FWR. Again, no such claim is pled and therefore it belongs outwith the scope of the Tribunal's decision in this case.

148. While the claimant has represented herself in this case, and is thus left without the benefit of expert legal assistance, it is clear that she is not only familiar with court processes (albeit in criminal appeals), but has also received a law degree, a legal practice diploma and a Masters degree. It is legitimate to draw from that background that had she wished to raise such additional claims before the Tribunal she could have done so, and would have been in a position to understand the process to be followed. She did not do so, and indeed during the hearing before us made no attempt to amend her claim.

149. The issues before us were set out at the start of this Judgment, and we address them in turn now.

i. **Was the respondent aware, or ought they reasonably to have been aware, that the claimant was suffering from a disability from April 2016 onwards?**

150. The respondent has admitted that at the material time, from April 2016 onwards, the claimant was a disabled person within the meaning of section 6 of the 2010 Act. However, the Tribunal must determine whether the respondent was aware of that fact, or ought reasonably to have been aware of it.

151. The evidence on this matter was relatively sparse. That is not to say that the evidence before the Tribunal about the claimant's condition was sparse: very considerable evidence was heard about the history and causes of the claimant's condition. However, there was very little evidence available to the Tribunal to demonstrate that the respondent was, or ought reasonably to have been, aware that the claimant was suffering from a disability.

152. It is clear that in 2013, the claimant emailed Mr Moyes (154) in the course of which she said that "*I am currently seeing a counsellor for post-traumatic stress disorder after what occurred last year".* That statement fell within an email in which the claimant was seeking to explain why she could not attend at a particular meeting. Of itself, it adds little to Mr Moyes'

knowledge. The fact that she was seeing a counsellor for PTSD does not indicate that that condition amounted to a disability within the meaning of the Act. It was, in our judgment, a passing comment, of which Mr Moyes took note but was not expected to take any further action.

153. The respondent had in its possession 3 OH reports, in which no mention was made of PTSD at all, in August 2015, May 2016 and January 2017. The reason, according to the claimant, was that she did not mention that she had such a diagnosis to any of the OH advisers. That may be so, and it is not for the Tribunal to criticise the claimant for not having disclosed her full medical history to those advisers other than to suggest that if this were an important feature of her medical history and condition, it is very difficult to understand why she did not mention it in these consultations.

154. Be that as it may, it remains the case that the respondent, when provided with 3 OH reports (commissioned by management referrals with a view to obtaining a better understanding of the claimant's condition and how they may assist her back to and at work), was given no indication from August 2015 that she was still suffering from PTSD at that stage. Indeed, the claimant's own evidence on this point is in itself unclear, as she spoke about the fact that at certain points in this history she was not, or did not consider herself to be, suffering from PTSD, but from anxiety or depression (neither of which are relied upon as a disability in this case).

155. We are left to conclude that the respondent, having sought advice as to the causes of the claimant's illnesses, could not have divined from the information received from OH and from the claimant that she was, from April 2016 onwards, still suffering from PTSD, or suffering from it to such an extent that it was reasonable to conclude that it was having a substantial, adverse, long term effect on her ability to carry out normal day to day activities.

156. The fact that the claimant told Mr Moyes in 2013 that she was receiving treatment for PTSD does not, in our judgment, demonstrate that that knowledge should have led them to understand that her condition had

amounted to a disability in 2013, nor that in 2016 it amounted to a disability because of its continuing effect upon her. It is clear from the claimant's own evidence that the condition is one whose effects have not been consistently with her throughout that period.

157. Accordingly, it is our judgment that the respondent was not aware, and ought not reasonably to have been aware, that the claimant was suffering from a disability within the meaning of the 2010 Act, after April 2016.

ii. **Was the claimant subjected to harassment by Graeme Brown from April 2016 onwards, on the grounds of sex and/or disability?**

iii. **If so, was the respondent liable for such conduct on the part of Graeme Brown?**

158. The Tribunal heard a considerable volume of evidence from the claimant about her perspective on the interactions which she had with Graeme Brown from April 2016 onwards. There is little doubt that the relationship between the claimant and Mr Brown was a very poor one, and that their mutual distrust built up over a period of time to the point where, by the time the claimant went off sick towards the end of 2016, matters had reached an irretrievable point.

