



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Ms P. Sun

(1) CRU International Ltd
(2) Ms Rebecca Gordon

Heard at: London Central Employment Tribunal

On: 6, 7, 10, 11, 12, 13 May 2021 (14 May in chambers)

Before: Employment Judge Adkin
Mr T Robinson
Mr T Harrington-Roberts

Representations

For the Claimant: Claimant in person

For the Respondent: Mr J Arnold, Counsel

JUDGMENT

- (1) The claim of failure to make reasonable adjustments pursuant to section 20, 21 of the Equality Act 2010 ("EqA") succeeds in respect of PCP2 only (strict deadlines for Performance Improvement Plan).
- (2) All other claims brought under the Equality Act 2010 are not well founded and are dismissed:
 - a. Remaining claims of failure to make reasonable adjustments;
 - b. Direct disability discrimination (section 13);
 - c. Direct race discrimination (section 13);
 - d. Discrimination arising from disability (section 15);
 - e. Indirect disability discrimination (section 19);
 - f. Harassment related to disability (section 26).

- (3) Claims for unpaid notice pay and holiday pay brought under the Employment Rights Act 1996 are not well founded and are dismissed.

REASONS

Procedural matters

1. This hearing took place with the Tribunal members, parties and observers all joining remotely by CVP. Barring a couple of minor hitches the technology worked well.
2. There were a series of applications made by the parties, for which oral reasons given and written reasons not requested during the course of the hearing. Either party may request written reasons within 14 days of the date that this judgment is sent out.

The Claim

3. The agreed list of issues is appended to these written reasons.

Findings of fact

The parties

4. The Claimant commenced working for the First Respondent on 26 April 2019 as Consulting Operations Manager, reporting directly to the First Respondent's CEO, Mrs Rebecca Gordon who is the Second Respondent.
5. The First Respondent is a consultancy which provides business intelligence on the global metals, mining and fertilizer industries through market analysis, price assessments, consultancy and events.

History

6. Before she began working for the First Respondent the Claimant had taken a lengthy career break. She had no experience of consulting, nor the sectors in which the First Respondent specialises i.e. metals, mining and fertiliser production. She did have a Level 1 AAT qualification in accounting.
7. She had successfully run and sold a business which provided services to students. Mrs Gordon explained to the Tribunal that this was one of the things that made the Claimant an attractive recruit. Although she didn't have any line management responsibility, she had run her own business, which Mrs Gordon hope would be of assistance in the role which she had in mind for the Claimant.
8. The role that the Claimant was recruited into was a new one. The role was to design, implement and monitor process and systems that contribute to internal efficiency gains and ensure maximum profitability from the First Respondent's

activities across multiple geographies. The First Respondent has a number of international offices including offices in the UK, US, China, Japan, India, Brazil Chile and Australia.

9. The introductory part of the job description for the role contained the following:

“Within CRU Consulting, the Consulting Operations Manager is responsible for designing, implementing and monitoring processes and systems that contribute to internal efficiency gains and ensuring we deliver maximum profitability from our activities.

You will be reporting to CRU Consulting’s Management Team and will be supported by admin contacts from our global offices. You will be driving best practice in the use of both current and future systems and processes and identifying changes required to support an expanding global workforce. You will be responsible for timely reporting of consulting data on a monthly basis. You will demonstrate excellent communication skills and proactively identify, prioritise, and delegate tasks without close supervision. In addition, you will be continually responsive to the needs to the business as part of the ongoing pursuit of operational excellence.”

10. The other element of the role was to line manage two administrative staff based in the London office.
11. In or around September 2019 the Claimant started to sit next to Mrs Gordon.
12. Also around this time the Claimant took over line management responsibility for Ms Tiffany Ault, who had previously reported directly to Mrs Gordon. The Tribunal received a written witness statement from Ms Ault, but she did not give oral evidence. We accept the Claimant’s evidence that as soon as the reporting changed Ms Ault’s turned cold. This is supported by contemporaneous communication within the bundle.

Anxiety

13. On 23 October 2019 the Claimant spoke to the First Respondent’s external occupational health provider, reporting significant feelings of anxiety and depressive symptoms. This was at the prompting of Mrs Gordon, as the note records. Mrs Gordon acknowledged in her evidence to us that the suggestion to speak to occupational health was prompted by a concern about the Claimant’s health.
14. Based on the occupational health note and the findings of the First Respondent’s own appeal process, the Tribunal finds that the First and Second Respondent had knowledge of the Claimant’s disability of anxiety from this point onward.

Ms Ault

15. At around the end of October 2019 Ms Ault told Mrs Gordon that the Claimant did not understand what Ms Ault's job responsibility was and questioned why the Claimant should be her line manager.

End of probation period

16. On 25 October 2019 the Claimant's six month probation period came to an end. Mrs Gordon did not however take any steps in relation to this for another couple of weeks.
17. We find that Mrs Gordon's approach, regarding the first three months as a "bedding in" period for the Claimant was understandable and perfectly sensible. It was somewhat surprising given the strength of Mrs Gordon's increasing feeling that the Claimant was struggling in performance that no steps were taken to remedy this or at least provide some structure or guidance during the later part of the six month probation period.
18. On 11 and 12 November 2019 Mrs Gordon sent an email to various colleagues who had been working with the Claimant requesting feedback on her performance.
19. On 14-15 November 2019 the Claimant attended a Project Management Training Course.

Meeting – 15 November 2019

20. On 15 November 2019 a meeting took place at which Mrs Gordon discussed the Claimant's performance with her. There was some positive feedback which suggested that she was trying hard and was efficient in following things up. Her efforts to centralise some processes had been acknowledged. A positive contribution with regard to subcontractor contracts and new joiner information was acknowledged.
21. There were however some doubts expressed about her capability. Various colleagues expressed doubts about whether she was up to the role, whether she had sufficient financial acumen or accountancy skills and doubts about whether she had sufficient "curiosity" to understand the First Respondent's business. Doubts were expressed about her ability to understand the business at all, which persisted from this point onward. There was a lack of confidence identified. The Claimant says that her anxiety/depression contributed to this.

Meeting 15 November 2019

22. On 15 November 2019 the Claimant and Mrs Gordon had a conversation about the Claimant's future with the First Respondent. The Claimant candidly shared with Mrs Gordon that she was experiencing some significant domestic challenges.
23. Mrs Gordon asked the Claimant to reflect on her priorities and her work-life balance. She told us in her oral evidence that she saw the Claimant's work role

as increasingly detrimental to her. She had a conversation with her in view of the feedback she had received from other colleagues about an increase in pressure. She queried with the Claimant whether this was what she wanted. She was trying to encourage the Claimant to sit back and ask herself some fundamental questions about whether she was doing this role for the right reasons, and to make a deliberate choice rather than simply ploughing on. We accept Mrs Gordon's evidence that this was the conversation and that it was a conversation that she had previously had with other people in her role as a line manager.

24. The Claimant told Mrs Gordon that she was feeling "withdrawn". Mrs Gordon told us that she understood from this "that she was finding it hard to get the right balance - children, travel, working and having 'difficult thoughts'".
25. On 16 November 2019 the Claimant visited her GP with ongoing symptoms of anxiety. The GP note records

"Boss told her she is not performing well and probate [probation] increased to another 3 months. Cannot take any time off"
26. On 17 November 2019 again saw her GP continuing to experience symptoms of stress and other symptoms that might be described as depressive in nature.

David Trafford email

27. On 21 November 2019 Mrs Gordon received an email from David Trafford, Group CEO, who was her line manager with a series of criticisms of the report about the consulting business in relation to October 2019. His final comment was

"I suspect that you have relied on Nina [the claimant] to do most of this and it is not great. Sorry for being a bit direct"
28. The Claimant seems to have understood and characterised this at various stages, including the Tribunal hearing as a single mistake in relation to a figure. The reality is that this was a wide-ranging criticism of the whole document, both its content, figures in it which were not explained or misleadingly presented and its format and appearance.
29. This criticism from Mr Trafford came a few days after the negative feedback that Mrs Gordon had received from a variety of stakeholders within the First Respondent business. It is clear that by this stage Mrs Gordon had significant doubts about the Claimant's capability to perform the role as she envisaged it.
30. While we accept Mrs Gordon's evidence that she did not shout at the Claimant, we find that it was made very clear to the Claimant that Mrs Gordon was unhappy. Whatever the precise words used, we accept that Mrs Gordon did say something to the effect that the Claimant did not have common sense or know the basics. Mrs Gordon acknowledged to us that she has a direct style.

We formed the impression that the Claimant would have been left in no doubt of Mrs Gordon's displeasure.

21 November 2019 meeting

31. There was a meeting which took place on 21 November, which Mrs Gordon documented in a typed note. In this meeting the Claimant explained various practical difficulties that she was experiencing in the role, including waiting for information to be supplied to her. There was some discussion as to the nature of the role she was performing.
32. Mrs Gordon confirmed to the Claimant that she was not passing probation due to the overwhelming body of feedback on things she needed to change to succeed in the role. She explained that Eleanor Simmons of HR would come to a meeting on 25 November 2019 to talk about the process. If as the Claimant contends, Mrs Gordon said that returning to work would not stop the process we find that that this reference to the process is that this was the Performance Improvement Process (PIP) that was going to be explained in the meeting on 25 November 2019 rather than immediately going into a dismissal process.
33. We do not find that the Claimant was told in terms that whether or not she returned to work would not stop the process leading to dismissal or that dismissal was inevitable. We consider that if these words had been said to her she would remember them and mostly likely quote them precisely. We are not surprised however that the Claimant got the impression from Mrs Gordon that it would be very difficult for her to succeed through the PIP process, because this reflects the reality that it was going to be difficult and that Mrs Gordon plainly had doubts about her ability to succeed.
34. In a later discussion on the same day the Claimant explained to Mrs Gordon that she was suffering from anxiety and that this had affected her performance this week.

GP visit

35. On 21 November 2019 the Claimant attended her GP at 14:45 that afternoon. The GP note records:

"anxiety, loss of appetite, poor sleep. Currently on probation at work. Has also made a big mistake at work today due to stress and advised employment will be terminated next week".
36. While we find that this is what was said to the GP, we do not find that this precisely reflects the reality of what the Claimant had been told. It was a stressful situation and we infer that the PIP process was unfamiliar to her.

22 November 2019

37. We accept the Claimant's case that on 22 November 2019, Ms. Ault told Mrs Gordon that the Claimant had upset her in relation to a Skype message regarding setting up online workshop. This related to an event described as

“sub-consultant speed dating” which appears to have been aimed at strengthening commercial relationships among members of the team.

