EMPLOYMENT TRIBUNALS

Claimant: Ms N Feltham

Respondent: Mayor and Commonality and Citizens of the City of London

Heard at: London Central Employment Tribunal

On: 5, 6, 11 and 12 (in chambers) October 2021

Before: Employment Judge E Burns
Ms S Campbell
Ms S Plummer

Appearances
For the claimant: In person
For the respondent: Mr C Adjei (counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that the following claims of the claimant succeed:

(1) the Respondent discriminated against her pursuant to section 15 of the Equality Act 2010 when it withdrew the offer of Customer Service in Housing; and

(2) the Respondent failed to comply with its duty to make a reasonable adjustment when it failed to offer her the right to be accompanied to the meeting on 3 April 2019.

All of the remaining claims fail.

REASONS

THE ISSUES

1. This is a claim arising from the Claimant's employment with the Respondent from 25 September 2017 to 31 July 2019.

2. The issues, which had been agreed at an earlier case management hearing, were:

2.1 Was the Claimant at the material times a disabled person? The Claimant relied on anxiety, depression and OCD.

The Respondent conceded part way through the hearing that the Claimant was a disabled person by reason of anxiety from February 2018 onwards.

2.2 Did the Respondent apply a provision, criterion or practice to the Claimant that placed her at a substantial disadvantage in comparison with persons who were not disabled? The Claimant relied upon Peter Sowemino and Wayne Garrigan conducting certain line management meetings on a one to one basis. Did the Respondent fail to make reasonable adjustments by not allowing the Claimant to have a person present with her at a meeting held on 30 October 2017?

2.3 Did the Respondent apply a provision, criterion or practice in respect of redeployment to the Claimant that placed her at a substantial disadvantage in comparison with persons who were not disabled?

2.4 Did the Respondent fail to make a reasonable adjustment by not redeploying the Claimant from December 2018?

2.5 In March 2019 was the Claimant refused a new role in customer service for City of London housing because of something arising in consequence of her disability (absence from work).

2.6 If so, was the treatment a proportionate means of achieving a legitimate aim. The Respondent relies on the need to provide an efficient and cost-effective public service, including the need to ensure regular attendance of staff in order to provide that service.

2.7 Did the Respondent apply a provision, criterion or practice to the Claimant that placed her at a substantial disadvantage in comparison with persons who were not disabled? The Claimant relied upon Peter Sowemino and Wayne Garrigan conducting certain line management meetings on a one to one basis. Did the Respondent fail to make reasonable adjustments by not allowing the Claimant to have a person present with her at a meeting held on 3 April 2019?

2.8 Was the Claimant shouted at by Wayne Garrigan on 3 April 2019?

2.9 Did the conduct have the purpose or effect of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

2.10 Was the conduct related to disability?

2.11 If the Claimant was subject to unlawful discrimination did that discrimination involve a fundamental breach of contract that the Claimant resigned in

response to without having affirmed the contract of employment so as to be a constructive dismissal for the purposes of the Equality Act 2010?

2.12 Were any of the claims submitted out of time; including whether they form part of conduct extending over a period the end of which is in time and/or whether it is just and equitable to apply a time limit in excess of 3 months

THE HEARING

3. The hearing commenced on the first day as a remote hearing by video. However due to technical difficulties, the Tribunal decided that it would be in the interest of justice for the hearing to take place in person. The parties were able to attend in person the following day and so the hearing was adjourned and restarted in person then.

4. In addition, with the agreement of the Respondent, the original hearing dates were varied to accommodate the Claimant's attendance at a compulsory training course for a new job.

5. The Claimant gave evidence. She also called her former colleague, a current employee of the Respondent, Christopher Nolan to give evidence on her behalf. He gave evidence via video.

6. The Claimant also provided a written witness statement from another former colleague, Nadia Dumtz. The Respondent did not wish to cross examine Ms Dumtz and she was not called as a witness. The Tribunal treated her evidence as accepted.

7. For the Respondent we heard evidence from:

- Peter Sowemimo, Assistant Head of Security
- Wayne Garrigan, Keep of the Central Criminal Court
- Alison Grayson, Corporate HR Business Partner

8. There was an agreed hearing bundle of 388 pages. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

9. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the Claimant was not legally disadvantaged because she was a litigant in person. We also made adjustments to accommodate the Claimant's anxiety and dyslexia, including allowing extra breaks and assuring that the Claimant was accompanied by her father for support. We regularly explained the process, and visited the issues when discussing the relevance of the evidence.

10. One issue of note arose regarding the evidence before us. The Claimant had made a covert recording of a meeting. Despite being ordered to do so, she had not managed, for technical reasons, to send the recording to the Respondent, nor had she prepared a true transcript of the recording. She

had, however, prepared a document which summarised what could be heard on the recording.

11. The Claimant brought her mobile phone to the first day of the in-person hearing and explained that an extract of the recording she had made was on her phone. The panel retired briefly so that the Respondent could listen to the recording in the tribunal room. Having listened to it, the Respondent did not object to the panel hearing the recording and we therefore listened to it at the start of the hearing before any witnesses were called.

FINDINGS OF FACT

12. Having considered all the evidence, we find the following facts on a balance of probabilities.

13. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

14. The Claimant commenced employed as a Security Officer, working 31.25 hours per week, at the Central Criminal Court on 25 September 2017. Her employment was subject to a six month probationary period.

15. The Claimant has dyslexia. She informed the Respondent of this prior to the start of her employment.

16. The Claimant says she was otherwise in good health at the start of her employment and was not aware of any other underlying conditions. We were not presented with any medical evidence covering the period prior to the start her employment.

17. The Claimant's role included working in the following areas: the public galleries, corridors, the main entrance, the Lord Mayor's entrance, the underground car park or the central control (CCTV) room. It involved her having contact with members of the public, some of whom could be difficult or challenging. She worked as part of a large team. There were just around 47 Security Guards in total at the time.

