EMPLOYMENT TRIBUNALS

Claimant: Ms Sundeep Gill

Respondent: Flogas Britain Limited

FINAL HEARING

Heard at: Leicester **On:** 4 (reading), 5 & 8-10 May 2017

Before: Employment Judge Camp Members: Mr M E Robbins
Mr C Bhogaita

Appearances
For the Claimant: Mr B Amunwa, counsel
For the Respondent: Ms A Reindorf, counsel

ORDER

(1) Permission to the Claimant to amend her claim to add additional complaints of direct disability discrimination is refused. This order was made on 5 May 2017.

(2) Permission to the Respondent to rely on an additional, previously undisclosed, document is refused. This order was made on 9 May 2017.

(3) Reasons for the above orders were given on the days they were made; written reasons were not requested orally and will only be provided if requested in writing within 14 days of this being sent to the parties.

JUDGMENT BY CONSENT

The Respondent made unauthorised deductions from the Claimant's wages in the gross sum of **£233.86** and must pay that sum to the Claimant forthwith. This judgment takes effect on 10 May 2017.

RESERVED JUDGMENT

All of the Claimant's outstanding claims fail and are dismissed.

REASONS

1. These are the tribunal's reasons for the above unanimous Reserved Judgment.

Introduction

2. The Claimant, Ms Sundeep Gill, was employed by the Respondent as a Marketing Manager from 15 September 2014 until her resignation on 29 January 2016. At the time of her resignation she was off sick from work, convalescing following surgery in early December 2015 on a disc prolapse. Her claim is substantially about the Respondent's decision not to pay her company sick pay for that period of sickness absence.

3. The Claimant went through early conciliation from 10 February to 7 March 2016 and presented her claim form on 5 April 2016. The main claim set out in the "*Statement of* case" document attached to the Claimant's claim form was a disability discrimination claim. It incorporated complaints of direct discrimination, unfavourable treatment because of something arising in consequence of disability under section 15 of the Equality Act 2010 ("section 15";"EqA"), and breach of the duty to make reasonable adjustments under EqA sections 20 and 21.

4. The Claimant suffers from complex regional pain syndrome ("CRPS"). Our understanding of CRPS is that it is an idiopathic condition, the main symptom of which is extreme pain, leading to mobility difficulties and low mood/depression. She developed the condition after a seemingly innocuous incident in January 2011 when she stubbed her toe. There is no dispute that the Claimant is and was at all relevant times a disabled person because of CRPS.

5. The Claimant also suffers from anxiety and depression. Her CRPS affects her anxiety and depression and vice versa; but it is not the case – at least not on the basis of the medical and psychological evidence we have before us – that her anxiety and depression was caused by CRPS. The Claimant's case has consistently been put forward on the basis of just such a causal link, the suggestion made being that her CRPS led to depression, which was diagnosed in January 2015. However, a report from a Clinical Psychologist dated 30 December 2015 (which was not in the trial bundle but which was, at the Claimant's request and with the Respondent's consent, put before us on day 4 of the final hearing) makes clear that the Claimant: "*has a long-standing history of depression due to multiple stresses during childhood and early adulthood*".

6. It is important for us to bear in mind when considering the Claimant's Tribunal claim that the condition she is relying on as her disability is CRPS and CRPS only. Although it may well have been possible for the Claimant to have relied on two conditions – CRPS and anxiety/depression – as disabilities for the purposes of a claim, that is not the claim she has brought and put before us.

7. We should like to make clear at the outset that nothing in our decision should be taken as being personally critical of the Claimant, nor as suggesting that her

evidence before us was dishonest in any way, shape, or form. We haven't had to resolve very many factual disputes about what happened in order to decide this case. It has been much more about why things happened and about what the legal consequences of those things happening are. There are instances of real conflicts of evidence (as opposed, for example, to the Respondent giving evidence about something and the Claimant, without evidence of her own on the point, simply asking us to reject the Respondent's account). In relation to such instances, where, later in these Reasons, we prefer the Respondent's version of particular events to the Claimant's, it is because we think the Respondent's version is more likely to be correct, and that the Claimant is probably mistaken in her recollection, in light of the inherent probabilities of the situation and/or of all the other evidence.

Claimant's complaints

8. In preparation for a case management preliminary hearing, Claimant's [then] counsel prepared a document ("Case Summary") headed "*C's Case Summary, Proposed List Of Issues and Response to R's Application for Strike Out*". That is the main document within which the precise complaints the Claimant is making are set out. During the first day of this final hearing, a reading day, however, it quickly became clear to us that the parties had different views as to what complaints were being pursued and what complaints were before the Tribunal. We sought to clarify this with counsel at the start of day two. Further clarification was provided throughout the hearing.

9. In light of that clarification, and following an unsuccessful amendment application by the Claimant, the complaints we were left with by the end of closing submissions were broadly those set out in the Case Summary as follows:

    9.1 eight complaints of section 15 discrimination, as set out in sub-paragraphs (a) to (f) of paragraph 25(1) of the Case Summary (there being two complaints in subsection (e));

    9.2 the section 15 complaints both rely on two "*something*"s said to arise in consequence of disability, namely "*the six weeks' planned absence for surgery commencing on 2 December 2015*" and "*anxiety and depression, a co-morbid condition*";

    9.3 the same eight complaints, but made as complaints of direct disability discrimination;

    9.4 a complaint of failure to comply with the duty to make reasonable adjustments, essentially about the decision not to pay company sick pay for the period from 2 December 2015 until the Claimant's resignation. This complaint related to an alleged decision that the Claimant would not be paid any more company sick pay until her Bradford Factor[1] was 30 or below[2]. The relevant "*provision, criterion or practice*" ("PCP") under

[1] Explained below.

[2] It hasn't always been clear to us whether the relevant Bradford Factor was 30 or below or under 30; but it makes no substantial difference to this case whichever it was.

section 20(3) of the Equality Act 2010 ("EqA") was [something like] including all absences in calculating the Bradford Factor. The relevant alleged "*substantial disadvantage*" was it being more likely company sick pay would be removed from the Claimant because of her disability than that it would be removed from a non-disabled comparator;

9.5 an indirect disability discrimination complaint based on the same PCP and disadvantage as the reasonable adjustments complaint;

9.6 a constructive wrongful dismissal complaint based on an allegation that the Respondent breached the so-called 'trust and confidence term' and that the Claimant resigned in response to that breach;

9.7 unparticularised claims for unauthorised deductions from wages / holiday pay.

10. In the opening paragraphs of the Respondent's Grounds of Resistance, the Respondent submitted that any complaints based on the proposition that it was a breach of the duty to make reasonable adjustments and/or indirect disability discrimination and/or section 15 discrimination not to pay company sick pay to the Claimant in respect of a period of disability-related absence had no reasonable prospects of success and should be struck out on that basis. That was the context within which the initial case management preliminary hearing took place on 2 June 2016, before Employment Judge Ahmed (by telephone).