38. There was an exchange of messages between Ms Ault and the Claimant as follows:

“TA: [Tiffany Ault] hi Nina, you asked me to set up a Skype call for Colin Pratt for the sub- consultant – do you not know how to set up Skype meetings then?”

NS: [Claimant] hi

TA: This sub- consultant speed dating session was for you to sort out

NS: I have never set up training session on Skype

TA: training session? You asked me to set up a call?

NS: he will do workshop on 6th morning. Some people from overseas office would also like to see the workshop.

TA: yes so you can set it up for them then – you have been with us 6 months now you should know how to sort out a Skype meeting

[https link]

NS: you can see the schedule here, from 10.50 – 1140am

TA: yes you can sort it out then

TA: so what was the point in you being involved then – I may as well done it myself

TA: new worries – I will speak to Rebecca if there is any problems”

39. Ms Ault's Job Description as Administrating assistant included the following:

“Scheduling and coordinating meetings including managing multiple complex calendars and re-occurring meetings more extensively, booking team meetings

Arranging and editing Skype recordings and liaising with Marketing for Youtube links and then adding on the eHub”

40. Based on this job description we are not at all surprised that the Claimant assumed that setting up Skype meetings would fall within Ms Ault's responsibility. We find that Ms Ault's comments to her manager were on the

face of it rude and disrespectful, particularly in the context of someone communicating with their line manager who was asking for assistance.

41. Ms Ault had been upset by events outside of the workplace. At around this time she had suffered what she describes in her witness statement as a family emergency, which the Claimant accepted in evidence was in fact a family bereavement.

Meeting 25 November 2019

42. On 25 November 2019 there was a meeting which has been described as an end of probation review. Mrs Gordon, Ms Simmons and the Claimant or Attended. This was the formal commencement of the Performance Improvement Plan ("PIP").
43. In that meeting the Claimant raised various matters including that it was hard to manage expectations in her role and the problems that were being caused by Precursive, a software package that was being implemented to help with the pricing up of consulting engagements.
44. A follow up letter dated 25 November confirmed
- "you were advised that you do not pass your probation as your performance is significantly below expected levels and therefore of concern."
45. The PIP document signed on 25 November set out five performance expectation/goals. In respect of each of them strategies/actions/tasks and performance indicators/required outcomes were specified. The performance expectation/goals were:
- 45.1. Complete design and implementation of system for better visibility of sub- consultants for the team;
- 45.2. Work with each Managing Consultant in Consulting to report internally on their area of management responsibility. Add this tracking to the Respondent's monthly report for internal circulation;
- 45.3. Improve communication and demonstrate greater understanding of the business;
- 45.4. Improve quality of line management in order for operations team to achieve goals;
- 45.5. Identify another area of the business that could be improved, develop plan for improvement, seek approval and implement plan.
46. The document contained a final review date of 25 February 2020, with some milestone deliverable dates of 23 December 2019, 2 January 2020, 23 January 2020.

Strained relations

47. We find that in the days following this PIP relations between the Claimant and Mrs Gordon were strained. Certainly from the Claimant's point of view this was a difficult and awkward time. Mrs Gordon had evidently experienced an awkward period caused by performance management with other employees before. Her evidence, which we have no reason not to accept is that she had previously found this to be awkward but an effective tool for improving performance.
48. We find that on 27 November 2019, at the office building entrance, the Claimant bumped into Mrs Gordon around 9:05am. The Claimant said hello to Mrs Gordon, but the latter did not return a greeting. Mrs Gordon says that based on the time this occurred it indicated that her train must be delayed which would naturally put her in a less good mood.
49. On 28 November 2019, at the Claimant's desk. Mrs Gordon and the Claimant sat next to each other, but Mrs Gordon did not speak to her at all. The Claimant's perception is that Mrs Gordon had a "hostile face".
50. On 2 December 2019, at the Claimant's desk, Mrs. Gordon did not speak to her at all. The Claimant's perception was that Mrs Gordon had an angry expression on her face.

Request to modify the PIP timescale

51. On 1 December 2019 the Claimant emailed Ms Simmons (copying Mrs Gordon) as follows:

"I have had a look at the PIP, regarding the timescale I understand that there is just under 2 months for the reports and line management. However, due to Christmas upcoming some team members are either very busy (have to schedule meetings for later dates) or will be taking holidays (could be more than half a month away from the office), which makes the timescale tight and pressurizing. If there are tasks I can solely complete I can stay up late to finish it.

...

The task deadline in the PIP is quite tight and pressurizing could you please adjust it considering the seasonal festival / holiday. It maybe good if you could provide mentorship for me as you are an experienced operations manager in CRU but it remains at your discretion."

52. She also sought some guidance on managing Ms Ault, and what was appropriate to delegate to her

53. The following day 2 December Mrs Gordon described the timeframes as “entirely achievable”. She said that there would not be a need to work any extra hours. She suggested that she develop goals for Ms Ault and declined the suggestion of Ms Simmons acting as a mentor, given her involvement in the PIP, without offering any alternative.

OH report

54. Following a consultation with occupational health on 4 December 2019, a report was produced Paul Hinckley an Occupational Health Adviser. In summary his advice was that the Claimant was currently fit for work with adjustments. He suggested that there should be an informal stress risk assessment and that the Claimant may benefit from work from home for up to two days a week temporarily. He advised that the Claimant was likely to be disabled within the meaning of the Equality Act 2010 due to ongoing anxiety, specifically raised levels of anxiety and low mood triggered by her perception of certain events at work.
55. He wrote:

“Fitness of the employee to perform current role?

Nina tells me that her GP has strongly advised her to take sick leave, but she wishes to remain at work as she feels that this is a crucial time during her extended probationary period. She also feels under pressure due to the performance improvement plan. We have discussed this, but Nina has underlined her dedication to the business and determination to remain, and therefore I advise that she is currently fit for work but may require further adjustments (please see below).

• Are there any adjustments that can be considered to support the employee in the workplace?

The adjustments already put in place by the business appear to be reasonable. However, as Nina perceives the trigger for her current condition to be work-related, it would be prudent to undertake an informal stress risk assessment based on the six key areas: demands, control, role, relationships, support and change. This is useful to both the employer and the employee, as it gives Nina the opportunity to voice and discuss the triggers for her distress, but it also provides an opportunity for the employer to gauge her understanding of the expectations placed upon her to successfully fulfil her role. At the same time, the employer has then also met its legally mandatory duty of care to undertake a risk assessment of this workplace hazard. Please refer to the links below for more information, [[hypertext links](#)].

PIP review 23 December

56. On 5 December Mrs Gordon received further feedback from colleagues. This was to the effect that the Claimant was struggling to understand the First Respondent's business.
57. On 23 December 2019 there was a PIP review with the Claimant, Mrs Gordon and Ms Simmons.

Homeworking

58. There was a further meeting on 9 January 2020 meeting to discuss the OH report following the consultation on 4 December. Despite the OH advice about homeworking, Mrs Gordon did not allow the Claimant to work from home. She says that this was because of a concern that the Claimant was using homeworking as a way of also looking after her children. She says that both she and Lynn Lupori, Head of Consulting, North America overheard children in the background when they spoke to the Claimant by telephone, and on other occasions that Claimant was unavailable when working from home.
59. The Claimant strongly denies that she took work phone calls at home and does not accept that her colleagues would have been in a position to hear children in the background. The Tribunal was referred to various documents on Skype which showed communications between the Claimant and her colleagues. Ultimately the Tribunal has not needed to resolve the specific dispute about whether children could or could not have been heard in the background.
60. We do find that Mrs Gordon had a genuine concern that the Claimant was using homeworking to carry out domestic responsibilities. We are fortified in that conclusion by references in the Claimant's witness statement at paragraph 17 and in her GP notes to the difficulties caused by the Claimant suddenly losing after-school care.

Stress risk assessment

61. Ms Simmons followed up this meeting on 15 January 2020 requesting a completed risk assessment. The Claimant returned a completed risk assessment to her at 22:20 that evening. This form contained the following under the heading 'Demands':

"Do different people at work demand things from you that are hard to combine? [Claimant]: [tick]

What action might help in response to areas ticked?

Maybe try to understand what causes are that things are being done in a different way.

Do you have unachievable deadlines? [Claimant]: [tick]

What action might help in response to areas ticked?

[Claimant]: At the moment, the deadline for the report is tight as waiting other people's response.

Do you feel pressured to work long hours? [Claimant]: [tick]

Do you have unrealistic time pressures? [tick]

[Claimant]: Not sure if it is the same as the unachievable deadlines"

PIP meeting 22 January

62. On 22 Jan 2020 there was a further PIP interim review meeting.

Concern about the effect of the PIP

63. On 26 January 2020 the Claimant wrote the following in an email to Mrs Gordon:

"I am writing to seek your help to deal a problem at work which is causing me some concern and I hope we can deal with it quickly.

Over recent months I have felt that I am being subject to continuing unfair treatment in the workplace which is aggravating my depression condition. Before the incident of my mistake on the monthly report in late November you were always very considerate and supportive, treated me as a person even if after received the team's feedback regarding my probation.

However, since the mistake on November monthly report your attitude has changed, started criticizing my work in ways you never did it before, and implemented performance improvement plan, which is different from our company's probation process. In addition, with regards to line manager which was triggered by the event, happened on 22nd November, of Tiffany complaining that I did not take consideration of her family bereavement. I feel that I was not heard (I asked her to set up Skype call / workshop on 20th November, before I was made aware of her family bereavement), should you need evidence I can provide it.

As of my email dated on 5th December 2019 that the deadline was too tight and it was difficult to make it, and I also have asked you to adjust it. Due to the PIP I was under extreme stress and you maybe aware that I cannot think properly recently due to my depression.

To be honest with you, with the implementation of PIP I have been constantly suffering symptoms of depression both at work and at home, which I am trying very hard to overcome. Every time when I speak to the team members I get nervous and am constantly thinking about their making feedback afterwards, especially I have

sinking feeling when I speak with Tiffany and Julie. It affects me in a way of slower thinking, misunderstanding, hard to focus etc.

I would be grateful if we could talk about my grievance in tomorrow's meeting as well."

OH report 3 February 2020

64. On 3 February 2020 there was a further Occupational Health Report produced following a telephone assessment. The Claimant was reported to have raised levels of anxiety and to be low in mood. She again reported that her GP had advised her to take sick leave, but that she was reluctant to do this. The occupational health assessor Paul Hinkley believed that the six key areas in the stress risk assessment had been carried out. He noted that his recommendation to allow temporary homeworking had been refused.
65. Mr Hinkley said
- "Like any risk assessment, the findings should be written down, acted upon and reviewed on a reasonable basis."
66. We do not find that any meaningful action to address the stress caused by the PIP deadlines was taken.