18. The Head of Security was James Ford. He was assisted by an Assistant Head of Security, Peter Sowemimo, who was essentially the Claimant's line manager. There were also several Security Supervisors who directed the day to day activities of the Security Guards. The Claimant was one of around 6 or 7 Security Guards who were recruited at the same time. They were all recruited on Grade A.

30 October 2017

19. On 30 October 2017, a meeting took place between the claimant and Mr Sowemimo, the Respondent's Assistant Head of Security. The reason for the meeting was because members of security management had raised

concerns about the Claimant's conduct and performance. Mr Sowemimo had witnessed the Claimant making, what he perceived to be an unprofessional comment.

20. The meeting was informal. The Claimant was not entitled under any of the Respondent's policies to be accompanied to the meeting and did not request this at any point before or during the meeting.

21. There is a factual dispute between the parties as to what was said at the meeting. The claimant says that as a result of the meeting on 30 October 2017 she began to experience symptoms of anxiety for the first time in her life. She did not seek medical assistance or take time off work, however.

22. No notes were made of the meeting, but Mr Sowemimo wrote to the Claimant following it outlining what had been discussed. The letter is dated 27 November 2017. In the letter, Mr Sowemimo warns the claimant that if her performance does not improve to the required standards, this could lead to her failing her probationary period and to the termination of her employment (B29-B31). We find this is what he told her at the meeting.

23. An outcome of the meeting was that the Claimant's performance was to be subject to an Action Plan. Mr Sowemimo kept an Action Plan Monitoring Log following the meeting. It runs from 20 November 2017 to 31 May 2018 and records various interactions with the Claimant, as noted by Mr Sowemimo (B213 – 212).

24. The letter also records that the Claimant complained about the behaviour of one of her colleagues, Barrington Sinclair towards her. Mr Sowemimo undertook some preliminary investigations into the Claimant's allegations, but formed the view that these were inconclusive and no further action was taken by him. The Claimant did not raise a formal grievance about Mr Sinclair's behaviour or Mr Sowemimo's investigation, but nevertheless felt aggrieved.

24 and 25 January 2018

25. An incident occurred on 24 January 2018 involved the Claimant being absent from her allocated work location.

26. Mr Sowemimo's log describes the incident on as follows:

Call from Security Manager, asking staff to ensure gallery is covered. On arrival at to the floor Nicole is sitting outside on the corridor. Whilst court 6 is sitting with members of the public unattended.	*Security manager calls Nicole to ask why she was not sitting in the galleries when he specifically asked her to ensure she was in the gallery. Nicole launches a tirade leaving James stunned and unable to talk. JF aske Nicole to*	*Due to the nature of the role Nicole is asked to go home as she was in no state to undertake the role*"

	come to the office Nicole refuses, starts crying JF send gallery supervisor to the floor to see if she was ok. On Arrival Nicolle is very upset. After 15-120 Supervisor asks Nicole to make her way to the office so she can discuss the situation. Nicole refuses to go the office stating she was to upset.	

(B215)

27. The following day, 25 January 2018, the Claimant met Mr Ford and Kim Green, Security Supervisor. She asked if she could be accompanied to the meeting, but this was denied by Mr Ford, because it was an informal meeting. According to the email Mr Ford wrote shortly after this meeting (which he sent to HR and his superiors) the Claimant walked out of the meeting before it was finished. It transpired that she had left work without letting anyone know. Mr Ford expressed the view that the Claimant was not suitable for a position in the Security Team and said he wished to terminate her contract in the email (B32).

28. The Respondent did not pursue the option of termination at that time, however, because of the Claimant's subsequent sickness absence.

Claimant's Sickness Absence (26 January to 19 March 2018)

29. The Claimant commenced a period of sickness absence lasting 37 days from 26 January 2018 to 19 March 2018.

30. Once the Claimant had been absent for more than 4 weeks, the Respondent referred her to its Occupational Health Service. The referral documentation (dated 14 February 2018) refers to the performance issues that had led to the meeting on 30 October 2017 and the incident on 24 January 2018. In it the Respondent asked for advice on whether the Claimant's conduct may be the result of an underlying condition. The referral form also records that the Claimant had been signed off by her GP until 28 March 2018 due to 'Anxiety and OCD and Work related stress' (B36 – B40).

31. We note that the referral form emphasised that due to staffing levels and increased operational requirements the security section was struggling to fulfil key aspects of the service (B38). This is also reiterated in two of the later referral forms (B68 and B81).

32. The Claimant was examined by Occupational Health on 21 February 2018. The resulting Occupational Health Report confirmed that the Claimant was signed off with anxiety and was receiving treatment (including medication) with arrangements underway for further psychological support. The report does not confirm that the Claimant had been diagnosed with OCD, but refers

to the possibility of her having this condition. There is no mention of depression in the report.

33. The OH advice was that the Claimant was not permanently incapable of undertaking the duties of other role, but could return to work on a phased basis (possibly with a permanent reduction in working hours) and should be supported in relation to attending therapy sessions once they commenced.

34. The OH Report included the following observation:

"Is it likely that the health problem meets the criteria for disability under the Equality Act?

Yes, from an Occupational Health perspective, I would consider her case as likely to meet the criteria for disability under the Act, which would entitle her to reasonable adjustments in the context of work. The final decision on the application of the Equality Act is a legal judgment, as you will know." (B43)

35. On the basis of this observation, the Respondent took the view that the Claimant was a disabled person and was protected under the Equality Act 2010.

36. The Claimant had also told Occupational Health that she felt victimised and a lack of support and fairness in the way she had been treated by the Respondent. She had said she believed her medical condition was linked to this (B41 – B42).

37. We were not provided with copies of all the Claimant's medical certificates. The medical certificate presented by the Claimant for the period from 20 February 2018 to 7 March 2018 states "Diagnosed with Obsessive Compulsive Disorder 28/12/2017. Started Treatment and Improving." The Claimant sent this medical certificate to the Respondent on 27 February 2018 (B45). The medical certificate had not been seen by the Occupational Health Adviser, but was consistent with what the Claimant told the Occupational Health Adviser.