159. The question for the Tribunal is whether the respondent bears responsibility for the treatment of the claimant by Mr Brown, and if so, whether that treatment amounted to harassment on the grounds of sex and/or disability.

160. The respondent's responsibility for the actions of Mr Brown depends, in our judgment, on the extent to which it was drawn to their attention that his behaviour towards the claimant was unacceptable. The claimant sent a number of emails, and communicated directly with Mr Moyes, to complain about how she felt within the department. The Tribunal did not hear evidence from Mr Brown, and accordingly cannot make any specific findings

about his attitude to this matter, but we found Mr Moyes to be a credible witness, whose primary concern when the claimant complained to him about Mr Brown was that the individuals involved, being both senior and professional, should find a way to work together beyond what amounted to "petty squabbles" (in his words).

161. It was clear, however, that although the claimant raised the behaviour of Mr Brown on a number of occasions with Mr Moyes, she did so on an informal basis, and at no stage did she raise a grievance or a formal complaint under the Dignity at Work policy. We considered that the claimant was seeking to place too much emphasis, retrospectively, upon the words used in her emails to Mr Moyes to show that she was intending to make a formal complaint. The reality is that she did not, at any stage, submit a grievance, as it was open to her to do.

162. In our judgment, it was not unreasonable for Mr Moyes to treat the claimant's complaints as informal, and to seek to address them in that way with Mr Brown. It is clear that Mr Brown had complaints, perhaps of a different sort, to make about the claimant, and that Mr Moyes, though well-intentioned, was unable to find an effective solution to the disagreements between them. It is difficult to avoid the impression, particularly given Mr Moyes' frequent response in evidence that he could not remember particular discussions on this point, that he was a very busy man who regarded this as a trivial issue which should have been capable of resolution between two adult professionals.

163. While Mr Moyes may be criticised for his handling of this matter, and for not being more sensitive to the concerns of the claimant, we do not find that the respondent could be held responsible for the actions of Mr Brown. Mr Moyes gave evidence, which we accepted, that he spoke frequently to Mr Brown to tell him, for example, to stop questioning the claimant's start and finish times. It appears to have had little effect, but the claimant did not take the matter further, and accordingly it is not surprising nor unreasonable that Mr Moyes chose to treat these issues as informal.

164. The claimant sought to obtain support from her counsellor to demonstrate why it was that she did not raise a grievance, but we found this evidence not to be of assistance in drawing our conclusions. There may well have been good reason for the claimant to refrain from raising a grievance – though she was capable of submitting FWRs, and of continuing to carry out her professional role – but the respondent was entitled to rely on the fact that she did not raise a formal grievance against Mr Brown as an indication of the level of behaviour which was ongoing at that time.

165. In any event, the claimant demonstrated before us a tendency to exaggerate the effect of particular actions against her. For example, on 20 July, Mr Brown sent her an email (238), in which he told the claimant that the clerk in the appeal court had asked to see her about a report for a particular appeal, and asking her to look in on him during that afternoon. The claimant interpreted – and before us, continued to interpret – this email as extremely hostile and bullying, being supervisory in tone. The plain reading of the email, however, is that one colleague is simply passing on a message to another, from a third party. Mr Moyes was very supportive of the claimant when she drew this to his attention – and indeed, if we may say so, very patient – but we came to the view that the claimant was prepared to exaggerate the impact of this message upon her in order to provide a basis for a complaint against Mr Brown.