Meeting 20 February 2020

67. There was a meeting on 20 February 2020, at which the Claimant met Ms Simmons. The Tribunal has had the benefit of reading an exchange of emails between the two following up from this meeting.
68. The Claimant raised a variety of concerns about the process and said that it was causing her some stress. The Claimant wanted to understand what an informal grievance was, suggesting that she was contemplating raising some sort of complaint. The Claimant also raised that Mrs Gordon's practice of inviting feedback from both senior and junior members of staff (characterised in the list of issues as a 360° approach) was causing particular stress to her given her anxiety. She said it was making it difficult when she spoke to colleagues at different level, knowing that they were judging her. She pointed out that this was not a practice being used to assess other colleagues.

End of PIP process

69. The PIP was due to end on 25 February 2020.
70. The Claimant was absent on sick leave until a GP note recommending a phased return to work dated 12 March 2020.
71. Very shortly after the Claimant's return to work, on 16 March 2020, she complains that in a meeting in the boardroom, Mrs Gordon kept blaming the Claimant and said it was her fault that the Team had not finished the work. The

Claimant complained that she had sent everything that the team needed and further that she'd been absent with sick leave.

Occupational Health reports

72. On 18 March 2020 a further Occupational Health Report was produced by Dr Steven Sperber, Consultant Occupational Physician. He offered this opinion:

“From an occupational health perspective, Ms Sun can be considered as fit for work. She is also fit to attend any relevant PIP meetings, although these will probably need to be arranged remotely due to the COVID-19 related restrictions. Ms Sun denies any homeworking access issues which were mentioned in the referral document.

From a medical point of view, she has certainly improved, but she remains quite vulnerable psychologically, and although no further workplace adjustments are currently required, she would benefit from regular catch ups with her line manager in order to ensure that she is coping with her duties and that her workload is manageable.

In my opinion the Equality Act 2010 is likely to apply in this case...”

73. On 24 March 2020 the first Covid “lockdown” began.

Dismissal meeting 30 March 2020

74. The letter inviting the Claimant to a meeting on 30 March 2020 suggested that the outcome could be no further action, further performance improvement measures or further disciplinary action. No mention was made of possible dismissal.
75. The Claimant attended a Skype meeting on 30 March 2020 with Mrs Gordon Eleanor Simmons. She complains that they played games with her and switched whatever she said to defend herself to blame her and say it was all her fault. We do not doubt that that is her perception of this meeting.
76. Plainly there was a difference of view as to whether the Claimant had or had not passed the PIP and to what extent she had met the various goals.
77. The Claimant complains that she was laughed at during this meeting. The Tribunal noted that Mrs Gordon laughed during her evidence to us on the topic of the “docusign” project, which was one of the points that was being discussed in the meeting of 30 March. This was her reaction to a project which the Claimant had carried out during the PIP to demonstrate her capability to manage projects. The nature of the project was an implementation of digital signatures.

78. Mrs Gordon acknowledged that this project had been done well by the Claimant but felt that was not an adequate project for the purposes of the PIP. While of course we should exercise due caution in drawing a conclusion from the conduct of a witness during a Tribunal hearing, it was notable that this was the only point that Mrs Gordon laughed at, during oral evidence from her which went on for 1 ½ days of Tribunal time. The remainder of her evidence was given in a thoughtful and professional manner. We find, on the balance of probabilities that she did laugh during the course of the PIP hearing.
79. While we do not conclude that Mrs Gordon was deliberately laughing to mock the Claimant, our finding is that she did laugh, which we presume was because she thought it was laughable that such a project would satisfy the requirements of the PIP.
80. The Tribunal appreciates how frustrating this must have been for the Claimant. She completed a project well only to be told that the project itself was not adequate.
81. The conclusion of this meeting was to dismiss the Claimant. She was paid a sum representing three months' pay, which was greater than her contractual entitlement.
82. In a letter confirming the dismissal dated 30 March 2020 Mrs Gordon confirmed that the Claimant did not pass her probation period as her performance was significantly below expected levels in some of the fundamental aspects of her role. The main areas of concern were expressed to be lack of communication, in particular with the First Respondent management team, lack of progress in designing and implementing processes and systems to improve efficiency, lack of identification or prioritisation of changes to be made to increase profitability and finally concern around line management skills.

OH change of report

83. On 31 March 2021 an administrator working for the external occupational health provider sent an email apologising and saying that the report dated 18 March had been sent in error and asking the First Respondent to delete the email and report. She said that the correct version would be sent as soon as possible. Of course by this stage it was too late and the decision to dismiss had been taken.
84. By an email of 6 April 2021 a password protected version of an occupational health report was sent from Dr Sperber. This amended version of the report changed a critical recommendation:

“From an occupational health perspective, Ms Sun can be considered as fit for work. She stated that her GP has advised she is too psychologically vulnerable to attend any relevant PIP meetings. Ms Sun denies any homeworking access issues which were mentioned in the referral document.”

Appeal

85. The Claimant appealed by email on 30 March 2020. This was treated as both an appeal against the decision to dismiss and a grievance. Of relevance to her claims of disability discrimination, she said:

“Previously, I have also explained many times about the error I made before was due to my disability but it was not acknowledged and I was told that it would not change the disciplinary process, and my manager also said that it would make her think if it was the right time for me to return to work.

The role of HR in the meeting should be impartial but it was more of two against one in the meetings, which has put me in a substantial disadvantage and suffering anxiety symptoms.

...

In addition, the reason why there was lack of communication with the team is because of my anxiety.

My disability was made worse during the disciplinary action as when I spoke to the team member I was worried about being judged. This is also written in the report dated 18th March from the occupational health professional, which is I have some social withdrawal.

The Equality Act 2010 (the Act) says that I am protected against unlawful discrimination at work in relation to my disability”

Appeal hearing

86. An appeal hearing took place on 16 April 2020. The hearing was conducted by Mr Paul Robinson, Director of business development and Mr Mark Betts, then HR director. No allegation of discrimination is made in respect of the appeal process. We find that the appeal managers approached their job with care and a commendable degree of thoroughness.
87. On 22 April 2020 Mrs Gordon was interviewed as part of the process.
88. On 7 May 2020 a reconvened appeal hearing took place.
89. On 19 May 2020 the Claimant received an outcome from the appeal and grievance. The appeal was not upheld, but the appeal panel did acknowledge some failings in the First Respondent’s process, which it articulated as a number of learning points:

“Throughout this report we have identified, that whilst not impacted on the outcome, do potentially give opportunity to enhance on our standards and expectations.

- Ensuring clarity in the probation process, feedback and quality of objectives.
- The manager education level in respect to understanding the Codes of Practice.
- Ensuring PIP goals are SMART and there is clear alignment to the assessment basis
- Ensuring invite letters are clear on potential outcome
- The level of support, understanding and process of running disciplinary meetings.
- Manager language and tone to employees in respect to performance.”

90. As to the PIP process the appeal panel concluded that the quality of the performance objectives in the documentation lacked specificity. They concluded however that any omissions in this respect were corrected by the support given orally during the PIP process.
91. As to the letter inviting the Claimant to the meeting on 30 March, the appeal panel acknowledged that this did not provide complete clarity as to the potential outcome (i.e. dismissal) and was short of best practice.
92. In respect of the Claimant’s complaint of disability the appeal panel concluded as follows:

“On joining, Rebecca provided you with flexibility to work remotely when needed, and this was primarily around hospital appointments, and having relaxed provisions for start and end times given childcare responsibilities. Additionally, during the summer, you had the ability to work compressed hours to accommodate school holidays.

During October, we have found that there was more awareness of your mental health issues, and as such several actions were undertaken by the company as a mechanism of support and understanding. We have found these were:

- Stress risk assessment – and continuous dialogues to reduce stresses
- Occupational health referral – with continued dialogue. There were three referrals over a period of three months

As a result of the support, the company considered several accommodations, which are outlined below:

- Quiet space – ensuring the opportunity and use of meeting rooms to conduct work in private area when required
- Flexibility in working hours – to suit appointments and other needs
- Working from home – approved on occasion but not as a permanent arrangement
- Performance goals – ensuring reasonable and achievable
- Change in job responsibilities – see below
- Change in feedback process – see below
- Prolong the PIP period
- Not to hold disciplinary meetings

It has been found that the request made by you to remove people leadership was considered but not agreed given this was a key responsibility of the role for which you were hired. If this were instigated it would reduce the purpose and value-add of your position, and, as such could not be accommodated. The panel understand this was discussed directly with you.

The Panel also found that Rebecca considered remote working but given the performance standards and concerns that your home working conditions were not conducive to the performance of your role, this was not appropriate as an ongoing arrangement however did approve remote working on a few occasions.

93. At paragraph 27 of his witness statement Mr Robinson said

"we were reflective of some of CRU's failings and how we could do things better as a company. Mark and I wanted to make this clear to Nina in the outcome letter and outlined several learnings that we would take away from the concerns that she raised. Irrespective of this, we determined that this did not materially impact on the company's decision to terminate Nina's employment on 30 March 2020 and in my view, given the seniority of the role and what the Company was expecting of Nina in that role, if she was unable to meet the basic standard and requirement of the role then the decision to terminate her employment was the correct one to have made. In my own view, even at the end of this process, Nina wasn't aware of what she should have been doing. There was a mismatch in expectations from the Company's perspective and Nina's, and this is where Mark and I determined that communication could have been better between the parties."

ACAS & presentation of claims

94. The claimant notified ACAS for the Early Conciliation process on 24 April 2020. The certificate was issued on 21 May 2020.
95. On 20 Jun 2020 the Claimant presented the first of her two claims.
96. A further claim was presented on 8 August 2020.

LAW

97. We are grateful to Mr Arnold for his written submissions on the law and the Claimant for her oral submissions.

Time limits

98. Relevant to *time limits*, section 123 EqA provides:

123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

- (a) then P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

99. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite

the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.’

100. *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA (‘such other period as the employment tribunal thinks just and equitable’) that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision.