38. Because of her sickness absence, the Claimant was invited to a meeting described as a "Stage 1 Formal Sickness Absence Management meeting - long term" with Mr Sowemimo & Helen Retter (Senior HR Business Partner) on 6 March 2018. She was accompanied to the meeting by her colleague Christopher Nolan. Following the meeting, Mr Sowemimo sent her a letter (dated 7 March 2018) recording the discussions at the meeting and the outcome (B50-B55).

39. The letter records that the Claimant told Mr Sowemimo that she had been diagnosed with anxiety on 28 December 2017. She said she was being treated with medication (50g Sertraline daily) and was waiting to commence a course of CBT. The Claimant confirmed that she had no previous history of anxiety.

40. We find, as a matter of fact, that the Claimant was diagnosed with anxiety and possible OCD on 28 December 2017 and this was the first time she had sought medical assistance with her mental health.

41. When asked about the references to feeling victimised in the Occupational Health Report, the Claimant referred to the incident involving Mr Ford and her earlier complaint about Barrington Sinclair (B51–B53)

42. The Claimant also informed Mr Sowemimo at this meeting that she had dyslexia. He had not been personally aware of this until the meeting.

43. Mr Sowemimo informed the Claimant that he had decided to extend her probation period by one month to 24 April 2018. The reason he gave for the extension of probation was because of the Claimant's absence. (B54).

44. Although it was anticipated that the Claimant would be well enough to return to work on a phased basis from 8 March 2018, she developed a kidney infection and was admitted to hospital. This led to a delay in her being able to return to work until 19 March 2018. Her return was initially short-lived because she was absent again between 29 March and 3 April 2018 due to a recurrence of the kidney infection. The Claimant returned to work on 4 April 2018.

Probationary Review: April 2018 – June 2018

45. By the beginning of April 2018, Mr Ford was absent on long term sick leave. The manager to whom he reported, Wayne Garrigan, The Keeper of the Central Criminal Court, took on the role of acting Head of Security. In this role he was required to undertake a formal review of the Claimant's probation.

46. The claimant met with Mr Garrigan & Berni Stockle (HR Advisor) on 24 April 2018 for this review. The Claimant was informed that she was entitled to be accompanied to the meeting, but chose to attend the meeting alone.

47. According to the letter written to the claimant afterwards, it was a positive and supportive meeting. The Claimant did not dispute this. Mr Garrigan extended the claimant's probation for a further two months to 26 June 2018, but in conjunction with a range of supportive measures, including a Stress Risk Assessment (B57 - B59).

48. The Claimant had no absences or work issues for the next two months and on 28 June 2018, the Respondent wrote to her to confirm that she had passed her probation and was confirmed as a permanent member of staff (B60).

July – November 2018

49. The Claimant was then absent on the following occasions for the following reasons:

- 04/07/2018 06/07/2018 (2 days) - Anxiety and OCD

- 16/07/2018 17/07/2018 (2 days) - Kidney Infection
- 16/08/2018 16/08/2018 (1 day) - Kidney Infection
- 31/08/2018 31/08/2018 (1 day) - Kidney Infection

50. This led Mr Sowemimo to conduct an informal meeting with the Claimant on 6 September 2018. He recorded the discussion at the meeting and the outcome of it in a letter dated 7 September 2018. The letter notes that the Claimant was scheduled to start 12 weekly CBT sessions in the near future. The Claimant also agreed to a referral to Occupational Health (B63 – B65).

51. The Occupational Health referral took place on 19 September 2018 (B70-B71). The Claimant had commenced her CBT counselling at this stage. The report refers to the Claimant having a long term anxiety condition, recurring kidney and urinary tract infections and a vitamin B12 deficiency. There is no mention of low mood, depression or OCD.

52. Following receipt of the OH Report, the Respondent invited the Claimant to attend a meeting said to be a "Stage 1 Formal Sickness Absence Management (SAM) meeting short term". The meeting took place on 25 September 2018. By this date, the Claimant had had two further absences, each being only 1 day for Anxiety.

53. The meeting was conducted by Mr Sowemimo and Alison Grayson, HR Business Partner. The Claimant was accompanied by Mr Nolan. The discussion at the meeting and the outcome of it were in a letter dated 26 September 2018 (B72 - B75). The letter records that the Claimant had had six of her 12 weekly CBT sessions by this date.

54. The outcome of the meeting was that the Claimant was set a Stage 1 formal Attendance Plan for 8 weeks commencing 25 September 2018. The Respondent's concern was that the Claimant had had so many incidences of short term absence. The OH report had indicated the Claimant was medically fit for work, but suggested various measures were needed to continue to support her as a result of her anxiety.

55. There was also a discussion about the possibility of a permanent reduction to her hours. The Respondent offered the claimant a contract variation reducing her hours to 25 hours per week on 27 September 2018 (B76-78). The Claimant declined to accept the variation because she could not afford to accept the offer.

December 2018 OH Report

56. The Claimant was referred to Occupational Health again on 30 November 2018. She had not been absent again. The referral on this occasion was primarily because her weekly CBT sessions were due to come to an end. The Respondent was considering whether or not to fund further counselling for the Claimant and wanted advice from Occupational Health as to whether this would be of benefit to the Claimant (B79 – B82).

57. The claimant was reviewed by Occupational Health on 18 December 2018, who confirmed that she would benefit from further counselling.