11. In the Case Summary – which was prepared for that preliminary hearing – amongst other things:

11.1 the precise complaints being pursued by the Claimant and the basis of those complaints was clarified (something which had not been done, not adequately at least, in the ET1 Statement of Case);

11.2 in some respects, the case put forward in Case Summary was different from that put forward in the Statement of Case;

11.3 Claimant's [then] counsel responded to the strike out application as follows: "*R invites this Tribunal to rely upon O'Hanlon v Commissioners for HM Revenue and Customs [2007] IRLR 404 to strike out C's claim. It is not clear whether R's misconception arises from a misunderstanding of O'Hanlon or of the claim. Suffice it to say O'Hanlon is authority for the proposition that, if an employer has never agreed to pay an employee for disability-related absences, once their contractual entitlement to sick pay is exhausted, a Tribunal cannot coerce it into doing so as a reasonable adjustment. It says nothing of the position where an employer has agreed to a series of benefits as adjustments necessary to enable the employee to perform a role within its organisation and then unilaterally withdraws them after an employee has come to rely upon them.*"

12. In other words, at the preliminary hearing the Claimant's case was very clearly being put forward on the basis that there had been an agreement to pay her company sick pay and that that agreement had been reneged upon by the Respondent; and that this provided the basis upon which the Claimant could

distinguish her claim from Mrs O'Hanlon's. We mention this because it seemed to us that at trial – or by the time we got to closing submissions, at least – the Claimant's case was in reality being put forward on a basis that Claimant's counsel had conceded at the preliminary hearing was prohibited by O'Hanlon, namely that, whether or not the Respondent had previously agreed to pay company sick pay to the Claimant as a reasonable adjustment, the tribunal should "*coerce*" the Respondent into paying it.

Issues & law

13. We have not considered and dealt with every issue raised during the course of the proceedings and/or during the final hearing before us but, in the main, only with those disputed issues that we felt it was reasonably necessary for us to deal with in order to reach our overall decision. The disputed issues we have dealt with are:

    13.1 was the Claimant dismissed, i.e. (i) did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? (ii) if so, did the Claimant affirm the contract of employment before resigning? (iii) if not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? If the Claimant was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice;

    13.2 did the Respondent treat the Claimant less favourably than it treated or would have treated others in the same or comparable circumstances, in accordance with EqA sections 13 and 23, in the eight ways alleged?

    13.3 if so, was this because of the Claimant's disability of CRPS and/or because of the disability of CRPS more generally?

    13.4 did the two "*something*"s referred to above arise in consequence of the Claimant's CRPS, in accordance with EqA section 15(1)(a)?

    13.5 if so, did the Respondent treat the Claimant unfavourably in the eight ways alleged because of either or both of those things?

    13.6 did the Respondent, at any relevant time, apply the PCP referred to above to the Claimant?

    13.7 if so, when it was applied to him, did any such PCP put the Claimant as a disabled person at a "*substantial disadvantage*" in comparison with persons who are not disabled, in accordance with EqA section 20(3)?

    13.8 if so, did the Respondent fail to take steps it would have been reasonable for it to have to take to avoid the disadvantage?

The law

14. Apart (possibly) from a slight dispute as to the proper interpretation of O'Hanlon, read together with in Griffiths v Secretary of State for Work and

Pensions [2015] EWCA Civ 1265, there does not seem to be any legal dispute in this case.

15. The law relating to whether someone has been constructively dismissed appears substantially in the issues as outlined above. Dismissal includes an employee terminating, "*the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*": ERA section 95(1)(c). What this means was definitively decided by the Court of Appeal in Western Excavations v Sharp [1977] EWCA Civ 165, in the well-known passage beginning , "*If the employer is guilty of conduct which is a significant breach…*" and ending, "*He will be regarded as having elected to affirm the contract.*"

16. As mentioned above, the Claimant relies, as the "*significant* [a.k.a. fundamental or repudiatory] *breach*", on a breach of the 'trust and confidence term', that is to say, the Claimant alleges that the Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. Any breach of that term is repudiatory. This serves to highlight that it is a high-threshold test: "*destroy or seriously damage*" is the wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.

17. To further emphasise how grave things must be for there to be a breach of the trust and confidence term, or some other fundamental breach of the contract of employment, I note that a fundamental breach is one going to the root of the contract; one that, adopting the wording used in some of the cases, 'evinces an intention not to be bound' by the contract.

18. This is – to an extent – a 'last straw' case. An essential ingredient of the final act or last straw in a constructive dismissal claim of this kind is that it is an act in a series the cumulative effect of which is to amount to the breach of the trust and confidence term. The final act need not necessarily be blameworthy or unreasonable, but it has to contribute something to the breach, even if relatively insignificant. See Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493.

19. In relation to affirmation, (which is referred to at the end of the above-mentioned passage from Western Excavations), we note paragraphs 11 to 15 and 21 to 29 of the decision of the EAT in Cockram v Air Products Plc [2014] IRLR 672.

20. Affirmation is not straightforward in a case like this one where there is alleged to be a course of conduct that amounts to a breach of the trust and confidence term. Affirmation of a particular breach of the trust and confidence term does not make things that happened pre-affirmation irrelevant to assessing whether there is a new breach after affirmation. The question being asked is what was the position when the Claimant resigned; and it is necessary to look at everything that happened, including things that happened before the contract was affirmed, in deciding whether there was a breach at the point of resignation. Affirmation only 'works' as a defence in these cases if the contract

is affirmed between the event constituting the last straw and the Claimant resigning.

21. Turning to the law relating to the discrimination complaints, our starting point – and almost our end point – has been the wording of the relevant parts of the EqA, in particular: sections 13, 15, 19, 20, 21, 23, and 136. The way the issues are worded in the list of issues, above, reflects the wording of the legislation.

22. In terms of case law, we have considered, first, paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

23. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EqA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which we adopt. Although the threshold to cross before the burden of proof is reversed is a relatively low one – "*facts from which the court* could *decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[3] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

24. Similarly, in relation to the direct discrimination complaints, it is for the Claimant to prove a prima facie case of less favourable treatment. "*To be treated less favourably necessarily implies some element of comparison: the complainant must have been treated differently to a comparator or comparators, be they actual or hypothetical.*" Harvey on Industrial Relations & Employment Law L[235]. The Claimant must show that she was treated less favourably than the Respondent treats or would treat others and merely proving, without more, that the Respondent treated her badly is insufficient.

25. An alternative approach to examining EqA section 136, one repeatedly commended by the EAT and Court of Appeal (e.g. in Ladele at paragraph 40(5)) is effectively to ignore the burden of proof altogether and simply to ask: "why was the Claimant treated in the manner complained of", i.e. what was the 'reason for the treatment'? We refer to paragraphs 60, 71, 72 and 75 of the decision of the EAT in Laing v Manchester City Council [2006] ICR 1519.

[3] i.e. the Claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

Wherever possible, we have sought to adopt this alternative approach and to determine the reason for the treatment in question.

26. In relation to the section 15, indirect discrimination and reasonable adjustments claims, we have sought to apply the law as explained: by the Court of Appeal in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at paragraphs 15 to 29, 43 to 47, 57 to 68, 73, and 79 to 80; by the Supreme Court in Home Office v Essop [2017] UKSC 27 from paragraph 18 onwards.

27. Some miscellaneous legal points are addressed later in these Reasons, as and when appropriate.

The facts

28. The case largely concerned events between September 2015 and January 2016, in particular a decision taken in November 2015 that the Claimant would not be paid company sick pay during her absence because of an operation in early December 2015.

29. Our findings of fact, many of which are not remotely contentious, are set out below. Further findings are made as part of our decision on particular complaints.

30. The Claimant was offered the job of Marketing Manager with the Respondent in August 2014. She was initially to be on £32,000 p.a., rising to £33,000 p.a. following successful completion of her probationary period. The Claimant had hoped for £35,000 p.a. The Respondent was not prepared to go that far at that stage.