Reasonable adjustments

101. A reasonable adjustment is an omission rather than an act (Matuszowicz v Kingston-upon-Hull County Council [2009] IRLR 288, CA). For the purposes of considering time limits, time start running from the point at which the employer should reasonably have acted, even if they did not. Given the potential difficulty caused by this ambiguity, Sedley LJ at paragraph 38 indicated that tribunals can be expected to have sympathetic regard to the difficulty [the antecedent provision] will create for some claimants when exercising their discretion as to whether to extend under the just and equitable jurisdiction.
102. In considering reasonable adjustments claims, tribunals are required to have an analytical approach (Environment Agency v Rowan [2008] ICR 218). The correct approach is to identify (i) the PCP; (ii) non-disabled comparators, where appropriate, (iii) the nature & extent of substantial disadvantage. This is in order to consider the extent to which taking the step would prevent the effect in relation to which a duty was imposed.
103. Regarding PCPs, in *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.
104. Whether the adjustment is made by luck or by judgment is immaterial – *Spence v Intype Libra Ltd.* UAEAT/0617/06/JOJ.
105. Knowledge - Paragraph 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty if he does not know and could not reasonably be expected to know that an interested disabled person has a disability AND is likely to be placed at a disadvantage by the employer's PCP para 20(1)(b).

CONCLUSIONS

Limitation/jurisdiction – Claim 1

106. **[Issue 3]** Whether any complaint in relation to Claim 1 occurring before 25 January 2020, namely Allegations 1, 2, 3, 4(i), 4(ii), 9, 11, 12, 13, 14, and 15, & RA PCP1(i)-(iii) and/or RA PCP2, is outside the primary limitation period?

107. Day A was 24 April 2020. Day B was 21 May 2020. The ET1 claim form was filed on 20 June 2020. The primary limitation period therefore commenced on 25 January 2020.
108. **[Issue 3.1]** Whether there was conduct extending over a period so as to be treated as done at the end of that period, the end of that period being within the primary limitation period?
109. As to allegations 1, 2 and 3 in November 2019, we do not find that these were part of a continuing act so as to bring this in time.
110. Allegation 4 was withdrawn.
111. Allegations 9 (placed on PIP 25 November 2019), 11 (criticisms 21 November 2019), 12 (alleged dismissal 21 November 2019), 13 (hostile face 27 November), 14 (hostile face 28 November), 15 (angry face 2 December) and are on the face of it out of time. We do not find that these were continuing acts.
112. RA PCP1(i)-(iii) (refusal of home working) are on the face of it out of time but the refusal (iv) 4 February 2020 was in time.
113. As to RA PCP2, namely strict deadlines for the PIP process, this relates to a decision of Mrs Gordon not to vary these deadlines on 2 December 2019 which is on the face of it out of time. The Claimant's email of 26 January 2020 again referred to deadlines being too tight. Mrs Gordon again stuck to the original deadlines, as was clear from her response of 27 January 2020. We find that 27 January 2020 was a new failure to make a reasonable adjustment relating to PCP2 falling within the primary limitation period.
114. PCP4, the refusal to remove line management responsibilities occurred on 2 December 2019. The Claimant referred to this on 27 January and again no action was taken. We find that 27 January 2020 was a new potential failure relating to PCP4 falling within the primary limitation period.
115. **[Issue 3.2]** If not, whether there is such other period of time as the Tribunal thinks just and equitable within which to bring the complaints?
116. We have taken account of the fact that the Claimant was attempting to resolve the matters that are the substance of her reasonable adjustment claim internally. We take account that some instances of these alleged failure fall into the primary limitation period. We have considered the guidance of Sedley LJ in Matuszowicz regarding the difficulty in relation to time running in reasonable adjustment claims. We are sympathetic to the problem.
117. The Tribunal has found that it is just and equitable to extend time in relation to the claims of failure to make reasonable adjustments based on PCP1 (office working), PCP 2 (strict deadline and rules), PCP4 (line management). We have gone on to deal with these allegations on the substantive merits.
118. As to the remaining allegations 1, 2, 3, 9, 11, 12, 13, 14 and 15, we have not found that it was just and equitable to extend time. The onus is on the Claimant to show we should extend time. Time limits are strict and extensions are the

exception rather than the rule. We do not find it would be just and equitable to extend time.

119. If we are wrong in the exercise of our discretion, we have dealt with these allegations in the alternative on the substantive merits below.

Limitation/jurisdiction – Claim 2

120. **[Issue 5]** Whether any complaint in relation to Claim 2 occurring before 30 April 2020, namely Allegations 5, 6, 7, 8 and/or 9 & PCP1, is outside the primary limitation period?
121. Day A was 30 July 2020. Day B was 30 July 2020. The ET1 claim form was filed on 8 August 2020. The primary limitation period therefore commenced 30 April 2020.
122. **[Issue 5.1]** Whether there was conduct extending over a period so as to be treated as done at the end of that period, the end of that period being within the primary limitation period?
123. As to the substance of allegation 5 (cold treatment toward the Claimant) we find that this was ongoing at the time of the commencement of the primary limitation period.
124. Allegations 6, 7, 8, 9, 11, 12, 13, 14 and 15 are on the face of it out of time.
125. **[Issue 5.2]** If not, whether there is such other period of time as the Tribunal thinks just and equitable within which to bring the complaints?
126. The Tribunal has found that it is just and equitable to extend time in relation to allegations 6, 7 and 8, which all relate to the claim of direct discrimination against Tiffany Ault, were brought out of time only because the Claimant became aware of things recorded by Ms Ault in notes in July 2020 following a subject access request under data protection legislation. She presented the claim in August 2020. Given the circumstances in which the Claimant became aware of the alleged discriminatory conduct at a later date than it occurred, we find it is just and equitable to extend time. We have gone on to deal with these claims on the substantive merits.
127. **[Issue 5.3]** By section 123 of the Equality Act 2010, a failure to do something is to be 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 he does an act inconsistent with doing it or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.
128. This is dealt with above.

Disability

129. The material period is September 2019 to 30 March 2020 .

130. By their e-mail dated 1 February 2021, the Respondents accept that the Claimant was disabled within the meaning of the Equality Act 2010 in the material period by reason of her anxiety.
131. As to the requisite knowledge of the disability, for:
132. **[Issue 8.1]** Direct disability discrimination, the Respondents accept that they had knowledge of the Claimant's disability from 4 December 2019, the date of the receipt of the Occupational Health report of 4 December 2019;
133. The Tribunal has taken account of evidence that the Respondents were aware of anxiety in October 2019, in particular at page 386 (OH referral dated 23/10/2019) and the appeal panel conclusion on page 367. Mr Robinson's oral evidence was that at this stage the Claimant had been having conversations with Mrs Robinson about anxiety.
134. The Tribunal finds that the Respondent had knowledge of the Claimant's disability, namely anxiety, from 23 October 2019.
135. As to knowledge of substantial disadvantage for the claimant of failure to make reasonable adjustments, we find that the Respondents had knowledge of the substantial disadvantage caused by the strict PIP deadlines from 1 December 2019 onward as a result of the Claimant's email to Ms Simmons, copied to Mrs Gordon on that date.
136. It has not been necessary to deal with knowledge in any more detail.
137. **[Issue 9]** Whether any disability allegations before 4 December 2019, namely Allegations 1, 2, 3, 9, 11, 12, 13, 14, and/or 15, fail because the Respondents were unaware of the Claimant's disability?
138. No.

Direct disability discrimination

139. **[Issue 10]** Was the Claimant treated less favourably by the First Respondent and/or the Second Respondent because of her disability than Rebecca Gordon, Sheena Patel were and/or a hypothetical comparator would have been, in circumstances with no material difference by the following acts or omissions:
140. **[Issue 10.1]** On 15 November 2019, when the Claimant told Mrs Gordon in a meeting of her family difficulties and that her children were on a Child Protection Plan, she responded immediately that it would make her think that it's not a good idea for the Claimant to be in work (**Allegation 1**) [111];
141. We do not find that the conversation between the Claimant and Mrs Gordon on this occasion amounted to favourable treatment. We accept Mrs Gordon's evidence that she was trying to get the Claimant to reflect on whether she was continuing with her job the right reasons, in view of the difficulties.
142. In any event we do not find that the treatment of this occasion was "because of" the Claimant's disability. We find that Mrs Gordon was aware that the

Claimant was suffering anxiety, but that the reason for this conversation was that Mrs Gordon honestly felt that the Claimant was struggling in the role. We find that the anxiety was a symptom of the difficulties in the role rather than the cause of the difficulties or of Mrs Gordon's actions.

143. **[Issue 10.2]** On 21 November 2019, when the Claimant told Mrs Gordon in a meeting of her family difficulties and that her children were on a Child Protection Plan, she responded immediately that it would make her think that it's not a good idea for the Claimant to be in work (**Allegation 2**) [111]
144. To the extent to which some similar themes arose on 21 November to those that already been discussed on 15 November, the same reasoning applies. Additionally 21 November was the date on which Mrs Gordon received an email from her line manager Mr Trafford. We do not see that this relates to Claimant's disability. It was his opinion about a report which he did not think was of adequate quality.
145. We do not find that this treatment was because of the Claimant's disability.
146. **[Issue 10.3]** On 21 November 2019, the Claimant had a quick private chat with Mrs Gordon and explained to her that she suffered from mental health problems, and that the mistake she had made was due to her headache and nausea. Mrs Gordon responded to say it was not a good idea for her to return to work, and that it would not stop the dismissal process (**Allegation 3**) [111].
147. Similar reasoning to our decisions for allegations 1 and 2 above applies.
148. If Mrs Gordon had said in terms that it would not stop the process i.e. that the Claimant's dismissal was predetermined at this stage, we find that this would have been less favourable treatment. We do not accept that Mrs Gordon said in terms that returning to work would not stop the dismissal process.
149. In any event we do not find that this treatment was because of the Claimant's disability. We find that Mrs Gordon's behaviour was entirely explained by her genuine concerns about the Claimant's capability in the role.

Direct race discrimination

150. **[Issue 12]** Was the Claimant treated less favourably by the First Respondent because of the Claimant's race (it appears she is alleged Chinese nationality and/or being non-white [PS38]) than the actual comparators named below were and/or a hypothetical comparator would have been, in circumstances with no material difference, by the following acts or omissions:
151. **[Issue 12.1]** When the line management duty was transferred to the Claimant in September 2019, one of her team member's (Tiffany Ault) attitude towards the Claimant started to turn cold, and was on-going (Allegation 5) [108]. Actual comparators: Rebecca Gordon, Julie Henderson and Sheena Patel;
152. The Tribunal only heard the Claimant's live evidence directly on this point, as well as some indirect observations from Mrs Gordon. We read Ms Ault's witness statement. We accept the Claimant's evidence that Ms Ault's attitude

was cold toward her from the point she took over line management responsibilities. There is ample evidence in the bundle is that Ms Ault was unhappy being line managed by the Claimant, both from interactions between the two and Ms Ault's private notes.