58. The report stated:

"Current situation

She describes feeling better supported recently but continues to have a perception of work-related stress. This appears to increase her levels of anxiety and, as indicated in the referral, a further period of counselling may be indicated. I would invite you to contact me by separate email to arrange the relevant administrative details. She continues, in my opinion, to be fit for her role as described but you may wish to consider an individual stress assessment utilising a suitable model such as the HSE Management Standards. In this way, she can better articulate how her current role leads her to feel stressed and, in turn, you may gain better insight into these stressors and consider what operational reasonable adjustments you may be able to make to alleviate these. I refer to perception as it is our individual response to events that give rise to the feelings that lead to stress. The causes of work-related stress are largely organisational, rather than medical in nature thus the root solution is also likely to be organisational rather than medical. Continuing reviews and regular one-to-one support is strongly recommended. We discussed work at length in its wider forms and she may well be suited for internal transfer or redeployment should a suitable Corporation vacancy occur. There is no evidence based on the information currently available, of incapacity." (B83 – 84)

59. Neither the Claimant nor the Respondent acted upon the suggestion of internal transfer.

60. Although not raised in the referrals, the Claimant's conduct at work continued to be matter of concern for Mr Sowemimo on occasions. He kept a log of various interactions with the Claimant from September 2018 onwards. Some of the entries refer to informal one to one conversations between him and the Claimant where he asked about her welfare. Others note occasions where the Claimant had to be spoken to about her behaviour. Mr Nolan told us that sometimes he would occasionally accompany the Claimant to meetings with Mr Sowemimo, but not all of them.

Spring 2019

61. The Claimant had no further absences in the early part of 2019. She provided the Respondent with a medical certificate in February 2019, however, which indicated that she required a phased return to work, amended duties and altered hours between 15 February and 15 March 2019 due to recurrent migraines (B93). As the medical certificate did not provide very precise detail of the hours or work the Claimant could undertake, the Claimant was referred to Occupational Health for advice.

62. The Claimant submitted a formal grievance in relation to her progression through the Security Career Grade Scheme to grade B at around this time. This was a matter which was causing her to feel stressed as it impacted on

her financial remuneration which had been adversely affected by changes to the benefits system (B86). This issue was eventually resolved with the Claimant being given a backdated pay increase, but not until early April 2019.

63. Prior to the Occupational Health appointment, the Claimant completed a stress risk assessment in conjunction with one of the Supervisors, Dean Taylor on 5 March 2019. Although the document notes some minor interpersonal issues involving a few colleagues and some concerns, it portrays a positive picture overall in which the Claimant said she was generally happy in her role and felt adequately supported (B94-B98).

64. The Claimant saw Occupational Health on 6 March 2019. The report dated 7 March 2019, reported that the Claimant was suffering migraines for which she had been prescribed pain medication by her GP. It suggested the condition was likely to be linked with her underlying anxiety condition and recommended that she continue working reduced hours and that funding for counselling should be approved. The report makes no mention of redeployment, depression or OCD (B99-B101).

65. On 7 March 2019, the Claimant became angry at comments that had been made about her relationship with Mr Nolan. She interrupted a meeting of the Security Team Supervisors and levelled accusations at Mr Taylor and Mr Sowemimo. At a meeting held shortly afterwards, Mr Taylor and Mr Sowemimo were later able to calm the Claimant down. She apologised for her behaviour saying it was because of her mental health condition and became emotional and tearful. Initially no action was taken as a result of the incident, but as can be seen below it became a matter that was the subject of a later disciplinary investigation.

66. We note that the Claimant asked to be accompanied by Mr Nolan at the meeting. Although he did accompany her initially, he was asked to leave because the meeting was informal.

Housing Role

67. At around this time, the Claimant applied for the role of Customer Services Officer in the Respondent's Housing Department. The Tribunal were not provided with a job description for this role, nor any information about the size of the department in which the Claimant would have worked, the number of people doing the role of Customer Services or working pattern in terms of hours and working days.

68. The application form explained that the Respondent participated in the scheme whereby disabled applications that met the essential criteria for a role would be interviewed. The Claimant answered positively that she had a disability, but was not required to provide any further details (B113).

69. The Claimant successfully interviewed for the role which led the Housing Department to offer it to her, subject to references. She was led to believe that the Housing Manger was very keen for her to take up the role.

70. Mr. Sowemimo completed a reference for the Claimant. The reference he provided was very positive. It asked a specific question about the Claimant's sickness record, however. Mr Sowemimo confirmed, correctly, that she had had 51 days off sick in the previous two years (B115-B116).

71. The Housing Manager decided to withdraw the job offer because of the Claimant's level of sickness. We were told by Ms Grayson that this was because the role was a front-line facing role dealing with queries and complaints from council housing tenants in which a high level of sickness absence could not be tolerated.

72. The Claimant learned that the job offer had been withdrawn on 25 March 2019. She was upset and tried to speak to Ms Grayson to understand the decision better.

73. Although the Head of the HR department was aware that the Claimant had an underlying health condition which it had determined meant she should be treated as a disabled person for the purposes of the Equality Act 2010, this information was not shared with the Housing Manager. It was also unknown to the member of the HR team responsible for assisting with the recruitment to the role. Ms Grayson told us this was for data protection reasons and that the Claimant could have approached the Housing manager herself. We note, however, that no-one in the HR department sought the Claimant's consent to share information about her disability with the relevant HR adviser or the Housing Manager.

Incident on 2 April 2019 and Subsequent Meeting on 3 April 2019

74. On 2 April 2019, a member of the public made a formal complaint about the behaviour of the Claimant and Nadia Dumetz. The complaint was in the form of a letter addressed to Mr Garrigan which he received that evening (B119-B120). On the same day, the Claimant refused to provide cover at the Lord Mayor's entrance while one particular colleague was stationed there.

75. Mr Garrigan decided that the incident should be investigated formally. On 3 April 2019, he told Mr Sowemimo about the complaint and asked him to find the Claimant and Ms Dumetz so that he could meet with them. Ms Dumetz was not on shift that day, but the Claimant was in work.

76. Mr Sowemimo went to find the Claimant to bring her to Mr Garrigan's office. He did not forewarn her that Mr Garrigan had received a complaint about the Claimant and wanted to discuss it with her. Nor did he offer the Claimant the opportunity to be accompanied at the meeting.

77. The Claimant made a covert recording of the conversation that ensued which the panel was satisfied was a genuine recording of the entire interaction that took place. The Respondent disputed this on the basis the recording was only 3-4 minutes long. Mr Sowemimo said he thought the meeting took longer and parts had been excluded, but we do not agree. The recording begins with him and the Claimant arriving in the room and ends with Mr Garrigan asking the Claimant to leave.