31. The Claimant signed her contract of employment on 26 August 2014. It included the following: "*Absence from work", "the company's current absence procedures are available from the HR Department but do not form part of your terms and conditions of employment.*"

32. There is a sickness absence policy in the trial bundle which is identical in all relevant respects to the sickness absence policy that applied to the Claimant's employment with the Respondent. Section 7 concerns sick pay. It states that company sick pay is discretionary. The other relevant parts of section 7 are:

> *Discretionary company sick pay is paid at 100% of base salary, for each working day of absence, subject to Line Manager approval and then having a Bradford Factor Score lower than the 'trigger score' of 30… Line Managers can refuse to authorise the payment of discretionary Company Sick Pay should they wish to do so… Line Managers may also authorise the payment of Company Sick Pay in cases where an employee's Bradford Factor is higher than the 'trigger score' should they wish to do so. Reasons for this may include (but are not limited to):*
>
> - *Exceptional/extenuating circumstances*
> - *Long term disability*

33. There is a section in the sickness absence policy explaining the Bradford Factor. The Tribunal is familiar with what a Bradford Factor is. It is a score used

– and often misused – to identify employees with potentially problematic attendance/absence. An individual's Bradford Factor is calculated by multiplying the total day's absence over the previous 12 months by the square of the number of separate periods of absence over the previous 12 months. For example, somebody who over the previous 12 months had had 2 periods of absence of 5 days each would have a Bradford Factor of 40 (ten times two squared).

34. Within the Respondent's sickness absence policy, the Bradford Factor is also used as a trigger point for managing sickness absence as a disciplinary issue.

35. At the end of the sickness absence policy, there is a section 11, headed "*Managing Absence for Employees with Disabilities".* The relevant part of this states:

> *The Equality Act specifically identifies the provision of leave as a reasonable adjustment where a disabled person needs to be absent from work for "rehabilitation, assessment or treatment". Examples may include (but are not limited to):-*
>
> - *Routine assessments of hearing aids*
> - *Hospital or specialist check-ups (including monitoring of related equipment or treatment*
>
> *This form of absence is not sickness absence but is classed as 'authorised absence'.*

36. The policy is rather unclear in this respect, but one of the ways it can reasonably be read is as meaning that authorised absence is not to be counted when calculating an individual's Bradford factor.

37. On her first day of work, on 15 September 2014, the Claimant completed a new starter form in which she explained her condition in the following terms: "*CRPS in my left foot and left leg. A chronic pain condition, managed by daily opiate based medication. Affects walking which is managed by using crutches. Currently taking part in a long term rehabilitation programme under the supervision of the Nottingham Pain Clinic at the Nottingham City Hospital.*"

38. Prior to the Claimant starting, on 20 August 2014, the Claimant's recruitment consultant had informed the Respondent that the Claimant needed some days off in the following few weeks for physiotherapy appointments and the Respondent had agreed to this.

39. For the entire period of her employment, the Respondent showed flexibility towards the Claimant in terms of allowing her time off for hospital appointments and allowing her to work from home whenever she asked to do so. Until November 2015, she was invariably paid company sick pay – full basic pay – during periods of absence for hospital appointments or for sickness.

40. Between 26 March 2015 and 25 September 2015 the claimant had 11½ days off either with sickness or for treatment of one kind or another. Those 11½ days were made up of six separate periods of absence. If all of them were taken into

account when calculating the Claimant's Bradford Factor in September 2015, it would have been around 400.

41. For most of her time with the Respondent, the Claimant concentrated on 'Renewables': that is, on the Respondent's renewable energy customers. In November 2014, a man called Greg Hilton was employed by the Respondent as the Head of the Renewables Division. Although he was not in a line management relationship with the Claimant, it was necessary for her to work with him quite a lot because she was the Marketing Manager responsible for the marketing of renewables.

42. The Claimant and Mr Hilton did not get on. It is quite impossible for us on the evidence we have to make an accurate assessment of the rights and wrongs of the situation as between Mr Hilton and the Claimant. Suffice it to say, for present purposes, that we accept the Claimant genuinely believed – or, at least, came to believe by Autumn 2015 – that Mr Hilton was behaving unreasonably and was bullying her; and that he was entirely, or almost entirely in the wrong; and that she was entirely, or almost entirely, in the right. The view of her Line Manager from January 2015, Mr David Robinson-Smith ("DRS"), was that it was rather more 'six of one and half a dozen of the other'. He was, and remained throughout, we note, a supporter of the Claimant and someone who respected her work and her abilities as a Marketing Manager.

43. During 2015, ostensibly because of Mr Hilton, the Claimant twice resigned and on both occasions was persuaded by DRS to retract her resignation. On a further occasion, she was about to resign and was persuaded by DRS not to do so.

44. The point in time at which the Claimant was contemplating resigning and was persuaded not to do so by DRS was on or about 4 September 2015. It led to what became the Claimant's grievance. DRS encouraged the Claimant to set out in writing details of how she felt she was being bullied by Mr Hilton. The Claimant did this in a document prepared around 7 September 2015. It was sent under cover of an email with "*Grievance*" in the "*Subject*" field and, although the document did not on its face suggest that the claimant was raising a formal grievance, it was immediately treated as one by Human Resources.

45. There was a meeting, identified as a grievance meeting, on 15 September 2015 between DRS, the Claimant, and HR. It was then decided that, instead of going through the normal grievance process, there would be a mediation meeting between HR, DRS, the Claimant, and Mr Hilton. This "*grievance mediation hearing*" took place on 2 October 2015. We can see what the Respondent, and in particular DRS, was hoping to achieve by having a mediation instead of going through a grievance process: a resolution of a conflict between two valued employees without going through a contentious grievance process – a grievance process that, almost certainly, would end with one or other of the employees being very unhappy. However, the Respondent accepts, and accepted well before the Claimant resigned, that whatever it was hoped would be achieved, the process was mismanaged very badly, to the Claimant's detriment.

46. Shortly after the meeting, the Claimant went off sick. She sent an email to DRS on 4 October 2015 stating "*I won't be returning to work until further notice*". In fact, she had 10 days sickness absence at this point, including two days of pre-planned absence connected with her CRPS. That period of absence was immediately followed by a period of annual leave until 9 November 2015.

47. During the summer of 2015, it was proposed that the Claimant would stop working in Renewables and concentrate on another area of the Respondent's business: Mains Gas. One of the reasons for this proposal was to minimise the amount of work the Claimant had to do with Mr Hilton.

48. The proposal began life around May 2015. It is reflected in a comment at the end of the document recording the Claimant's appraisal in May 2015: *"Beyond the short term plan (June to Sept), I would like Sundeep to reallocate her work load and pick up Mains Gas as a project. This will mean her time will be split evenly between renewables and Mains Gas*."

49. The proposal evolved into a clear plan for Mains Gas to occupy all or most of the Claimant's time from 1 January 2016. It was reasonably firmly in place by mid-September 2015. There is an email on 11 September 2015 from Rebecca Holland of HR to the Claimant referring to a "*handover in small manageable steps to reduce marketing involvement for renewables and introduce a new channel to your portfolio of Mains Gas previously discussed with David* [DRS]"*.*

50. Alongside the discussions about this proposed move out of Renewables and into Mains Gas were discussions about a salary increase. On or about 16 June 2015, DRS had agreed with the Claimant that her salary would be increased to £35,000 per annum if, by the end of August, she completed particular objectives that had been identified in her appraisal in May. This agreement and the fact that it had not by then been implemented was one of the things raised by the Claimant in her email to DRS of 4 September 2015.

51. On or about 6 October 2015 DRS supported the Claimant being given the agreed salary increase in a conversation with Lee Gannon, the Respondent's Managing Director. Presumably, this was on the basis that DRS agreed with her that she had met the objectives. Around that time, Mr Gannon was concerned about attendance, particularly within the marketing team. He approved the salary increase, but in his email confirming this, he stated: "*as discussed I want to understand Bradford Factor here and with Helayna* [another employee in the marketing team] *and be clear on how this is being managed with these guys.*" The salary increase to £35,000 was backdated to 1 September 2015 and this was subsequently confirmed in writing to the Claimant.

52. Mr Gannon's conversation with DRS and email set off a mini internal investigation into the sickness absence records, and Bradford Factor scores, of the Claimant and Helayna. At this time, the Claimant's Bradford Factor was calculated by DRS by reference to all of her absences means; her planned or approved absences, and any other potentially disability-related absences, were not excluded. He also got his arithmetic wrong to some extent. We nevertheless find that he was acting in good faith.