166. What follows in that email is perhaps instructive as to the true basis of the dispute between them, in that Mr Brown asked the claimant if she had contacted the bench about the appeal report, and if she intended to sit in on the appeal. In our judgment, much of the tension between Mr Brown and the claimant arose from the desire of Mr Brown to move as quickly as possible to phase 2 of the Lord Justice Clerk's proposed new role for the JAs, in order, perfectly understandably, to fortify his hopes of regrading. The claimant was not keen to move to phase 2, and resisted such overtures. That disagreement runs through the evidence from April 2016 onwards.

167. What is significant, in our judgment, is that while Mr Brown's conduct, on the face of it, may have been arrogant and unpleasant, we do not consider that the evidence demonstrates that, even had the respondent been responsible for such conduct, it was based on either sex or disability. There is no evidence whatsoever that Mr Brown was or should have been aware that the claimant was suffering from a disability from April 2016 onwards, and no basis for such a finding. Accordingly, we cannot find that his actions were taken on the grounds of the claimant's disability. So far as being based on her gender is concerned, we accept Mr Nichol's submission that any criticisms made about the claimant's timekeeping may have been based on her childcare commitments, but childcare of itself is not a protected characteristic, and it cannot be assumed that the burden of childcare falls mainly on a woman.

168. However, we found that Mr Brown's actions, insofar as we can make any conclusion about them at all without a grievance investigation or hearing from the witness himself, were not, in our judgment, based on the claimant's disability nor sex but upon his desire to see the new role of JA, set out in phase 2, implemented by all JAs as soon as possible, so that they could be upgraded as part of the JEGs exercise. That is not a basis upon which the claimant's claim that she was harassed on the grounds of sex or disability may succeed, and accordingly that claim must fail.

169. In any event, it is our conclusion that the respondent does not bear liability for the actions of Mr Brown.

iv. Did the respondent subject the claimant to direct discrimination on the grounds of sex and/or disability?

170. The basis upon which the claimant makes this complaint is somewhat unclear to the Tribunal. In her submission, she concentrated on allegations of indirect discrimination, and failures to make reasonable adjustments.

171. However, it is our conclusion that the respondent did not subject the claimant to direct discrimination on the grounds of sex or disability.

172. With regard to the disability discrimination claim, given that we have found that the respondent did not know nor ought they reasonably to have known that the claimant was, at the material time, a disabled person, we cannot find that their treatment of the claimant amounted to discrimination on the grounds of disability.

173. With regard to the claim of sex discrimination, it appears that the claimant complains that she was treated less favourably than a man would have been in relation to the treatment she received from Mr Brown, over a period of years. It appears that she is relying upon her status as a carer of children, in demonstrating that Mr Brown, by questioning her hours and her absences from the office due to childcare commitments, was discriminating against her on the grounds of sex.

174. We do not, ultimately, find that Mr Brown behaved towards the claimant as he did because of her sex. There is very little evidence to this effect. He was persistent in stressing to her the need for her to be present at particular times in the office, and he was not slow in expressing the view that her flexible working request would place him and others in some difficulty, and that they should have been consulted about it. However, there is no basis for suggesting that those attitudes had any bearing on Mr Moyes' decisions on the FWRs, nor indeed on Mr Marwick's appeal decision.

175. Accordingly, once again, we concluded that Mr Brown's priority here was to see the role of the JA upgraded, and that his annoyance with the claimant emerged from a sense that she was frustrating that objective. That she was a childcarer does not mean that remarks made within the office, no matter how inappropriate or obnoxious they might have been, were related to her sex but it is our view that his priority was relating to the desire to see the role upgraded.

176. We are therefore unable to find that the claimant was discriminated against on the grounds of sex or disability.

v. **Did the respondent breach section 80F of the Employment Rights Act 1996 in refusing the claimant's flexible working request dated 17 August 2017?**

vi. **Did the respondent subject the claimant to indirect discrimination on the grounds of sex in refusing the claimant's flexible working request dated 17 August 2017?**

177. We take these two issues together, as being related.

178. In our judgment, the respondent did not breach section 80F of the 1996 Act in refusing the claimant's FWR dated 17 August 2017. Fundamentally, standing section 80F(4), the claimant had no entitlement under the Act to have a second application considered within 12 months of her previous application having been granted. As a result, given that the Act provides no right for the claimant to have made a further FWR in August 2017, the respondent cannot have been in breach of section 80F by refusing it.