78. The discussion deteriorated very quickly. Mr Garrigan began by asking the Claimant about the incident the previous day. She replied that she did not know what he was talking about and tried to ask him questions about it. Although Mr Sowemimo tried to provide more detail to the Claimant about the incident at the Lord Mayor's entrance, Mr Garrigan became frustrated that the Claimant was interrupting him. His voice can be heard shouting over the Claimant saying that he is not prepared to discuss the matter and it will be proceeding to a disciplinary. The meeting concluded when Mr Garrigan asked the Claimant to leave his office. The Claimant does not make a request to be accompanied at any time during the discussion.

79. The Claimant experienced a panic attack shortly after the meeting, while she was still at work. An ambulance was called for her. She was able to be treated while present at work rather than have to be taken to hospital. She left work early and was then absent on sick leave from work until 20 May 2021.

80. The Claimant submitted a fit note to the Respondent which said "*Panic attack on 3 April triggered by management meeting …. Unfortunately this incident means that Nicole will struggle even further with her mental health and it now seems appropriate that she is offered an alternative workplace.*"

April to July 2019

81. While the Claimant was absent, Mr Garrigan was appointed to conduct an investigation into the complaint received about the incident on 2 April 2019. The investigation also included the earlier incident that involved the Claimant that had occurred on 7 March 2019. The Respondent has a policy that prohibits the internal transfer of an employee when under a disciplinary investigation. This would have applied to the Claimant from 3 April 2019 onwards.

82. The Claimant was referred to Occupational Health on 25 April 2019. The referral asked various questions, including a request for advice about the GP's recommendation that the Claimant found an alternative workplace (B126).

83. The Claimant was examined on 3 May 2019. The OH report confirmed that her anti-anxiety medication had been increased to 100 mg by the Claimant's GP. On the question of an alternative workplace, the OH report said the following:

As mentioned, she raises several perceived difficulties including being treated unfairly by management and colleagues, lack of line management support, historical issues as outlined in the work place stress risk assessment and the pending formal investigation. The actual duties of her post do not seem to be her main concerns therefore redeployment specifically on medical grounds is unlikely to be necessary particularly if some of these concerns can be addressed/ resolved. That said, the break down in working relationships/ trust may be difficult to rebuild and she is also finding it difficult to foresee a return to the role. Taking this into

consideration, the organisation may wish to look at an alternative post to help facilitate a return to work." (B131)

84. The Claimant was invited to a meeting called a Stage 2 sickness absence management meeting with Mr Sowemimo & Ms Stockle. The meeting took place on 10 May 2019. The Claimant was initially unaccompanied at the meeting. Part way through, however, she asked that the meeting be adjourned so that she could be accompanied by Mr. Nolan. The Respondent allowed this.

85. The discussions at the meeting and the outcome were recorded in a letter dated 15 May 2019. The Claimant said that she believed her panic attack was brought on by being told about the investigation at the meeting on 3 April 2019. She was informed that the Respondent considered the investigation was necessary, but reassured that she would be given the opportunity to be accompanied at any interview. The Occupational Health Report had also suggested as an alternative that she could provide a written submission.

86. The Claimant was moved to stage 2 the Respondent's Absence Management Process. It was agreed that she would receive CBT funded by the Respondent. Redeployment to an alternative role was not discussed at the meeting (B135-B138).

87. The Claimant returned to work on 20 May 2019 on a phased basis. She was not required to work in the public galleries or any area where she would have contact with the public. Instead, she was assigned to work in the Control Room. She was interviewed for the purposes of the disciplinary investigation by Mr Garrigan on 23 May 2019. She was permitted to be accompanied by Mr Nolan.

88. The Claimant commenced the ACAS early conciliation process on 18 June 2019 (A13).

Claimant's Resignation

89. Mr Garrigan concluded the disciplinary investigation on 20 June 2019. His recommendation was that the Claimant should face disciplinary action in connection with the incident on 7 March 2019, which he determined constituted potential misconduct, and the incidents on 2 April 2019, which he determined constituted potential gross misconduct (B139-B151).

90. The Claimant was invited to attend a disciplinary hearing scheduled to take place on 17 July 2019. It did not take place, however. This was because on 16 July 2019, Mr Nolan handed a resignation letter to Mr Garrigan on behalf of the Claimant. The letter explained that the Claimant was resigning with immediate effect.

91. The letter states that the reasons for the Claimant's resignation, "*are due to my health deteriorating due to the way I have been treated from the time I started leading up to now. I have also been judged and treated with great difficulty due to a relationship I had with one of my colleagues. I have*

suffered mentally and psychically from this place of work and I am no longer willing to make my health suffer." (B196)

92. The Respondent accepted the resignation and did not proceed with the disciplinary hearing. As the Claimant had some accrued untaken annual leave, the Respondent treated her as remaining employed until 31 July 2019 but she was not required to attend work during the period between 16 and 31 July 2019 and was paid in full (B197).

93. The Acas early conciliation certificate was issued on 18 July 2019 and the Claimant presented her claim to the tribunal on the same date.

LAW

Disability

94. Disability is a protected characteristic under section 4 of The Equality Act 2010 (the Act).

95. In order to be disabled for the purposes of the Equality Act 2010, a person must meet the requirements in section 6 of the Equality Act 2010. These are supplemented by the provisions of Part 1 of Schedule 1. The tribunal should also have reference to the "Employment: Statutory Code of Practice" and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" published by the Equality and Human Rights Commission (EHCR).

96. Section 6(1) of the Equality Act 2010 says that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

97. There are four key questions:

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?

98. The EHRC Guidance tells us that physical or mental impairment should be given its ordinary meaning (paragraph A3). The EHRC Code explains that the term "mental impairment" is intended to cover "a wide range of impairments relating to mental functioning, including what are often known as learning disabilities" (paragraph 6 of Appendix 1, EHRC Code).

99. “Day-to-day activities” are things people do on a regular or daily basis. This can include general work-related activities, but not unusual or specialised activities.

100. “Substantial” effect means more than minor or trivial (section 212(1) Equality Act 2010).