53. On 12 October 2015 there was an exchange between the Claimant and DRS which included the following from DRS: "*I have agreed the salary change with Lee. He is okay but flagged a high Bradford score… as we discussed, this means we must schedule known absenteeism going forward. Will need to do this for your op.*" The Claimant's reply included this: "*the first conversation I had to ensure this didn't happen was to discuss my condition with Emma Miveld and Chris Aston… I was told as I have a chronic condition the Bradford Factor would not apply in my case for absences, this is why I send all my letters to Emma as planned absences. Outside of this all sick leave has been due to my CRPS flare-ups which you are aware that I cannot control*."

54. DRS informed Mr Gannon on 13 October 2015 that the Claimant had a Bradford Factor of 833 and that Helayna had a Bradford Factor of 686. Mr Gannon responded to that information with an email of 13 October 2015, the relevant parts of which are as follows:

> *As previously discussed with you, we cannot sustain this level of time out of the business, pressure is building and all staff have to pull their weight across all areas of the company. These two when on site appear to spend more time smoking than they do at their desks and the time keeping of Helayna when the cylinder lead is on site is embarrassing at best, this is something that I have seen as well as a good number of others in and around the company.*
>
> *I look forward to seeing the outcome of your plan, however I want to be clear I am not a fan of any employee that does not put a shift in, it's not acceptable and needs dealing with, I trust you will do this sooner rather than later.*

55. Around Friday 16 October 2015 there was an incident during which nobody in the marketing team was present to deal with an issue that arisen. This caused problems and was a matter of great concern to Mr Gannon. Following this incident, on or before 22 October 2015, Mr Gannon emailed DRS setting out instructions including the following:

> *1. No one works from home unless it's agreed with me directly, including you* [i.e. including DRS].
>
> *2. I want the team on site completing full business days at their desks from Tuesday…*

56. This email from Mr Gannon was forwarded by DRS to the marketing team, including to the Claimant, on 22 October 2015. DRS's covering email included the following:

> *Please ensure you inform me in advance if you intend to be out of the office (for whatever reason) & I will run by with Lee.*
>
> *Suggest we do this every Friday. To date, Lee has been okay with requests as long as we have a good justification… If we do this religiously for a few weeks I think this request will go away.*

57. At no subsequent stage was any request by the Claimant to work away from the office, or otherwise to work flexibly, refused by the Respondent.

58. It was also around this time that the Claimant was firming-up her plans to have an operation on her prolapsed disc. This was first mooted around July 2015. At

that time, the Claimant was undecided as to whether she would have an operation and as to when, if she did have it, it would take place.

59. An email she sent to DRS and Emma Miveld from HR on 24 July 2015 includes the following: "*I believe that I will require 6 weeks mandatory recovery, so will not be in work for this. After this there is a further 6 weeks of recovery where I should be able to start getting around… From a cost point of view I don't think I can afford to take full recovery period as I still need to cover private medical costs during recovery which will not be covered by SSP. Your help to get me back to work… would be really appreciated.*"

60. Originally, the Claimant's case in these proceedings seemed to be that at the start of her employment it had been agreed, unconditionally, that she would be paid full company sick pay for all periods of disability-related absence. That was always an inherently implausible case; and in our view it would be flatly contradicted by this email of 24 July 2015.

61. When that contradiction was put to her during cross-examination, the Claimant changed her case. Her case seemed to become that at some stage early on in her employment (i.e. not, as she had originally maintained, before she accepted the Respondent's offer of employment), it had been agreed by the Respondent that no disability-related absence would count towards her Bradford Factor score; but that this agreement would be periodically reviewed. We can find no support for this alleged agreement in the contemporaneous evidence.

62. The email of 24 July 2015 clearly suggests the Claimant believed she would be paid only SSP for all or some of the period referable to the operation. In her email of 12 October 2015, already referred to, she doesn't mention any periodic review, nor any requirement for consultation, which is something else she has suggested was agreed. Instead, the email of 12 October 2015 puts forward a case similar to the one she had originally advanced in these proceedings – namely the case she abandoned under cross-examination, as we have just explained.

63. We are prepared to accept that sometime near the start of the Claimant's employment, possibly even during one of the two interviews she had before she was offered the job, there was some discussion of the Respondent's sickness absence procedure. We accept that the Claimant had particular reasons for enquiring as to what the sickness absence procedure might be. We are therefore prepared to accept that section 11 of that procedure might well have been outlined to her; and that she might well have been told that planned absences for particular treatment, for example physiotherapy related to disability, would be taken out of account when deciding whether absence levels were bad enough to trigger an absence management process. What we do not accept, however, was that anything was said to her – and, in particular, that any promises were made to her – to the effect that she would be treated more favourably than is envisaged in the sickness absence policy. That policy is clearly stated to be non-contractual and can reasonably be interpreted in a

number of different ways, particularly with regards to what constitutes absence from work for "*rehabilitation, assessment or treatment*".

64. In relation to the email of 25 July 2015, we should add that in part of her oral evidence, the Claimant suggested: she was querying what the sick pay position would be if she were to have the operation; that she never received the clarification she wanted about this; and therefore that (for reasons we couldn't quite discern) she simply assumed that she would be paid full company sick pay for absence related to the operation. In other words, the allegation that firm promises were made to her about company sick pay, which she relied on in relation to her operation, and which were broken by the Respondent, was contradicted by her own evidence.

65. In early October 2015, alongside seeking confirmation of her salary increase and receiving that confirmation, the Claimant sought and received confirmation that she would be permitted to take a period of planned absence following her operation. She also sought confirmation she would not be working on Renewables from 1 January 2016 onwards, and enquired specifically about reasonable adjustments on her return from hospital.

66. All this happened at a time when, we understand, not even the exact date of the claimant's surgery was known. The Respondent's response to the claimant's queries (from Rebecca Holland on 13 October 2015), which we think was a reasonable one at that time and in those circumstances, included the following:

> *With regards to detailed assurances on the reasonable adjustments* [which the] *business will or can support you with, will all depend on a review via occupational health prior to your return.*
>
> *At this time it is not possible to know how this will look like as we won't be able to ascertain this until your surgery is completed … but please be assured we will support you where possible and liaise with you fully at every step during your hospital visit and subsequent recovery plan…*
>
> *Please remember we are here to help and your Line Manager is committed to supporting you through the procedure when it happens next year.*

67. Reassurance regarding Renewables was provided in an email from DRS to the Claimant of 4 November 2015 that was sent to the Claimant together with a further copy of Rebecca Holland's email of 13 October 2015. DRS's email of 4 November included the following:

> *The email below is the commitment we will endeavour to accommodate your needs next year when you have surgery. We can define this in more detail once you have confirmation on arrangements.*
>
> *On your responsibilities, I confirm that you will not be working on renewables from January 1 onwards.*

68. Also on 13 October 2015, the Claimant was sent a separate letter from Rebecca Holland confirming the grievance/mediation hearing outcome. That letter is a rather confused and confusing document, reflecting the fact that the

hearing or meeting on 7 September 2015 was an unsatisfactory mish-mash of a grievance hearing and a mediation hearing.

69. On 10 November 2015, following her return from annual leave, the Claimant confirmed to the Respondent the dates of her surgery. The surgery was scheduled for 3 December 2015. She stated she would "*require 6 weeks' mandatory leave for recovery post-surgery*" and she formally requested leave from 2 December 2015 to 13 January 2016, "*at which point I will be assessed by my surgeon as to whether I am fit to return to work*". She stated in an email to DRS of 10 November 2015 that she "*would appreciate if you would discuss next steps with the Occupational Health Nurse*".