153. It may be of some significance that the difficulties in the relationship started when she started to manage Ms Ault, not before. There is no suggestion of antipathy prior to this, which might have occurred if Ms Ault had a particular problem with the Claimant's race or nationality.

154. We received oral evidence from Mrs Gordon, who clearly had a high opinion of Ms Ault that that that she was

"very robust, not the same level of education as some others in the office, she's fought through many challenges, but willing to please. It became clear that it was a difficult relationship [between C and TA]. My understanding of Tiffany is that she respects people who have more skills. She doesn't like to be taken for granted - in a general sense - she was struggling to get the value from the line management relationship that she wanted."

155. We accepted Mrs Gordon's evidence on this point, which we found to be consistent with Ms Ault's witness statement and the contemporaneous evidence. We note that Ms Ault had been there a number of years, and inevitably knew more initially about the First Respondent business than the Claimant did. It seems that she had a close relationship with Mrs Gordon before the change in the reporting line such that Ms Ault reported to the Claimant. It is plain that Ms Ault did not particularly respect the Claimant's knowledge or skills, and resented reporting to her rather than Mrs Gordon who was CEO of the First Respondent. It was unfortunate, as the Claimant commented upon, that Ms Ault considered she still had a direct line to discuss matters and express discontent to Mrs Gordon. None of this was the Claimant's fault, but it made the relationship difficult.

156. It is clear that Ms Ault was sufficiently unhappy about her relationship with the Claimant as her line manager that she was documenting various incidents that made her unhappy.

157. In her witness statement Ms Ault raised two matters which had caused her to be somewhat uncomfortable with the Claimant. First, she said that the Claimant requested that participants in a meeting leave in descending order of age. Given that Ms Ault was the youngest she said she was always kept to last. Although the Claimant found this difficult to acknowledge, we judge from her reaction in evidence which was different to her completely straightforward way of dealing with other questions that there was an element of truth in this account of Ms Ault.

158. Additionally, as the Claimant acknowledged, there was an introductory "getting to know you" conversation with Ms Ault when she started to line manage her. Ms Ault says that she found the Claimant's questions intrusive. She noted in her private note (page 451)

“Nina heard my mum has some issues and she wanted to spend 30 minutes going through my mums history”

159. Whether Ms Ault was being oversensitive it is difficult for the Tribunal to judge, but we do not have any basis to find that this was not a genuine concern. The Claimant did not have line management experience coming into this role. The Tribunal finds that the Claimant was not aware of the fact that Tiffany found that conversation intrusive. From her perspective she was simply getting to know a new direct report.
160. We have considered the content of the notes of Ms Ault disclosed under the subject access request, which relate to situation in which the Claimant seems not initially to have understood what was meant by the term Fire Marshall. This is an allegation that the Claimant tried to amend her claim to include as a further incidents of race discrimination. While we did not allow the application to amend, had we done so we would not have found that it was race discrimination. It seems purely and simply to have been a communication difficulty. (In a similar vein we noted the email of 22 January 2020 from Juan Esteban Fuentes which stated that it was difficult to communicate with the Claimant by telephone, which he initially attributed to his own standard of English). In circumstances where the Claimant's English is of a very high standard but not perfect, we find that minor miscommunications or slight misunderstandings are not by themselves evidence of discrimination but are simply a fact of life in the kind of international workplace that the First Respondent is.
161. In conclusion, while Ms Ault's behaviour might be characterised as “less favourable treatment”, we do not find that the Claimant's race or nationality was the reason for it. We find that the circumstances of the line management transfer we have described above and Ms Ault's perception of the Claimant's skills and knowledge are the reasons for the treatment.
162. **[Issue 12.2]** At the end of October Ms. Ault told Mrs Gordon an untrue fact, namely didn't know what job responsibilities were and questioned why the Claimant should be her line manager (Allegation 6) [108]. Actual comparator: Rebecca Gordon.
163. This allegation was not very clearly articulated in the list of issues and as a result not dealt with by Ms Ault in her witness statement. The allegation appears at paragraphs 40 – 40 one of the Claimant's witness statement
164. We have interpreted untrue in this context to be that Tiffany said something knowingly that was untrue i.e. she was deliberately misrepresenting the situation
165. We accept Claimant's evidence that Ms Ault told Ms Gordon that Claimant did not know what TA's job responsibilities were. That the Claimant was struggling to understand Ms Ault's role is a theme that appears on page 451 of Ms Ault's note.

166. It may be that the Claimant felt that he did understand Ms Ault's role. We have no basis to conclude that Ms Ault was falsely alleging that the Claimant did not understand her role. We find it more likely that this reflected a feeling on the part of Ms Ault that the Claimant did not fully understand the role.
167. We accept the Respondent's submission that Mrs Gordon as a comparator does not really help us given that her circumstances and relationship and history with Ms Ault are difficult.
168. We do not consider that we have received evidence from which we could conclude that this treatment was because of the Claimant's race, nor evidence from which an inference could reasonably be drawn. We have considered the circumstances of the initial confusion over the term Fire Marshal. We do not find on balance that this was anything more than a minor communication difficulty. We do not find that this is evidence from which we should draw an inference of discrimination.
169. We find "the reason why" this was said was that Ms Ault was impatient with the Claimant and unhappy being line managed by her. We do not find it was because of the Claimant's race or nationality. Do
170. **[Issue 12.3]** On 22 November 2019, Ms. Ault told Mrs Gordon that the Claimant had upset her 'from the Sky[p]e message regarding setting up online workshop'. However, the Claimant found that she had helped David Trafford, Group CEO set up meetings, bring drinks and snacks to the meeting room before (Allegation 7) [108]. Actual comparators: David Trafford and Mrs Gordon; and/or
171. We accept the Claimant's case that Ms Ault did tell Mrs Gordon those words.
172. Again we do not find that Mrs Gordon herself is a helpful comparator. As to Mr Trafford, given that he was very senior (Ms Ault's third line manager) we do not consider his circumstances are materially similar to that Claimant's.
173. We found that was Ms Ault was upset for two reasons. First, she had recently suffered a family bereavement, which the claimant was aware of (but only after she had sent a request) and second, the Claimant had asked her how to do this on a previous occasion.
174. We find however that this was explained by the bereavement and the repetition of the request and does not relate to the Claimant's race.
175. **[Issue 12.4]** In early December 2019, an untrue fact was told to Mrs Gordon by Ms. Ault, which was that the Claimant was mad at her when she asked for the location of one-to-one meetings for the internal and external consultants. Following that, she said she would resign from her job if the Claimant was to continue to be her line manager (Allegation 8) [108]. {or words to that effect?}
176. We accept that Ms Ault told Mrs Gordon that the Claimant was mad at her. It is difficult for us to conclude that this was "untrue" in the sense of Ms Ault deliberately misrepresenting the situation. We find this was likely her

perception, whatever the reality of the situation. As to Ms Ault saying that she might resign, we find that she did say that she no longer wanted to carry on working for the First Respondent if she was going to be line managed by the Claimant. We acknowledge Mr Arnold's submission that this is not precisely the same as a threat of resignation. There is a distinction. We are not surprised however that the Claimant drew the inference that this was a threat of resignation. It would be natural to conjecture that resignation would follow on in these circumstances.

177. We conclude that this is a continuation of the same unhappy dynamic between the two of them, exacerbated by the fact that due to the historic reporting line, Ms Ault felt that she had direct access to Mrs Gordon to make complaints about the Claimant which exacerbated the situation.
178. We do not have evidence from which we could determine that race is the reason, nor evidence from which we could reasonably infer this.

Discrimination arising from disability (s.15)

Unfavourable treatment

179. Was the Claimant treated unfavourably by the following:
180. **[Issue 13.1]** Being placed on a performance improvement plan on 25 November 2019 (**Allegation 9**); and/or The Claimant was placed on a performance improvement plan.
181. We find that this treatment is "unfavourable". No comparison is required.
182. **[Issue 13.2]** Being dismissed on 30 March 2020 (**Allegation 10**)? The Claimant was dismissed.
183. The First Respondent, realistically, concedes this is "unfavourable".

Because of something arising in consequence of disability (section 15)

184. If so, was it because of something arising in consequence of her disability:
185. **[Issue 14.1]** In respect of being placed on a performance improvement plan, a mistake which arose out of poor concentration which arose out of struggling to get to sleep which arose in consequence of her disability;
186. We do not accept the way this has been characterised by the Claimant. There was not simply a single mistake. There was a more fundamental concern about her performance or capability, not only in the October 2019 report which drew criticism from Mr Trafford on 21 November, but in the feedback more generally from other people within the First Respondent business who were dealing with the Claimant. We do not accept that this was a case of a single mistake caused by poor concentration caused by sleeplessness caused by anxiety. This mischaracterises the situation. How far the First Respondent might be to blame for having unrealistic expectations in this situation falls outside the scope of this decision.

187. **[Issue 14.2]** In respect of the Claimant's dismissal, the Claimant's inability to meet the requirements of the performance improvement plan because of her struggle to deal with her work and the pressure of being on the PIP which arose in consequence of her disability.
188. We do not accept the "something arising" as it has been characterised. The Claimant was dismissed, ultimately we find, because the First Respondent (principally Mrs Gordon) felt that the Claimant was not capable of fulfilling the role.
189. We find that Mrs Gordon genuinely believed that the Claimant was not capable of fulfilling the role and there was evidence from colleagues which supported this.
190. Whether the expectations of the Claimant were fair falls outside of the scope of our decision. We are not considering the fairness of the dismissal. We would however make the observation, given the geographically distributed nature of the First Respondent's business and the history of it growing through acquisition that seeking to understand the detail of the business and identify opportunities for efficiency savings was likely to be technically and politically challenging for any newcomer to the organisation. Unlike Mrs Gordon, the Claimant did not have an MBA. She did not have a background in management consulting. The expectations of what she could realistically achieve in this newly created role appear to us to have been very high. We find that the appeal panel correctly identify that there was a mismatch in expectations. This was the nub of the problem.
191. We acknowledged that the pressure of being on the PIP was significantly exacerbated by the Claimant's anxiety. We have dealt with this further in the claim of failure to make reasonable adjustments below. We do not however find that this additional pressure was the reason why she was dismissed. The reality, we find was that it was going to be difficult for her to successfully pass the PIP, in the sense that Mrs Gordon's mind was already made up that she would be dismissed because of the mismatch in expectations about what the Claimant could achieve in the role.