101. When considering adverse effect, any medical treatment [or other measures] is to be disregarded (paragraph 5(1), Schedule 1, Equality Act 2010)

102. According to paragraph 2(1)(a) – (c) of Schedule 1 of the Equality Act, the effect of an impairment will be considered to be long term if:

- It has lasted for at least 12 months;
- It is likely to last for at least 12 months; or
- It is likely to last for the rest of the life of the person affected.

103. In *All Answers Ltd v W and anor* [2021] EWCA Civ 606 the Court of Appeal confirmed that where a condition has not lasted at least 12 months at the time of the alleged discriminatory acts, the test is whether, at the time of the alleged discriminatory acts, the claimant’s condition was likely to last 12 months or for the rest of their life. “Likely” should be interpreted as meaning that it could well happen (e.g. EHRC Guidance, Paragraph C3). The tribunal cannot take into account what happens subsequently, but must make an assessment by reference to the facts and circumstances existing at the date of the alleged discriminatory acts.

Discrimination Arising from Disability

104. Subsection 15(1) of the Equality Act 2010 provides that:

A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim

105. Limb (a) involves a two stage test:

- Did the claimant's disability cause, have the consequence of, or result in, "something"?

- Did the employer treat the claimant unfavourably because of that "something"?

It does not matter which way round these questions are approached.

106. According to subsection 15(2), subsection 15(1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. It is not necessary, however, for A to be aware that the "something" arises in consequence of B's disability (*City of York Council v Grosset* [2018] EWCA Civ 1105).

107. The concept of unfavourable treatment is unique to section 15. In the case of *Williams v Trustees of Swansea University Pension and Assurance Scheme and another* [2018] UKSC 65, the Supreme Court said it was a similar to a detriment. In particular, there is a requirement that the disabled person "must have been put at a disadvantage." No comparator or comparison is required.

108. Known as the test of objective justification, the leading case on limb (b) is *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110, ECJ. The Court held that, to justify an objective which has a discriminatory effect, an employer must show that the means chosen for achieving that objective:

- correspond to a real need on the part of the undertaking
- are appropriate with a view to achieving the objective in question, and
- are necessary to that end.

109. A balancing act is required. The discriminatory effect of the treatment has to be balanced against the employer's reasons for it. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (*Homer v Chief Constable of West Yorkshire* [2012] UKSC 15)

110. When determining whether or not a measure is proportionate it is relevant for the tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2017] UKSC 27). The tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied (*The Trustees of Swansea University Pension & Assurance Scheme and another v Williams* UKEAT/0415/14).

111. The tribunal is required to make an objective assessment which does not depend on the subjective thought processes of the employer. This question is not to be decided by reference to an analysis of the employer's thoughts and actions. The question is whether the treatment, objectively assessed, at the time it occurred, a proportionate means to achieve a legitimate aim irrespective of the process adopted by the employer.

112. We must also consider the guidance contained in the EHRC Statutory Code of Practice that is relevant to this question. This is contained, in particular at paragraph 5.12 which states that:

"*It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."*

The guidance in paragraphs 4.28 – 4.32 is also relevant.

Reasonable Adjustments

113. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

114. Section 20(3) provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

115. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

116. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

117. In *Environment Agency v Rowan* 2008 ICR 218 and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT gave general guidance on the approach to be taken in reasonable adjustment claims.

118. A tribunal must first identify:

- the PCP applied by or on behalf of the employer
- the identity of non-disabled comparators; and
- the nature and extent of the substantial disadvantage suffered by the claimant in comparison with the comparators

119. The phrase PCP is interpreted broadly. The EHRC Code says (paragraph 6.10):

"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."

120. In *Ishola v Transport for London* [2020] ICR 1204 the Court of Appeal said that all three words "provision", "criterion" and "practice" "..*carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again*."

121. Once the three matters outlined above have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made

reasonable adjustments as matter of fact, not whether it failed to consider them.

122. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the claimant, but also take into account wider implications including the operational objectives of the employer.

123. The Statutory Code of Practice on Employment 2011, published by the Equalities and Human Rights Commission, contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

Harassment

124. Section 40(1)(a) of the Act provides that an employer must not, in relation to employment by it, harass a person who is one of its employees. The definition of harassment is contained in section 26 of the Act

125. Section 26(1) of the Equality Act 2010 provides:

"A person (A) harasses another (B) if

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

126. The unwanted conduct must be shown "to be related" to the relevant protected characteristic.

127. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

128. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that affect.

Burden of Proof in Discrimination cases

129. Section 136 of the Equality Act contains provisions dealing with the burden of proof in discrimination cases which envisage a two-stage process. Initially it is for a claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from a respondent, that the respondent committed an act of unlawful discrimination.

130. At the second stage, discrimination is presumed to have occurred, unless a respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was not unlawful discrimination. A respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

131. Guidelines on the application of the predecessor of section 136 of the Equality Act 2010 were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142* and *Madarassy* v *Nomura International Plc [2007] EWCA Civ 33*. The decision of the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 confirms the guidance in these cases applies under the Equality Act 2010.

132. In *Laing v Manchester City Council* [2006] IRLR 748, the EAT observed that it will not always be necessary for the tribunal to adopt the two-stage approach and the tribunal's focus must be at all times be the question whether or not they can properly and fairly infer discrimination from the evidence before them.

Time Limits

133. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

134. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

135. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

136. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

137. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

138. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach is for the tribunal to *assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of British Coal Corporation v Keeble* [1997] IRLR 36 set out below, as well as other potentially relevant factors:

- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

139. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule **(***Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

ANALYSIS AND CONCLUSIONS

Was the Claimant a disabled person? (Issue 2.1)

140. As noted above, the Respondent conceded part way through the hearing that the Claimant met the definition of a disabled person for the purposes of the Equality Act 2010 by reason of anxiety from February 2018 onwards.

141. It was important for the Tribunal to consider if the Claimant met the definition from an earlier date, however, because the Claimant's claim included a claim of potential disability discrimination on 30 October 2017 which pre-dated February 2018. In considering this question we took into account the other two conditions relied upon by the Claimant, namely OCD and depression.