70. On the same date, the Claimant was given formal confirmation of her salary increase, backdated to 1 September.

71. At this time, it remained the case that a number of things were running alongside each other, as they had been from early October 2015.

72. First, there was the Claimant's grievance. With considerable assistance from DRS, the Claimant was preparing, and ultimately on 12 November 2015 sent, an appeal against the grievance outcome.

73. Secondly, the Claimant's salary increase was being confirmed. Thirdly, in accordance with Lee Gannon's earlier directions (referred to above), the sickness absence records of the Claimant, Helayna, and of another member of the marketing team, called Harriet[4], who also had a very high Bradford Factor. Fourthly, arrangements were being made in relation to the Claimant's forthcoming operation.

74. Also in or around mid-November 2015, the Claimant found out that a dedicated Mains Gas marketing manager role, i.e. a new role and not just a new project within the marketing team, had been created and that one of her colleagues in the marketing team, called Rena, had obtained that post.

75. Precisely what the Claimant was alleging in relation to the Mains Gas Marketing Manager post was not entirely clear and changed during the course of the hearing. Ultimately, the Claimant seemed to accept – or, at least, it seemed to be accepted on her behalf through Counsel – (and whether she accepted it or not, we find that this is what happened) that the Respondent's Board had decided that: Mains Gas should have its own dedicated Marketing Manager within the Mains Gas Team (i.e. not within Marketing); a new role would be created in that respect; the new role would be additional to the existing Marketing Manager roles within Marketing.

76. That new role was, we accept, advertised internally in some way, shape or form at a time when the Claimant was not present in the workplace. She wasn't in the workplace either because she was off sick following the grievance outcome or because she was on holiday. She did not apply for the role; Rena did and obtained it.

[4] Surname "Woodman", we think.

77. The Claimant's case, as put forward in closing submissions, was that whether the role was advertised or not, the Respondent deliberately took steps to conceal the existence of that role from her so as to avoid her applying for it and that this was direct discrimination and/or section 15 discrimination.

78. On 13 November 2015, there was a meeting between the Claimant, DRS, and the HR Director of the Respondent, Sharon Platts, about her appeal against the grievance decision. Shortly before the meeting, without warning the Claimant or discussing it with the Claimant first, Mrs Platts and DRS had decided that the Claimant would not be paid any more company sick pay in relation to periods of sickness absence until her Bradford Factor – as calculated by the respondent – came down to 30. This would mean, amongst other things, that she would be paid SSP only for the period of absence connected with the Claimant's forthcoming operation. They decided that they would tell the Claimant about this at the meeting on 13 November, and duly did so, stating that what the respondent was doing was in line with its sickness absence policy.

79. Also at the meeting on 13 November 2015, the Claimant's grievance appeal was discussed. The Claimant makes various allegations about what was said as part of her claim.

80. On 17 November 2015, there was an email exchange between the Claimant and Mrs Platts. In that email exchange, amongst other things, the Claimant queried whether a decision about non-payment for sickness absence had been taken purely in relation to the forthcoming absence for the operation or whether, going forward, she would not get company sick pay until her Bradford Factor came down to 30. Mrs Platts replied: "*We have stopped payment for any future absences through sickness, planned or otherwise, until your Bradford Factor is below a score of 30 as per our company policy.*"

81. Mrs Platts went on in that email to suggest that the Claimant's Bradford Factor was over 900 and that it had been calculated *excluding: "absences related to your chronic pain condition in order to ensure you are not detrimentally affected by the application of the calculation with your ongoing medical condition.*" Mrs Platts was mistaken about this. As above, DRS had included all absences in his calculation of the Claimant's Bradford Factor.

82. The Claimant then queried the calculation of her Bradford Factor. She suggested that if disability-related absences were taken out of account, her Bradford Factor would be just 1. Mrs Platts then emailed the Claimant, DRS and HR Service Manager called Tracy Brown suggesting that the Claimant should discuss her Bradford Factor with DRS and stating: "*Tracy – we need to be very clear on the appropriate Bradford Factor please."*

83. Mrs Platts envisaged there being a review of the Claimant's Bradford Factor and she asked to be kept "*abreast of the outcome"* that review. However, there never was a concerted attempt by the Respondent to work out what the Claimant's Bradford Factor, calculated correctly was or should have been. DRS's view in the end was that although the Claimant's Bradford Factor would not be quite as high as had been indicated on 17 November 2015 if disability-

related absences were taken out of account, it would in any event be well over 30.

84. The Respondent did not at any time review its decision that it would not pay company sick pay for the period of the Claimant's absence related to her operation. What the Respondent did do, however, in late November 2015, was to alter its stance with regards to what the Bradford Factor trigger for non-payment of company sick pay would be *after* the Claimant returned to work after the operation. It was made clear in a series of correspondence with the Claimant that the Respondent would be considering making adjustments to the trigger in light of occupational health ("OH") advice and that, going forward, what reasonable adjustments should be made would be considered and reviewed on an ongoing basis, again in light of OH advice.

85. We accept the Respondent's evidence that it felt the need for OH advice and assistance in dealing with the Claimant going forward for perfectly proper reasons. Indeed, it is difficult to see how the Respondent could have proceeded appropriately without such advice and assistance. Much was made in closing submissions of an email from Tracy Brown to DRS of 17 November 2015 in which Tracy Brown drafted an email for DRS to send to the Claimant. Tracy Brown's email includes the following: "*I would suggest a small 'holding' email to Sundeep as below – just to deflect any negative energy and to keep her at bay until we get OH on board.*" We were asked by Claimant's Counsel to infer that there was something sinister about that email; that it suggested a contemptuous attitude towards the Claimant and her condition. We do not read it in that way. Tracy Brown was, we think, suggesting nothing more than that the Claimant required a response; that if a response was not given then there would be "*negative energy*"; and that a response should be sent in an attempt to keep the Claimant content until OH advice could be obtained.

86. An appointment with OH was made for 24 November 2015. The Respondent had a lot of questions for OH – rather more, perhaps, than was, with hindsight, sensible. However, the Claimant was told in advance what questions were being asked of OH and none of the individual questions was objectionable. The appointment took place and a report from an OH Nurse Practitioner was provided on 26 November 2015.

87. On 30 November 2015, Mrs Platt's emailed the Claimant again confirming that a Bradford Factor trigger score of 30 for non-payment of company sick pay applied only to the forthcoming absence for the Claimant's operation; and that after the claimant's return, a revised trigger would be agreed in light of OH advice. There is no good reason not to take Mrs Platt's email at face value.

88. The Claimant was duly absent from work for her operation from 2 December 2015 and was paid only SSP from then until her resignation. She was signed off with a 6 week fit-note describing her condition as "*post operative surgery*".

89. DRS emailed her on 7 December 2015 just to ask her how she was. On 9 December, Mrs Platts wrote to her wondering whether she was willing and able to attend a telephone meeting on the 16th to discuss her appeal against the

grievance. The claimant didn't object and the telephone meeting between Ms Gill, DRS and Mrs Platts took place on 16 December 2015.

90. The Claimant makes various allegations about things that were said at that meeting which form part of her complaints of disability discrimination. There is, however, a certain amount of relevant common ground about what was said. Amongst other things, Mrs Platts informed the Claimant of her provisional view that the original grievance process had been conducted completely inappropriately and that the outcome of the original grievance had no validity. Mrs Platts also asked the Claimant how she wanted to take the process forward, given that the Claimant would not be working with Mr Hilton.

91. On 18 December 2015, Mrs Platts wrote to the Claimant enclosing the Respondent's summary of the telephone meeting on 16 December 2015. She again asked the Claimant to "*consider and clarify what additional outcomes you would be seeking, if any, as a result of reopening the grievance*". At no time between then and her resignation did the Claimant provide the clarification sought.