Proportional means of achieving a legitimate aim

192. **[Issue 15]** Giving our findings above, we have not gone on to deal with the First Respondent's justification defence.

Indirect disability discrimination (s.19)

193. The Claimant alleges the following PCP (provision, criterion or practice): a 360° generalised subjective performance feedback (PCP1) [111].
194. **[Issue 17]** Around 10 November 2019 - February / March 2020, did Rebecca Gordon and/or Eleanor Simmons of the First Respondent apply (or would have applied) PCP1 to both those with the Claimant's disability (including the Claimant) and those without the Claimant's disability in circumstances with no material difference?

195. In her email of 23 February 2020 which followed up from the meeting on 20 February 2020, one of the Claimant's complaints was that other colleagues were not assessed by having "all-round feedback" for probation. One of the essential elements for a claim of indirect discrimination is that policy is applied to those with and without the protected characteristic. The evidence of the Claimant's does not suggest that this was the situation.

Particular disadvantage

196. **[Issue 17]** Did PCP1 put or would put those with the Claimant's disability (including the Claimant) at a particular disadvantage namely:, those with anxiety would become overly worried, would start to have a sinking sensation in their chest and be unable to answer questions from team members who provided the feedback?
197. We have not received evidence of a general disparity of disadvantage for disabled people, or those with anxiety. We do not feel we can take on "judicial notice" that disabled people or even those with specifically anxiety would, generally speaking suffer a disadvantage as a result of a 360° review approach. This is not obvious or self-proving.
198. It seems to the Tribunal that the particular anxiety in this case was caused by the difficulties in the relationship between the Claimant and one of her two direct reports, rather than a 360° policy per se.
199. The claim of indirect disability discrimination cannot succeed.

Proportional achievement of a legitimate aim

200. **[Issue 19]** It has not been necessary for us to deal with a potential justification defence, in view of our findings above.

Failure to make reasonable adjustments (ss.20-21)

PCPs

201. The Claimant alleges the following PCPs [107]:
202. **[Issue 20.1]** Required administration team to be in the office (RA PCP1) on the following occasions: 12 November 2019 [PS17], 23 December 2019 [PS19], 9 January 2020 [PS21] and 4 February 2020 [PS19];
203. The significance of these dates is that these were dates on which requests for homeworking were refused.
204. Ultimately, even those members of staff who had an agreement to do some homeworking were required to be in the office some days of the week. In the case of the Claimant she was required to be there all the time. This was a PCP that was applied to the Claimant
205. **[Issue 20.2]** Strict deadline and rules for performance improvement plan (RA PCP2) on 2 December 2019 [107] / [PS20];

206. The Claimant raised a request on 1 December 2019 that the deadlines be varied. This was refused by Mrs Gordon in an email dated 2 December.
207. The Claimant went on to complain further about deadlines on 26 January 2021. Mrs Gordon did not relax the deadlines in response.
208. Requested reasonable adjustment on deadlines for the monthly report and line management in the PIP but was refused the next day (page 192, page 230 see comments in red).
209. The Tribunal finds that the First Respondent did operate strict deadlines in the PIP. It is not clear however what rules are being referred to, and our finding is that strict deadlines is the PCP.
210. **[Issue 20.3]** The decision to proceed with disciplinary hearings after the PIP quickly (RA PCP3) on 30 March 2020.
211. It is the case that the Respondent proceeded toward the meeting on 30 March without any undue delay following the conclusion of the PIP process in February. There was some delay while the Claimant was on sick leave.
212. Following *Ishola*, we do not find that this could be characterised as a PCP. The timing of progression from the end of the PIP to the disciplinary hearing we find was essentially a “one-off” decision confined to the circumstances of this case.
213. **[Issue 20.4]** [PCP4] Requiring employees to manage their direct reports
214. The Claimant was required to manage Ms Ault.

Substantial disadvantage

215. If so, did RA PCPs 1-4 place the Claimant at a substantial disadvantage (attributable to her disability) in comparison to non-disabled employees, namely
216. **[Issue 22.1]** For RA PCP1, having to work in the office resulted in stressful travelling, panic attacks under crowded environment and increased anxiety;
217. The Claimant was able to do this journey three days a week.
218. The Claimant provides more detail at paragraph 17 of her witness statement which helps us to identify the cause of the anxiety.
- "Around 12/11/2019 work from home requests were refused and my friend reduced today she could help with school pickup, I could not find children care solution in such a short notice and I was constantly worrying and struggle in concentration"
219. The GP note on 16 November 2019 contains the following which is in similar terms: “Friend aware of her personal situation and was helping pick [up] kids but can only do 3 days so added stress.”

220. We do not find that the commute to the First Respondent's office placed the Claimant at a substantial disadvantage. It was rather the difficulty of child care after school that was the source of the difficulties.
221. We do not find therefore that there was a substantial disadvantage for the Claimant as a disabled person as compared to nondisabled person. Any single parent in this situation would have the same difficulty. We do not minimise how stressful this must have been.
222. **[Issue 22.2]** For RA PCP2, on bad days, the Claimant could not do much work. When Mrs Gordon gave the Claimant a hostile, angry face, the Claimant got a sinking feeling in her chest and struggled to concentrate. She often had to catch up with work at home at night and tried to meet the deadline;
223. We do not make any finding in respect of the "hostile angry face" allegation which we have dealt with in earlier allegations and does not it seems to us form part of a PCP.
224. We have concluded based on the evidence that the PIP with strict deadlines caused the Claimant significant anxiety and did amount to a substantial disadvantage compared with a person who was not so disabled.
225. The Claimant requested an extension to the deadline on 1 December 2019, explaining in a recent email that it was "tight and pressurising". It is evident that she felt that she would need to work late and evident that she was working long hours.
226. While, as the Respondent submits, the occupational health report produced following a consultation on 4 December 2019, does not expressly refer to moving deadlines, it is recommended that it would be prudent to carry out a stress risk assessment.
227. The stress risk assessment filled in by the Claimant on 15 January 2020, set out fully above, makes it clear that she feels that she has unachievable deadlines, unrealistic time pressures, and pressure to work long hours.
228. In the PIP form completed on 29 January 2020 the Claimant referred to a request to adjust a deadline made on 5 December 2019 that was refused. She wrote:
- "I actually have already started working on the project and have consulted Beijing, Singapore, Sydney and Santiago and they are happy with it but was awaiting Pittsburgh's response.
- Due to the time pressure and stress I have forgotten it and was hunting projects with panic.
229. We find that the Claimant was indicating that she was suffering from stress as a result of the PIP, and the Respondent was aware or ought to have been aware of this, in the context of knowledge of disability from 23 October 2019

and the Claimant's email of 1 December 2019 and the content of the stress risk assessment on 15 January 2020.

230. **[Issue 22.3]** For RA PCP3, the First Respondent held the disciplinary hearing despite the GP's advice to avoid stressful triggers.
231. We find that a video hearing to consider the Claimant's dismissal, given the circumstances and her anxiety, did place her at a substantial disadvantage. We are fortified in the conclusion by the content of the Claimant's witness statement paragraphs 56-60. While we suspect that the Claimant may have given the better account of herself when she perceives, it was plainly a very stressful experience, and worse the context of suffering from anxiety as confirmed by her GP note.
232. The Claimant says in relation to the hearing which took place on 30 March 2020 that it was held despite the Respondents being aware she was psychologically vulnerable. She says that they were "rushing to finish the show".
233. **[Issue 22.4]** PCP4 did the Respondents requirement for the Claimant to carry on her line management responsibilities place her at a substantial disadvantage?
234. We have considered the facts, that the Claimant did not produce the certificate from her doctor's suggesting that she should have reduced responsibility to the Respondent's, on 30 January 2020 did not make any annotation against the line and team manager issue. Line management is not mentioned in the occupational health report of 3 February 2020, nor in the report dated 18 March 2020.
235. The Claimant admitted in cross examination that it really was PIP rather than Ms Ault that was the principal cause of stress.
236. We find that although the Claimant did find managing Ms Ault in particular difficult, that this essentially was due to a personality clash with Ms Ault as described above. While the Claimant's symptoms of anxiety cannot have made this easy, we do not find this amounted to a substantial disadvantage in the circumstances of the case given the considerations above.

Reasonable steps

237. If so, whether the Respondent took such steps as it was reasonable to take to avoid the disadvantage?
238. The Claimant contends it was reasonable to have taken the following steps:
239. **[Issue 24.1]** For RA PCP1, the Claimant be allowed to work from home two days a week. A number of other team members were allowed to do so - Rebecca Gordon, Sheena Patel and Will Aye;
240. It has not been necessary for us to consider this in view of our finding that this was not a substantial disadvantage.

241. **[Issue 24.2]** For RA PCP2, the First Respondent should have relaxed the deadline. There were occasions where previous monthly reports were late and there was no issue;
242. The Tribunal gave careful consideration to Mrs Gordon's evidence on this point. We acknowledge her argument that keeping the PIP for going longer was unkind and unreasonable. We do not doubt that this was a view that was genuinely held by her.
243. We have considered this matter objectively, however, taking account of all the circumstances including both the effect on the Claimant, the disadvantage to her and the likely effect on the First Respondent.
244. We have come to the conclusion that a slight relaxation of the deadlines imposed, in view of the particular difficulties and stress reported by the Claimant, the fact that Christmas was interposing and the effect on her anxiety, would have been a reasonable adjustment in the circumstances. The only cost would have been a short additional period of paying the Claimant her salary.
245. We have considered the alleged adjustments set out at paragraph 25 of the list of issues, relied upon by the Respondent as "background" but as circumstances that must be taken into consideration in the assessment of what would be a reasonable adjustment. Point 25.1 "Seeking advice from Occupational Health advisers and acting in accordance with the medical information received" We do not find has been made out on the evidence. The occupational health advisers recommended a stress risk assessment. The stress risk assessment plainly highlighted that the deadlines were a source of stress. Stress in the circumstances we see as being closely intertwined with anxiety, which was the Claimant's disability. We do not find on the balance of probabilities that the First Respondent made any adjustment in respect of the timing of the stages of the PIP. On the contrary this was refused and further complaint about it by the Claimant in January were simply ignored by Mrs Gordon.
246. We consider that it would have been a reasonable adjustment to slightly relax the deadlines within the PIP process. In her claim form the Claimant suggests that the adjustment should have been to move a deadline from January to February. In our assessment the adjustment necessary would have added no more than four weeks to the overall process as an adjustment. The First Respondent failed to make such an adjustment.
247. **[Issue 24.3]** For RA PCP3, the First Respondent should have delayed the hearing to a later date.
248. By contrast with PCP2, on balance we accept Mrs Gordon's argument here about delay. It is not clear to us that delaying further would be an adjustment that would have ameliorated stress. It would essentially prolong the period of stress. Once the PIP process had come to an end, there was no good reason to delay the disciplinary stage.