142. The burden of proof was on the Claimant to show that she was a disabled person at an earlier date. To satisfy the burden of proof she needed to present evidence that supported her argument.

143. The Claimant referred us to her GP notes for the period from 26 January 2018 to 11 March 2019. These were supplemented by duplicate medical certificates from her GP, although the Claimant admitted that not all of these had been given to the Respondent.

144. We were also provided with the Claimant's sickness record at the Respondent for the period 26 January 2018 to 20 May 2019 and we were referred to the four occupational health reports that had been completed dated 21 February 2018, 18 December 2018, 7 March 2019 and 3 May 2019. We also had the notes from the various sickness absence meetings held with the claimant.

145. The Claimant told us in her evidence that she had not a mental health condition prior to joining the Respondent. She said that her symptoms first began ***after*** her meeting with Mr Sowemimo on 30 October 2017. She did not take any time off work and did not seek medical assistance until December 2018, when she was diagnosed with anxiety and possibly OCD.

146. In light of this, we conclude that the Claimant did not meet the definition of a disabled person as at 30 October 2017 because none of her symptoms had begun to manifest themselves prior to this date.

147. The panel has not found it necessary to resolve the question as to whether the claimant was disabled by virtue of the other conditions she relies upon. Our decision making in relation to each claim, set out below, would not be any different.

Reasonable Adjustment Claim – Meeting on 30 October 2017 (Issue 2.2)

148. It follows from our decision that the Claimant was not a disabled person as at 30 October 2017 that this claim fails.

Reasonable Adjustment Claim - Redeployment (December 2018 to end of employment) (Issues 2.3 to 2.4)

149. It is not disputed that the Respondent made no proactive attempt to and did not redeploy the Claimant.

150. The PCP on which this claim is based is not particularly clear in the Issues. We have analysed the claim on the basis that the Respondent had two PCPs which were applied to the Claimant. There were:

    (a) the practice of not proactively redeploying employees without a medical recommendation; and

    (b) not permitting internal transfers where an employee is subject to a disciplinary investigation.

151. In this case, redeployment was not medically recommended at any time.

152. The first reference to redeployment was in the report dated 18 December 2018. Here, Occupational Health suggested that the Claimant *"may well be*

suited for internal transfer or redeployment should a suitable Corporation vacancy occur." This was not, in our judgment, a medical recommendation that she should be redeployed, but a suggestion intended to be helpful, because of the Claimant's perceptions about her relationship with management in her role.

153. Redeployment was not mentioned in the OH report dated 7 March 2019. The OH report of 3 May 2019, however, expressly stated that, "*The actual duties of her post do not seem to be her main concerns therefore redeployment specifically on medical grounds is unlikely to be necessary…"* It went on to suggest that an internal transfer might be helpful to facilitate a return to work because of the Claimant's perception that relationships had broken down. The Claimant did not challenge this conclusion when she met with the Respondent at the sickness absence meeting on 10 May 2019 and in fact, did not raise redeployment at this meeting at all.

154. We have considered whether the first PCP caused the Claimant substantial disadvantage when compared to hypothetical non-disabled comparators in the same material circumstances as her. In our judgment it cannot have done so. Hypothetical non-disabled comparators who wished to move elsewhere because of their perceptions about their relationships with management would have been in the exact same position as the Claimant. That position was, from December 2018 until 3 April 2019, that she was free to apply for internal vacancies, but not entitled to have the respondent proactively seek to or redeploy her.

155. Similarly, the second PCP did not, in our judgment, cause the Claimant substantial disadvantage when compared to hypothetical non-disabled comparators in the same material circumstances as her. This PCP only applied from 3 April 2019 onwards. At this time, there was no medical recommendation that the Claimant should be redeployed. All that the Occupational Health Adviser said was that an internal transfer might facilitate a return to work. In fact, as we know, the Claimant was able to return to work from 20 May 2019 without the need for an internal transfer.

156. As we have concluded that the Claimant did not suffer any substantial disadvantage as a result of the PCPs applied to her, when compared to non-disabled hypothetical comparators in the same circumstances, this claim fails.

157. We add, however, for the sale of completeness, that if our analysis is incorrect on the issue of substantial disadvantage, we would in any event reject the claim for another reason. That reason is because we do not consider redeployment constituted a reasonable adjustment for the Respondent to have to take, when it was not medical recommended.

158. Even a relatively large employer such as the Respondent has a limited number of roles. Although it is appropriate to require an employer to redeploy disabled employees where there is medical advice that the new role would alleviate substantial disadvantage, to expand the obligation to

circumstances where it might simply be helpful is not objectively reasonable and places too high a burden on the employer.

Discrimination Arising because of Disability Claim - Customer Services Role (Issues 2.5 and 2.6)

159. It is not disputed that the Respondent offered the Claimant a Customer Services Role in its Housing Department, but withdrew it. This meets the legal definition of unfavourable treatment for the purposes of section 15 of the Equality Act 2010.

160. The Claimant learned about the decision to withdraw the offer of the Housing Customer Services Role on 25 March 2019. The Respondent accepted during the hearing that the claim is therefore in time, as the Claimant commenced the ACAS early conciliation process less than 3 months later on 18 June 2019.

161. It is not disputed that the reason that the Respondent withdrew the offer of the Housing Customer Services role from the Claimant was because of her absence record and the fact that she had had 51 days of sickness absence. Of the 51 days that the Claimant had been absent, 42 days were because of Anxiety with only 9 days being for other reasons. We therefore conclude that the reason for the withdrawal of the job offer was something arising from the Claimant's disability.

162. The Respondent has argued that the discrimination was not unlawful because it was objectively justified because of the need to provide an efficient and cost-effective public service which included the need to ensure regular attendance of staff in order to provide that service.

163. The Tribunal considers this need can constitute the basis of a defence of objective justification, but that defence is not sufficiently made out here. The onus is on the Respondent to justify to the Tribunal any potentially discriminatory decision and demonstrate that it has acted proportionately.