92. Also on 18 December 2015, Tracy Brown wrote the Claimant asking the Claimant's permission to write to the Claimant's General Practitioner to enable the OH Nurse Practitioner to finalise her advice. On 22 December, the Claimant wrote asking why additional information was needed from the GP. Tracy Brown wrote back on the same day explaining that the OH Nurse Practitioner had commented in her report that she needed further information from the GP in particular respects and that that was the sole purpose of seeking consent to write to the General Practitioner direct. The Claimant finally sent the completed consent form by post on 25 January 2016.

93. On 15 January 2016, the Claimant confirmed in a telephone conversation with DRS that she would be signed off for a further 4 weeks. The condition referred to in her new fit-note, of 15 January 2016, was "*post microdiscectomy*".

94. On 19 January 2016 Tracy Brown wrote to the Claimant noting that the Claimant had not replied to her email of 22 December 2015. The gist of Tracy Brown's letter was that, pending permission to speak to the Claimant's General Practitioner and finalisation of OH advice, the Respondent would "*be progressing this matter further based on the information available*".

95. The letter of 19 January 2016 continued:

> *We need to review the reasonable adjustments that we have agreed with you to date to understand if we have been reasonable and fair in our approach. The adjustments we need to review are:*
>
> - *The time off you have had so for appointments*
> - *Frequency and total amount of absence levels*
> - *We also need to consider a revised Bradford Factor trigger.*

96. That letter was sent by post and we assume it would have arrived within a few days of 19 January. Also on 19 January, the Respondent emailed the Claimant

to inform her that, unfortunately, she had been overpaid salary and that the overpayment of salary would need to be 'clawed back' when she returned to work. The Claimant's last communication to the Respondent prior to her resignation (other than, as above, about the OH report and consent forms) was on 19 January and was about the overpayment of salary.

97. On 29 January 2016, the Claimant sent a letter of resignation as an attachment to an email stating, "*I have decided to resign as I feel I have not been left with any other option*". We refer to the resignation letter, which speaks for itself.

98. We shall now give our decision on each of the Claimant's complaints, roughly following the order in which those complaints are set out in the Case Summary.

Section 15 complaints

99. The section complaints can't get off the ground unless the Claimant has satisfied us that the two "*something*"s relied on did indeed arise in consequence of disability.

100. As explained above, the first of the two "*something*"s is the 6 week planned absence for surgery commencing on 2 December 2015. The best evidence the Claimant has to support of her case in this respect – indeed, it is really the only evidence going to the issue of what the cause of her planned absence was – are various statements contained within the OH report of 26 November 2015. The relevant parts of this are statements that her "*prolapsed disc … could have been caused by altered walking gait*" and "*it is possible that a prolonged altered gait and poor posture due to pain could have been a contributory factor. However, this may not be related at all".*

101. In short, the only healthcare professional commenting on the cause of the prolapsed disc which led to the Claimant having an operation in December 2015 does not express the opinion that that injury was probably – that is, on the balance of probabilities – caused by her CRPS. Further, with all due respect to her, it seems to us that an OH Nurse Practitioner is not qualified to comment on the tricky area of causation of this kind of injury.

102. The second alleged "*something*" is "*anxiety and depression, a co-morbid condition"*. By the end of the hearing it was clear the Claimant was not alleging that her depression itself was caused by CRPS. Insofar as we could understand this part of the Claimant's section 15 claim, it seemed to us, that putting it at its reasonable highest, it was to the effect that the period of sickness absence she took in October 2015 following the original grievance decision, ostensibly because of anxiety and depression, arose in consequence of her disability.

103. Once again, unfortunately for the Claimant, there is a dearth of medical evidence supporting the Claimant's case on causation. Such medical evidence is there is strongly suggests that this period of sickness absence was <u>not</u> linked to her CRPS. The OH report includes the following: "*She has also developed depression. There is a common link to depression and long term pain suffers* [sic]*. Sundeep reports that her depression is not necessarily linked to her*

CRPS, though, and instead links this into perceived work related stresses." As an aside, we note that the OH Nurse Practitioner seems to have been labouring under the misapprehension that the Claimant had only developed depression after developing CRPS, whereas in fact she has a long history of depression.

104. The other medical evidence, such as it is, says nothing at all about causation of either the period of sickness absence in early October 2015 (or of the Claimant's prolapsed disc for that matter).

105. Even the non-medical-expert evidence relating to causation of the period of sickness absence in early October 2015 does not support the Claimant's case. In the Claimant's own witness statement, she doesn't express the opinion that there was a causal link to CRPS. The relevant part of her witness statement refers only to her letter appealing against the grievance decision. In that letter of appeal, she discusses two weeks' leave for stress separately from the discussion in the letter of the CRPS, i.e. she does not suggest in that letter that a period of absence was due to a CRPS flare-up. There is nothing in her letter of resignation about this period of sickness either.

106. In summary there is no real evidence at all – and not even a bare assertion from the Claimant herself – that this period of sickness absence arose in consequence of her disability. Even if she had herself given clear evidence that she believed it did, this would not by itself be enough to prove it did.

107. Accordingly all of the Claimant's section 15 complaints must fail.

Direct discrimination

108. We turn to the Claimant's complaints of direct discrimination set out in paragraphs 25(1)(a) to (f) of the Case Summary.

109. The first complaint is about "*removing C from agreed role as Mains Gas Marketing Manager*". The Claimant's case in her witness statement was (after referring to a meeting in November 2015) that: "*Previously I had been given a new role as 'Gas Mains Marketing Manager' by Mr Robinson-Smith from 28 September 2015 before I had gone on annual leave. The plan had been for me gradually take this on after I returned from my leave and then permanently by 1 January 2016. However, when I had returned, I was informed by a colleague that this role had since been advertised as a vacancy internally and given to my colleague, Rena Mistry*".

110. That complaint evolved during the course of the hearing and by the end of the Claimant's evidence it was along these lines: at some stage between June and August 2015, the Claimant was told that she would be Mains Gas Marketing Manager from 1 January 2016.

111. We think much of the difference between the Claimant's and the Respondent's case in relation to this allegation is purely semantic. We bear in mind the Claimant was employed as a Marketing Manager, not as a Renewable Marketing Manager or any other particular type of Marketing Manager. In that capacity, she could be assigned to any number of different projects. For much

of her time at the Respondent, though, she could accurately have been described as a Renewables Marketing Manager; and if things had proceeded as DRS intended them to, from 1 January 2016, the Claimant could have been described as a Mains Gas Marketing Manager. We do not, however, think that there was ever an intention to change her job, but merely to change the area of the Respondent's business which, for the time being, she would be expected to concentrate on.

112. By the end of her oral evidence, we couldn't say what the Claimant's own case was about how and when any new role was allegedly promised or given to her. If the Claimant is alleging that anything happened over and above her being told by DRS that from around 1 January 2016 she would primarily be responsible for Mains Gas instead of being primarily responsible for Renewables, we aren't at all sure what the Claimant's precise allegation is; and we don't accept any such allegation.

113. The Respondent's evidence in relation to the Mains Gas role is reasonably clear, has been consistent, and in fact fits with the Claimant's evidence to a significant extent. DRS's plan, which started being formulated back in around May 2015, was that the Claimant would indeed be the Marketing Manager responsible for Mains Gas. That remained DRS's plan and was communicated as such to the Claimant. However, around the beginning of October 2015, the Respondent's Board took a decision (independent from and over the head of DRS), a strategic decision that was nothing to do with the Claimant personally, that there should be a new dedicated Mains Gas marketing role within the Mains Gas department rather than within Marketing. There is no evidence whatsoever before us to contradict the Respondent's evidence about how that role came into being.

114. Equally, there is no evidence to support the allegation that a decision was taken by someone to prevent her from finding out about this role because of her disability; nor that any steps were taken deliberately to prevent her from finding out about the role, let alone that any such steps were taken for that reason.