249. The First Respondent relied upon an Occupational Health Report as suggesting that the Claimant was fit to attend this hearing.
250. Insofar as there was a clash with the GP report, an occupational health is produced by a specialist who is expert in workplace medicine.
251. We find that the First Respondent was entitled to rely on this report and it was reasonable to go ahead.
252. **[Issue 24.4]** For RA PCP4, Remove line management responsibilities (or at least for Tiffany Ault)
253. In view of our conclusion on substantial disadvantage, it has not been necessary to deal with this.
254. **[Issue 25]** We have considered these “adjustments” described by the Respondents as background as to what is reasonable when considering issue 24. We find that the matters relied on were in the main not implemented to do with disability, but accept Mr Arnold’s submission that following Spence, this is not material.

Harassment related to disability

255. Whether the Respondent engaged in the following conduct:
256. **[Issue 26.1]** On 21 November 2019, the Claimant was repeatedly criticised by Rebecca Gordon in an open-plan office that she did not have common sense or know the basics (Allegation 11) [109];
257. We find that Mrs Gordon did say words to the effect that the Claimant did not have common sense or know the basics. This was in the context of the critical email from Mr Trafford that she had just received.
258. We accept that this was unwanted conduct which would have created an intimidating environment for the Claimant.
259. We do not find however that it “related to” her disability. What is “related to” is a question of fact for the Tribunal. We simply do not find that there is a sufficient degree of connection in this case to make out this requirement of section 26 EqA.
260. **[Issue 26.2]** On 21 November 2019, the Claimant was dismissed by Mrs Gordon (Allegation 12);
261. We consider that the Claimant may have genuinely believed that the failure of probation indicated at that stage that she was being dismissed. Having considered the note of the meeting at page 160, the reference to a process and a further meeting, we find that it was the intention of Mrs Gordon that a PIP process would be initiated the following week. This is also corroborated by Ms Simmons' evidence. This was not a dismissal. The Claimant has not made out this allegation on the facts.

262. **[Issue 26.3]** By way of a general finding relevant to the following allegations, Mrs Gordon conceded that during this period relationship was strained. Mrs Gordon denied herself feeling awkward. As to whether the Claimant was feeling awkward she replied "possibly".
263. **[Issue 26.3.1]** On 27 November 2019, at the office building entrance, the Claimant bumped into Mrs Gordon around 9:05am. The Claimant said hello to Mrs Gordon, but she ignored the Claimant with a hostile face (Allegation 13);
264. We accept that Mrs Gordon did not return a social pleasantry on this occasion and find that the Claimant felt ignored. For similar reasons to those above however, we do not find that this was related to her disability. Relations between the two were strained. The Claimant felt awkward. This was because of the initiation of the PIP, and not related to the Claimant's anxiety.
265. **[Issue 26.3.2]** On 28 November 2019, at the Claimant's desk. Mrs Gordon and the Claimant sat next to each other, but Mrs Gordon did not speak to her at all and gave the Claimant a hostile face (Allegation 14);
266. Again we accept that Mrs Gordon did not speak to the Claimant and find that the Claimant felt ignored. For similar reasons to those above however, we do not find that this was related to her disability. Relations between the two were strained. The Claimant felt awkward. This was because of the initiation of the PIP, and not related to the Claimant's anxiety.
267. **[Issue 26.3.3]** On 2 December 2019, at the Claimant's desk. Mrs Gordon did not speak to her at all and gave the Claimant an angry face (Allegation 15);
268. Again we find that this allegation is made out factually and find that the Claimant felt ignored. For similar reasons to those above however, we do not find that this was related to her disability. Relations between the two were strained. The Claimant felt awkward. This was because of the initiation of the PIP, and not related to the Claimant's anxiety.
269. **[Issue 26.3.4]** On 16 March 2020, in the Boardroom, Mrs Gordon kept blaming the Claimant and said it was the Claimant's fault that the Team had not finished the work. This was even though the Claimant had sent everything that the team needed (Allegation 16);
270. We accept that Mrs Gordon attributed some blame to the Claimant for the Team not finishing the work. We understand why the Claimant feels that this was unfair since she believed she had sent the team what they needed and also she had been on sick leave.
271. We do not find that this was related to the Claimant's anxiety. This was following on from a period where the relationship had been strained between the two and Mrs Gordon's perception was that the Claimant was not performing in her role.
272. **[Issue 26.4]** On 30 March 2020 during a Skype video call at 2pm, Mrs Gordon and/or Eleanor Simmons played games and switched whatever the Claimant

was trying to defend to blame her and say it was all her fault. They laughed at the Claimant (Allegation 17).

273. We find that Mrs Gordon did laugh, for the reason set out above in our findings of fact. We find that this was her reaction to the “docuSign” project which she plainly thought was very limited and did not consider to be worthy of the suggestion that this demonstrated an ability to project manage. This reaction was unfortunate and was understandably from the Claimant’s point of view extremely disconcerting.
274. We do not find that this related to the Claimant’s anxiety. This was very a difficult meeting because of the circumstances. The Claimant was trying to defend her performance and suggest that she should have passed the PIP. Mrs Gordon did not agree. This is always going to be awkward meeting. We find it was the history of the PIP and the performance concerns that explain the dynamic at this meeting.

Remedy

275. To what remedy is the Claimant entitled (to include matters of Chagger, contribution and mitigation)?
276. The Tribunal has yet to receive submissions of Chagger, contribution and mitigation. There will need to be a remedy hearing if the parties are unable to agree damages. We have not made any decision on these points.
277. It is worth noting that we have found that the decision to dismiss in itself was not discriminatory. The Claimant is not able to bring a claim for unfair dismissal given that she does not have the requisite two years’ service.
278. We have yet to hear evidence and argument and yet to make a decision on the point, but at present it seems unlikely that any financial loss claimed could represent more than four weeks’ salary given that this is the extension to the PIP process that we find it would have been reasonable to make.

Remedy Hearing

279. A one day remedy hearing has been listed on **16 July 2021** to be heard by CVP.
280. The parties should agree a bundle of documents relevant to remedy by **18 June 2021**.
281. The parties should exchange witness statements by **2 July 2021**.

Employment Judge Adkin

Date 28/5/2021

WRITTEN REASONS SENT TO THE PARTIES ON
..28/05/2021.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

Case Nos. 2203672/2020 & 2204811/2020

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL

BETWEEN:

MS. PEINA SUN

Claimant

-and-

(1) CRU INTERNATIONAL LTD.

(2) MS. REBECCA GORDON

Respondents

LIST OF ISSUES v2

The Claimant's claims

1. The Claimant makes the following claims:

Claim 1

- 1.1 Direct disability discrimination (s.13);
- 1.2 [WITHDRAWN]
- 1.3 Discrimination arising from disability (s.15);
- 1.4 Failure to make reasonable adjustments (ss.20-21);
- 1.5 Harassment related to disability (s.26);

Claim 2

- 1.6 Direct race discrimination (s.13); and
- 1.7 Indirect disability discrimination (s.19).

Limitation

*Claim 1 - ACAS Early Conciliation – R142273/20/37 [& R160617/20/35]*¹

2. Day A was 24 April 2020. Day B was 21 May 2020. The ET1 claim form was filed on 20 June 2020. The primary limitation period therefore commenced on 25 January 2020.
3. Whether any complaint in relation to Claim 1 occurring before 25 January 2020, namely Allegations 1, 2, 3, 4(i), 4(ii), 9, 11, 12, 13, 14, and 15, & RA PCP1(i)-(iii) and/or RA PCP2, is outside the primary limitation period?

In particular:

- 3.1 Whether there was conduct extending over a period so as to be treated as done at the end of that period, the end of that period being within the primary limitation period?
- 3.2 If not, whether there is such other period of time as the Tribunal thinks just and equitable within which to bring the complaints?
- 3.3 By section 123 of the Equality Act 2010, a failure to do something² is to be 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 he does an act inconsistent with doing it or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.

Claim 2 - ACAS Early Conciliation – R174820/20/54 & R174824/20/18

4. Day A was 30 July 2020. Day B was 30 July 2020. The ET1 claim form was filed on 8 August 2020. The primary limitation period therefore commenced 30 April 2020.
5. Whether any complaint in relation to Claim 2 occurring before 30 April 2020, namely Allegations 5, 6, 7, 8 and/or 9 & PCP1, is outside the primary limitation period?

¹ Awaiting sight of certificate

² Failure to make a reasonable adjustments is an omission, not an act -

In particular:

- 5.1 Whether there was conduct extending over a period so as to be treated as done at the end of that period, the end of that period being within the primary limitation period?
- 5.2 If not, whether there is such other period of time as the Tribunal thinks just and equitable within which to bring the complaints?
- 5.3 By section 123 of the Equality Act 2010, a failure to do something³ is to be 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 he does an act inconsistent with doing it or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.

Disability

6. The material period is September 2019⁴ to 30 March 2020⁵.
7. By their e-mail dated 1 February 2021, the Respondents accept that the Claimant was disabled within the meaning of the Equality Act 2010 in the material period by reason of her anxiety.
8. As to the requisite knowledge of the disability, for:
 - 8.1 Direct disability discrimination, the Respondents accept that they had knowledge of the Claimant's disability from 4 December 2019, the date of the receipt of the Occupational Health report of 4 December 2019;
 - 8.2 Discrimination arising from disability, the Respondents accept that they had had knowledge of the Claimant's disability, or could reasonably have been expected to know of the same from 4 December 2019;
 - 8.3 Indirect disability discrimination, no knowledge of the disability is required, although it may go to whether any indirect disability discrimination was unintentional or not;

³ Failure to make a reasonable adjustments is an omission, not an act - *Matuszowicz v Kingston-upon-Hull County Council* [2009] IRLR 288, CA.

⁴ Allegation 5 below, being the first allegation chronologically

⁵ EDT / last allegation chronologically

- 8.4 Failure to make reasonable adjustments, the Respondents accept that they had had knowledge:
- 8.4.1 of the Claimant's disability, or could reasonably have been expected to know of the same from 4 December 2019; but
 - 8.4.2 do not accept that they had knowledge that the Claimant was likely to be placed at a substantial disadvantages asserted by the Claimant in relation to the alleged PCPS;
- 8.5 Harassment related to disability, knowledge of the Claimant's disability is required where the Claimant contends (as in this case) that the unwanted conduct was related to her disability.
9. Whether any disability allegations before 4 December 2019, namely Allegations 1, 2, 3, 9, 11, 12, 13, 14, and/or 15, fail because the Respondents were unaware of the Claimant's disability?