164. In this case, the Respondent has failed to adduce any evidence supporting its argument, other than in very general terms. The Tribunal did not hear evidence from the Housing Manager who was the decision maker responsible for making the potential discriminatory decision or the person who provided her HR support. Based on what we were told, neither the Housing Manager nor her HR Support were made aware the Claimant was disabled, even though the Respondent had full knowledge of her condition. They cannot therefore have been able to give consideration to whether the decision was a proportionate one that did not discriminate more than necessary or whether the Claimant's disability could be accommodated.

165. Although the Claimant had had a significant period of absence, this primarily dated back to January 2018, around 16 months earlier, when she was first diagnosed. Once she had been taking her medication for around 8 weeks she returned to work. Although she had some linked absences following this as a result of recurrent kidney and urinary tract infections, the medical evidence did not suggest that she would not be able to maintain a

satisfactory level of attendance. At the time the decision was made, she had not had any full days off sick for a period of around six months since 21 September 2018.

166. As noted above, the only information we were told about the new role was that it was a front-line customer facing role. The Claimant's existing role was also a front-line customer facing role. Notwithstanding that the security section had staffing resource issues and its own demands, it had been possible for the Respondent to make various adjustments to enable the Claimant to continue in her role. In our judgment, in the absence of any evidence to the contrary, it would have been possible to accommodate the Claimant in the new role. For this reason, the Claimant's claim succeeds.

Reasonable Adjustment Claim – Meeting on 3 April 2019 (Issue 2.7)

167. It is not disputed that the Respondent did not offer the Claimant the opportunity to be accompanied to the meeting on 3 April 2019.

168. The PCP on which this claim is based is expressed to be Peter Sowemino and Wayne Garrigan conducting certain line management meetings on a one to one basis. We consider a more accurate way of describing this PCP was the Respondent's policy or practice of not permitting employees to be accompanied to informal meetings. Mr Sowemimo told us this was the Respondent's policy and it is evident from the records of the incident on 7 March 2021 that this was a practice that had previously been communicated to the Claimant.

169. We consider that this policy placed the Claimant at a substantial disadvantage on 3 April 2021 in comparison with persons who were not disabled by reason of an anxiety condition. The Claimant's anxiety condition meant that she was more vulnerable to becoming distressed and panicky when negative issues were communicated to her by managers.

170. We consider it was reasonable for the Respondent to have offered the Claimant the opportunity to be accompanied to the meeting held on 3 April 2019. Mr Sowemimo had full knowledge of the Claimant's condition and had witnessed her becoming distressed first-hand. He came very close to acknowledging in his oral testimony that he could easily have forewarned the Claimant that Mr Garrigan wished to speak to her about a serious matter and arranged for Mr Nolan to accompany her. Although impracticable to do this on each and every occasion the managers needed to speak to the Claimant, the matter which was to be discussed on 3 April 2019 was treated by the Respondent as very serious and in our judgment required this adjustment.

171. We have noted that the Claimant did not ask to be accompanied at the meeting. We do not consider this prevents the Respondent being liable. The Claimant had no information about the purpose of the meeting. As set out in our findings of fact, the discussion was very quick and deteriorated very quickly. It is not surprising to us that the Claimant did not try and ask to be accompanied. She was not, in our judgment, given an opportunity to do so once the meeting had begun.

Disability Related Harassment Claim – 3 April 2019 (Issues 2.8 – 2.10)

172. We have found, as a matter of fact, that the Claimant was shouted at by Wayne Garrigan on 3 April 2019. We do not consider that Mr Garrigan purposely meant to violate the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for her, but his manner and tone had this effect.

173. We do not, however, uphold the Claimant's claim of disability discrimination. The reason is because the conduct was not, in our judgment, related in anyway whatsoever to disability, whether the Claimant's own disability or disability generally.

174. Mr Garrigan shouted at the Claimant because he was frustrated that she was asking questions and interrupting him. He raised his voice in part because of anger and in part because he wanted to assert himself and be heard and shut down the discussion. The words he shouted did not refer to the Claimant's disability and were not of themselves discourteous. The incident was intimidating because he was shouting. The conduct was hostile and degrading because it belittled the Claimant generally by making her feel that she was not entitled to speak or defend herself. In our judgment, it would have had the same impact on other junior employees regardless of whether or not they had mental health conditions.

Constructive Discriminatory Dismissal Claim (Issue 2.11)

175. We have upheld two of the Claimant's claims of unlawful discrimination, namely the Respondent's withdrawal of the Housing Customer Services role and the failure to offer the Claimant the right to be accompanied to the meeting on 3 April 2019. Where an employer is responsible for unlawful discriminatory acts this almost invariably gives rise to a fundamental breach of contract and did so in this case in our judgment.

176. The claims of unlawful discrimination we have upheld were known to the Claimant on 25 March and 3 April 2019. She did not, however, resign until 16 July 2019.

177. In our judgment, the claimant did not resign in response to the unlawful discrimination. Instead, she resigned in order to avoid attending the disciplinary hearing which was due to take place on 17 July 2019.

178. Even if the incidents of unlawful discrimination formed some part of her thinking at the time of her resignation, in our judgment, the Claimant had affirmed the breached contract of employment by the time she resigned. The Claimant returned to work on 20 May 2019. This was around six weeks after the meeting on 3 April 2019 and nearly two months before her resignation. She did not make any formal complaint about the withdrawal of the Customer Support Officer role. She did raise a concern about the way in which Mr Garrigan had conducted himself at the meeting held in 3 April 2019, but this did not prevent her attending the investigation interview with him on 23 May 2019. There was no open indication from her that she

continued to feel unhappy about these two matters such that she should be treated as having reserved her position in relation to the breach of contract.

179. The Claimant's claim of constructive discriminatory dismissal therefore fails.

Time Limits (Issue 2.12)

180. The claims that the Tribunal has upheld are in time. We have not therefore had to consider this issue.

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Employment Judge E Burns
2 January 2022

Sent to the parties on:

5 January 2022

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For the Tribunals Office