115. In our view, the most likely explanation for what happened is that because of her sickness absence and holiday she did not see and/or overlooked an internal advertisement for this role. The allegation of an elaborate conspiracy by the Board to prevent her from applying for this role because she would be absent for one particular event taking place in Scotland in January 2016 is fanciful.

116. The second direct discrimination complaint is "*withdrawing C's adjustment of home working".* This claim fails on the facts. There was a practice whereby the Claimant would be allowed to work from home as and when she needed to. This was never a specific adjustment made to accommodate the Claimant's CRPS. Even if it was, it was never withdrawn. All that happened was that the process by which requests for home working were to be approved was changed, possibly for a short time, in late October 2015, as set out in DRS's email to the Claimant and other staff of 22 October 2015. In her oral evidence,

the Claimant confirmed that at no stage was any request she made to work from home declined by the Respondent. Further, there was no less favourable treatment, in that the Claimant was treated the same as everyone else. None of this had anything to do with disability anyway, nor with the Claimant specifically. The practice changed because of a particular incident in late October where no one was in the office to deal with an issue that arose.

117. The third direct discrimination complaint is "*trivialising C's grievance and threatening her with dismissal if stress related absences continued"*.

118. In the Claimant's witness statement and in her resignation letter there is some confusion about the dates in relation to this allegation. There is reference to 16 November 2015. These allegations in fact relate to the meeting that took place on 13 November 2016; the meeting that took place on the 16th was the telephone meeting on 16 *December*.

119. During the course of the hearing, the allegation about "*trivialising*" the Claimant's grievance was confirmed to be about an alleged comment of Mrs Platts alleging that the Claimant had been "*throwing her toys out of the pram*" by going off sick in October 2015. We prefer the Respondent's account of events in relation to this. The idea that Mrs Platts, who is a very experienced HR professional who clearly chooses her words with the utmost care, would accuse the Claimant of this is highly unlikely. It is much more likely that the Claimant in her own mind simply seized on the words "*toys out of the pram*", which were being used in a different context, and that the Claimant misinterpreted them. We also note that if one looks at how the Claimant put this allegation in her resignation letter – "*Sharon made the comment, "we felt like you threw your toys out of the pram because you didn't like the outcome of the grievance"*." – it is not so very far from the way Ms Platts concedes she used the phrase "*throwing her toys out of the pram*" at paragraph 12 of her witness statement.

120. Even if using the phrase "*throwing toys out of the pram*" was unfavourable treatment related to the Claimant's anxiety and depression in early October 2015, we have already found that that period of anxiety and depression was not connected with the Claimant's disability; and there was no <u>less</u> favourable treatment here anyway.

121. It seems to us that, particularly in closing submissions, there was an attempt to conflate the Claimant's psychological state with her CRPS and suggest that mistreatment of the Claimant related to her psychological state was somehow mistreatment connected with her disability. The evidence before us does not support that suggestion. Even if Ms Platts was unduly unsympathetic to the Claimant's psychological state – and we don't think she was – this would not be something from which we could infer that the reason for any mistreatment was CRPS.

122. The suggestion – made for the first time in the Claimant's oral evidence – that Ms Platts told the Claimant that there was a plan to dismiss her is most unlikely to be what happened, given Ms Platts' experience and the sort of woman she is (or, at least, how she came across to us when giving her evidence). That

suggestion is not made in the Claimant's own witness statement, nor was it made in her resignation letter. In her witness statement the allegation is that "*dismissal* [was] *being considered as an option*". In her resignation letter the Claimant alleged, "*I asked Sharon if they were looking to dismiss me to which she said "this could be a possibility".".*

123. We are not satisfied that there was any less favourable treatment here. We don't think anything was said to the Claimant at this meeting that would not have been said to any non-disabled member of staff in the same position as the Claimant; we think there is no proper basis in the evidence for us to find otherwise, nor, indeed, for us to find that the comment had anything to do with disability. Further, we don't think there was even any unfavourable treatment here either. It is unsurprising to us that an HR professional, asked a direct question as to whether or not a review of the Claimant's sickness absence and reasonable adjustments following receipt of an OH report could result in the Claimant's dismissal, would give the kind of answer Mrs Platts gave. Moreover, it is entirely clear to us that the reason Ms Platts talked about dismissal was because she was asked a direct question by the Claimant about it, and provided the only answer she reasonably could.

124. The next allegation is "*pressuring C to withdraw her grievance appeal and advising how she would have to work with Gavin Hilton without the issues being addressed*".

125. This allegation is put in the following way in the Claimant's witness statement: "*I was … told that it would be unfavourable for me to continue with my grievance and a consequence of doing so would be that I would have to return as Renewables Marketing Manager… I had been told that if I did continue with a grievance I would have to return to working with Greg…"*.

126. We think this is not an accurate summary of what was said. This complaint relates wholly or mainly to the telephone meeting on 16 December 2016. We think it is inconceivable that if this had been said during that telephone meeting, or at any other time, it would not have been mentioned in the Claimant's resignation letter; and yet the Claimant's resignation letter is completely silent on the point.

127. The Respondent's version of events – which is, broadly, that it was remotely possible that if the Claimant pursued her grievance, and if the grievance was determined against her (i.e. if the Respondent decided the Claimant was in the wrong and Mr Hilton was in the right), she might have to go back to work with Mr Hilton in the future – is supported by the contemporaneous notes of the meeting and is also supported by the contents of a letter of 18 December 2015 that was sent to the Claimant and to which the meeting notes were attached. The Claimant did not at the time suggest that those meeting notes were inaccurate.

128. Further, even if there was some unfavourable treatment here we are not satisfied that there was any less favourable treatment and we see no basis in the evidence for finding that there was; still less evidence to support the

Claimant's contention that, if this was so, it had something to do with her disability.

129. The next allegation is "*in breach of the company's written policy adding previously discounted disability-related absences in the Bradford Factor*". The "*in breach of the company's written policy"* part of this allegation seemed to disappear during the course of the hearing. Putting that to one side, it is reasonably clear to us that what happened (around October 2015) was not that the Respondent suddenly started taking into account the absences in calculating the Bradford Factor when they had not been doing so previously, but, instead, that for the first time during the Claimant's employment, the Respondent started asking the question, "*what is the Claimant's Bradford Factor?*"*.*

130. What remains of this complaint, then, is an allegation that the Respondent, in the form of DRS, calculated the Claimant's sickness absence Bradford Factor by reference to all of her absence from work, including authorised / planned absences and disability-related absences. That allegation is factually correct; but its factual accuracy takes the complaint nowhere.

131. This complaint does not, upon analysis, actually 'work' as a complaint of direct disability discrimination. For there to be direct disability discrimination, there would have to be treatment that was less favourable in comparison with that which would be meted out to a non-disabled comparator. The allegedly less favourable treatment relied on by the Claimant is not taking disability-related absences out of account. But a non-disabled person would not have any disability-related absences; they would therefore would be treated exactly the same way as the Claimant, in that all of their absences would be taken into account just as all of the Claimant's were.

132. In any event, we accept that the reason this was done was a simple mistake by DRS. We note that DRS was at all times a supporter of the Claimant and at all times knew of her disability. The idea that he would suddenly take against because the Claimant was suffering from CRPS, to the extent where he would deliberately (and, presumably, maliciously) include all sickness absence in calculating her Bradford Factor score in a bid to do her down doesn't fit remotely with any of the history of the relationship between him and the Claimant; nor does it fit with our impression of him as an individual.

133. In summary, there was here, once again, no less favourable treatment and any unfavourable treatment had nothing to do with the Claimant's disability.