Direct disability discrimination

10. Was the Claimant treated less favourably by the First Respondent and/or the Second Respondent because of her disability than Rebecca Gordon, Sheena Patel were and/or a hypothetical comparator would have been, in circumstances with no material difference by the following acts or omissions:
- 10.1 On 15 November 2019, when the Claimant told Ms. Gordon in a meeting of her family difficulties and that her children were on a Child Protection Plan, she responded immediately that it would make her think that it's not a good idea for the Claimant to be in work (**Allegation 1**) [111];
 - 10.2 On 21 November 2019, when the Claimant told Ms. Gordon in a meeting of her family difficulties and that her children were on a Child Protection Plan, she responded immediately that it would make her think that it's not a good idea for the Claimant to be in work (**Allegation 2**) [111];
 - 10.3 On 21 November 2019, the Claimant had a quick private chat with Ms. Gordon and explained to her that she suffered from mental health problems, and that the mistake she had made was due to her headache and nausea. Ms. Gordon responded to say it was not a good idea for her to return to work, and that it would not stop the dismissal process (**Allegation 3**) [111].

11. [WITHDRAWN]

Direct race discrimination

12. Was the Claimant treated less favourably by the First Respondent because of the Claimant's race (it appears she is alleged Chinese nationality and/or being non-white [PS38]) than the actual comparators named below were and/or a hypothetical comparator would have been, in circumstances with no material difference, by the following acts or omissions:

12.1 When the line management duty was transferred to the Claimant in September 2019, one of her team member's (Tiffany Ault) attitude towards the Claimant started to turn cold, and was on-going (**Allegation 5**) [108].

Actual comparators: Rebecca Gordon, Julie Henderson and Sheena Patel;

12.2 At the end of October Ms. Ault told Ms. Gordon an untrue fact, namely [DETAILS] and questioned why the Claimant should be her line manager (**Allegation 6**) [108]. Actual comparator: Rebecca Gordon. *NB – the Respondent does not understand how , conceptually, Ms. Gordon is a valid comparator;*

12.3 On 22 November 2019, Ms. Ault told Ms. Gordon that the Claimant had upset her 'from the Skye message regarding setting up online workshop'. However, the Claimant found that she had helped David Trafford, Group CEO set up meetings, bring drinks and snacks to the meeting room before (**Allegation 7**) [108]. Actual comparators: David Trafford and Ms. Gordon; and/or

12.4 In early December 2019, an untrue fact was told to Ms. Gordon by Ms. Ault, which was that the Claimant was mad at her when she asked me for the location of one-to-one meetings for the internal and external consultants. Following that, she said she would resign from her job if the Claimant was to continue to be her line manager (**Allegation 8**) [108].

Discrimination arising from disability (s.15)

Unfavourable treatment

13. Was the Claimant treated unfavourably by the following:

13.1 Being placed on a performance improvement plan on 25 November 2019
(**Allegation 9**); and/or

13.2 Being dismissed on 30 March 2020 (**Allegation 10**)?

Because of something arising in consequence of disability

14. If so, was it because of something arising in consequence of her disability:

14.1 In respect of being placed on a performance improvement plan, a mistake which arose out of poor concentration which arose out of struggling to get to sleep which arose in consequence of her disability;

14.2 In respect of the Claimant's dismissal, the Claimant's inability to meet the requirements of the performance improvement plan because of her struggle to deal with her work and the pressure of being on the PIP which arose in consequence of her disability.

Proportional means of achieving a legitimate aim

15. If so, does the Respondent show the treatment was a proportionate means of achieving a legitimate aim:

15.1 The Respondent contends the following legitimate aims:

15.1.1 Maintaining satisfactory performance of employees; and/or

15.1.2 Ensuring operational effectiveness and efficiency of the business.

15.2 The Respondent contends that these were proportionally achieved - the measures taken:

- 15.2.1 corresponded to a real need on the part of the organisation, having regard to the particular considerations which were weighing upon the First Respondent's mind in the present case (but also in any event);
- 15.2.2 were appropriate with a view to achieving the objectives (aims) pursued; and
- 15.2.3 were reasonably necessary to that end.

Indirect disability discrimination (s.19)

Provision, criterion or practice (PCP)

- 16. The Claimant alleges the following PCP: a 360° generalised subjective performance feedback (**PCP1**) [111].
- 17. Around 10 November 2019 – February / March 2020, did Rebecca Gordon and/or Eleanor Simmons of the First Respondent apply (or would have applied) PCP1 to both those with the Claimant's disability (including the Claimant) and those without the Claimant's disability in circumstances with no material difference?
NB – the Respondents assert that Ms. Gordon requested feedback on the following dates – 11 / 12 December 2019 [RG18], 19 December 2019 [RG45], 21 January 2020 [RG48], and 12 February 2020 [RG58].

Particular disadvantage

- 18. Did PCP1 put or would put those with the Claimant's disability (including the Claimant) at a particular disadvantage namely:, those with anxiety would become overly worried, would start to have a sinking sensation in their chest and be unable to answer questions from team members who provided the feedback?

Proportional achievement of a legitimate aim

- 19. If so, does the Respondent show the following aims were legitimate and proportionally achieved –

19.1 The Respondent contends the following legitimate aims:

19.1.1 To ensure that performance for all employees is monitored and to provide both positive and constructive feedback as a way to improve performance;

19.1.2 To ensure managers meet the requirements of the role;

19.1.3 To ensure managers have the skills to support the team; and

19.1.4 To further their development in the role.

19.2 The Respondent contends that these were proportionally achieved - the measures taken were:

19.2.1 corresponded to a real need on the part of the organisation, having regard to the particular considerations which were weighing upon the First Respondent's mind in the present case (but also in any event);

19.2.2 appropriate with a view to achieving the objectives (aims) pursued; and

19.2.3 reasonably necessary to that end.

Failure to make reasonable adjustments (ss.20-21)

PCPs

20. The Claimant alleges the following PCPs [107]:

20.1 Required administration team to be in the office (**RA PCP1**) on the following occasions: 12 November 2019 [PS17], 23 December 2019 [PS19], 9 January 2020 [PS21] and 4 February 2020 [PS19];

20.2 Strict deadline and rules for performance improvement plan (**RA PCP2**) on 2 December 2019 [107] / [PS20]; and

20.3 The decision to proceed with disciplinary hearings after the PIP quickly (**RA PCP3**) on 30 March 2020.

21. Did the Respondent apply RA PCPs1, 2 and 3 or any of them to the Claimant?

Substantial disadvantage

22. If so, did RA PCPs 1-3 place the Claimant at a substantial disadvantage (attributable to her disability) in comparison to non-disabled employees, namely

22.1 For RA PCP1, having to work in the office resulted in stressful travelling, panic attacks under crowded environment and increased anxiety;

22.2 For RA PCP2, on bad days, the Claimant could not do much work. When Ms. Gordon gave the Claimant a hostile, angry face, the Claimant got a sinking feeling in her chest and struggled to concentrate. She often had to catch up with work at home at night and tried to meet the deadline;

22.3 For RA PCP3, the First Respondent held the disciplinary hearing despite the GP's advice to avoid stressful triggers.

Reasonable steps

23. If so, whether the Respondent took such steps as it was reasonable to take to avoid the disadvantage?

24. The Claimant contends it was reasonable to have taken the following steps:

24.1 For RA PCP1, the Claimant be allowed to work from home two days a week. A number of other team members were allowed to do so – Rebecca Gordon, Sheena Patel and Will Aye;

24.2 For RA PCP2, the First Respondent should have relaxed the deadline. There were occasions where previous monthly reports were late and there was no issue;

- 24.3 For RA PCP3, the First Respondent should have delayed the hearing to a later date.
25. The Respondent contends the following steps were taken and were reasonable to take or that the Claimant's contended steps was not a reasonable step to take:
- 25.1 Seeking advice from Occupational Health advisors and acting in accordance with the medical information received;
- 25.2 A quiet space for the Claimant to work;
- 25.3 Flexibility in working hours, including agreeing to compressed hours;
- 25.4 Amending the feedback process so that the Claimant only received feedback on her performance from key stakeholders.

Harassment related to disability

26. Whether the Respondent engaged in the following conduct:
- 26.1 On 21 November 2019, the Claimant was repeatedly criticised by Rebecca Gordon in an open-plan office that she did not have common sense or know the basics (**Allegation 11**) [109];
- 26.2 On 21 November 2019, the Claimant was dismissed by Ms. Gordon (**Allegation 12**);
- 26.3 On the following occasions, Ms. Gordon was hostile towards the Claimant:
- 26.3.1 On 27 November 2019, at the office building entrance, the Claimant bumped into Ms. Gordon around 9:05am. The Claimant said hello to Ms. Gordon, but she ignored the Claimant with a hostile face (**Allegation 13**);
- 26.3.2 On 28 November 2019, at the Claimant's desk. Ms. Gordon and the Claimant sat next to each other, but Ms. Gordon did not speak to her at all and gave the Claimant a hostile face (**Allegation 14**);

- 26.3.3 On 2 December 2019, at the Claimant's desk. Ms. Gordon did not speak to her at all and gave the Claimant an angry face (**Allegation 15**); and
- 26.3.4 On 16 March 2020, in the Boardroom, Ms. Gordon kept blaming the Claimant and said it was the Claimant's fault that the Team had not finished the work. This was even though the Claimant had sent everything that the team needed (**Allegation 16**);
- 26.4 On 30 March 2020 during a Skype video call at 2pm, Ms. Gordon and/or Eleanor Simmons played games and switched whatever the Claimant was trying to defend to blame her and say it was all her fault. They laughed at the Claimant (**Allegation 17**).
27. If so, was the conduct unwanted?
28. If so, whether the proven unwanted conduct related to the Claimant's disability? See in particular the Claimant's assertions at [109-110].
29. If so, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating , hostile, degrading, humiliating or offensive environment for him?
30. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In considering whether the conduct had that effect, the Tribunal will take into account:
- 30.1 the Claimant's perception;
- 30.2 the other circumstances of the case; and
- 30.3 whether it is reasonable for the conduct to have that effect?

Remedy

31. To what remedy is the Claimant entitled (to include matters of *Chagger*, contribution and mitigation)?