179. It is notable, in our judgment, that the respondent did consider it, taking the view that if they were to review it and find it acceptable they may be prepared to grant it, but that goes further than the statutory entitlement to have such a further application considered within 12 months.

180. The claimant's position on this matter was difficult to understand. She submitted, quite clearly, a second FWR on 17 August, in writing, amending the hours which she had been granted under her April FWR; and yet sought to maintain that, firstly, this was merely a continuation of the first FWR, and secondly, that it had been granted verbally by Mr Moyes.

181. We did not accept that this was a continuation of the first FWR. The hours sought (in terms of their distribution rather than their number) were different to the first FWR, and the claimant proceeded to submit the second application. At the time, in our view, the claimant was well aware that she

was making a second application. It was disingenuous of her to claim before us that she considered the process to be one rather than two.

182. Further, we did not accept the claimant's evidence that Mr Moyes had agreed to grant the second application. It was not clear when it was said he had agreed to this (the claimant appearing to suggest it was either in April, or in July by telephone, or possibly both), but what the claimant was asserting was also unclear. It appears that she was saying that Mr Moyes had told her that he was "minded" to grant the second FWR. Even if that were the case, that does not amount to confirmation that the application had been granted, and the process which followed quite clearly demonstrated that it needed to be considered in the way envisaged by the policy.

183. In any event, we found the evidence of Mr Moyes, that he had not agreed to such a further request at any stage, to be entirely credible and consistent. He said that the claimant had indicated to him that she may need to alter her hours once she knew what after school care was available for the children, but he was waiting for her to come back and confirm to him what specific change to her hours she was seeking. Since the new roles being introduced to the department would clearly involve the possibility of the claimant having to be at work at particular times on particular days to sit in on criminal appeals, Mr Moyes could not commit to agreeing to a particular pattern of work until he knew what it was that the claimant was seeking.

184. At best, the claimant's evidence was incoherent; at worst, it was simply disingenuous. We were unable to find any basis for her contention that the application had been granted at any stage by Mr Moyes, and we were prepared to prefer the evidence of Mr Moyes on this point.

185. So far as the claimant's complaint of indirect sex discrimination was concerned, we understand that the PCP which the claimant asserts was imposed upon her was that she require to work to the hours granted her following the first FWR in April 2017. We accepted Mr Nichol's submission that there was no evidence that women as a group would be disadvantaged

by such a refusal. The claimant was not prevented from working part time. She was permitted to work the hours which she had applied for. What was not permitted to her, for reasons which we found credible and justifiable, was to choose not to work at times when the department required her to work.

186. It was critical in our consideration of this aspect of the case that in the decision to refuse her FWR from August, the respondent offered the claimant the opportunity to work the chosen hours on an interim basis for 3 months, given that phase 2 was a pilot which would have to be reassessed. The claimant, for reasons we found unaccountable, declined this compromise, on the basis that she wished to argue that the application had already been granted. Her refusal to accept this offer of an interim solution was unreasonable in our judgment. As a result, we cannot find that the respondent did, in fact, impose upon the claimant the PCP of having to work the hours set by the first FWR.

187. Further, that PCP was not imposed, on the evidence before us, on anyone not sharing her protected characteristic of being female, and therefore her complaint was with the specific treatment of her by the respondent rather than on the basis of the imposition of a PCP.

188. In any event, there was no evidence before us to demonstrate that the PCP would impose any particular disadvantage upon the group to which the claimant belonged.

189. Accordingly it is our judgment that the respondent did not indirectly discriminate against the claimant by refusing the FWR in August 2017.

190. It is therefore our conclusion that the claimant's claims before this Tribunal must fail, and are therefore dismissed.

Employment Judge: Macleod

Judgment Date: 25 June 2018

Entered into the Register: 25 June 2018

And Copied to Parties