134. The next allegation is "*in breach of the company's written policy applying a lower threshold than to non-disabled employees before threatening C with the risk of dismissal"*. This allegation fails on the facts. The Claimant was not threatened with dismissal. To the extent she was warned of the possibility of dismissal, there was no discussion of her Bradford Factor in that context. All discussions about her Bradford Factor were in the context of sick pay. Further, there is no proper basis for us to infer that this treatment was or might have been anything to do with the Claimant having CRPS. Further, the reason for the

treatment was that Ms Platts was asked a direct question to which she provided an honest and reasonable answer.

135. The final allegation of direct discrimination is "*withdrawing her agreed sick pay without consultation*". Again this allegation evolved during the hearing. By the end of the hearing it was not really about what had previously been agreed or whether what was done was done without consultation. The allegation is, it seems to us (again putting it at its reasonable highest; making it as strong as it could reasonably be), simply about a decision to stop paying the Claimant company sick pay.

136. The first subsidiary issue we have to decide in relation to this complaint is: was there less favourable treatment? The Claimant's own oral evidence was that everyone was told that no company sick pay would be paid until their Bradford Factors fell below 30; on her own evidence, then, there was no less favourable treatment.

137. The only evidence we have of anyone else being paid sick pay with a Bradford Factor over 30 is that Harriet (mentioned earlier) was paid for 2 days sickness in January 2016 when her Bradford Factor may have been as high as 160. We note that that payment was made in late January 2016 and that the Claimant's complaint relates principally to a decision taken in November 2015. Further, the only evidence we have as to why Harriet was paid was that it was a payroll error. We are invited by the Claimant to infer that the reason for the treatment was because the Claimant was disabled whereas Harriet was not. Harriet's status, whether disabled or not, is unclear. But even if we assume that Harriet was not a disabled person, we think there is no proper basis in the evidence for us drawn the inference the Claimant wants us to.

138. Turning to the reason for the decision to stop the Claimant's sick pay, it was mainly, in our view, Mr Gannon's crackdown on absenteeism, which was a crackdown across the board, brought about in no small part because of the Claimant's pay rise. He was evidently not happy about someone with what he understood to be a poor attendance record being paid company sick pay, particularly not at an enhanced rate because of a pay rise.

139. In conclusion on direct discrimination, all of the complaints fail and are dismissed.

Indirect discrimination

140. The Claimant's complaint of indirect disability discrimination is not the complaint identified in the Case Summary. The complaint in the Case Summary is about Bradford Factor trigger points for disciplinary action for absenteeism. The Claimant's case that we have been hearing is nothing to do with trigger points for disciplinary action for absenteeism. No disciplinary action was ever triggered; and there was never any discussion about trigger points for disciplinary action. Such discussion as there was about Bradford Factors was in the context of payment of sick pay.

141. The indirect disability discrimination complaint that is being pursued is identical in all relevant respects to the reasonable adjustments complaint. It seems to us that the complaint is much better put as a reasonable adjustments complaint than as a disability discrimination complaint; and that if the Claimant's reasonable adjustments complaint fails the indirect disability discrimination complaint also necessarily fails. Accordingly, we turn now to the reasonable adjustments complaint.

Reasonable adjustments

142. As explained above, the PCP that by the end of the hearing the Claimant was working with was along these lines: a policy of including all sickness absence in calculating the Claimant's Bradford Factor for the purposes of sick pay. The substantial disadvantage relied on is that the Claimant would have been, and was, exposed to a greater risk of her sick pay being stopped than a non-disabled comparator would have been.

143. We note that in common with many reasonable adjustments complaints, this complaint has been put forward in a rather abstract way – as if all that is necessary for the Claimant to do is to identify a PCP and identify substantial disadvantage in order for her complaint to succeed. The complaint before the tribunal is not, however, an abstract one. It is a complaint about a specific thing: a complaint about a particular PCP being applied to the Claimant at a particular time and in a particular way causing particular disadvantage. (Although EqA section 20(3), unlike section 19, does not refer to PCPs being applied to people, self-evidently the Claimant can't bring a complaint unless a PCP has been applied to her, i.e. unless the Respondent has actually breached a duty to make reasonable adjustments owed to her). The complaint is actually about the Claimant's sick pay being stopped; or about the decision to stop the Claimant's sick pay, which substantially amounts to the same thing. Accordingly, the first question for us is: did a PCP of including all sickness absence (and in particular disability-related absence) cause the Claimant's sick pay to be stopped?

144. If there is a PCP that results in non-payment of sick pay it is: not paying sick pay until the Claimant's Bradford Factor falls below 30, in combination with calculating the Bradford Factor taking all absence into account. It is conceded by the Respondent that such a PCP could in principal cause substantial disadvantage to the Claimant as a disabled person in comparison with persons who are not disabled. The concession is made on the basis that she would have more absence from work than someone without her condition because of her planned absences for specific treatment for CRPS; and that this would place her at greater risk of having sick pay taken away. However, in practice on the facts of this case, the cause of the Claimant's sick pay being stopped was not the application of that PCP, or any other PCP that the Claimant has mentioned during the course of these proceedings.

145. There is considerable overlap between this question of whether the application of a discriminatory PCP led to the Claimant's sick pay being stopped and what steps it would be reasonable for the Respondent to have to take in order to avoid any disadvantage caused by the application of a particular PCP. If the

PCP is not paying sick pay until her Bradford Factor falls below 30 in combination with calculating the Bradford Factor taking all absences into account, the obvious step that could have been taken to avoid that PCP causing substantial disadvantage to the Claimant as a disabled person would be taking all disability-related absences out of account in calculating her Bradford Factor and/or raising the Bradford Factor trigger point.

146. Raising the Bradford Factor trigger point would not be a particularly effective way of avoiding disadvantage; it would be rather crude and arbitrary in its effect; not "*reasonable*", in other words. Discounting disability-related absences would be a much more effective way of avoiding disadvantage. If disability-related absences were taken out of account, there would be no good reason to increase the Bradford Factor trigger point. Taking both steps would not be just avoiding the disadvantage but giving the disabled person a 'free pass' to take extra, non-disability-related absence. Indeed, it would not really be avoiding the disadvantage at all, but doing something else.

147. If, then, we assume for the present purposes that the duty to make reasonable adjustments was engaged and that the Respondent took the step of discounting disability-related absences pursuant to that duty, what the Respondent would have done would have been to pay company sick pay to the Claimant if and only if her Bradford Factor, calculated without taking any disability-related absences into account, were under 30.

148. We have already explained that we are not satisfied that the period of sickness absence from 2 December 2015 was disability-related. There would be no reason in accordance with disability discrimination legislation to treat that period of absence any differently in relation to the Claimant as a disabled person from the way a similar period of absence would be treated in relation to anyone else. The same goes for the 8 days sickness absence taken in early October 2015.

149. If we calculate the Claimant's Bradford Factor at the relevant time discounting all absences that we are satisfied were disability-related, the Claimant, before she began her period of sickness absence from 2 December, had a Bradford Factor of 36 (2^2 x 9): she had had two periods of sickness absence in the previous 12 months that were not disability-related, totalling 9 days. On day one of her period of sickness absence for the operation, her Bradford Factor would have gone up to 90 (3^2 x 10).

150. Returning to whether the application of a relevant PCP caused the claimant's sick pay to be stopped, the reason it didn't is that: the relevant part of the PCP is to do with taking disability-related absences into account; the claimant's company sick pay was not stopped because disability-related absences were taken into account – it would have been stopped anyway.

151. In summary on this point: the Claimant's company sick pay was not stopped because of the application to her of any relevant PCP; even if the Respondent was at the relevant time under a duty to make reasonable adjustments, complying with that duty would not have resulted in the Claimant being paid company sick pay.

152. Moreover, we have to consider the answer to the question: was it reasonable for the Respondent to have to take any such steps if the duty to make reasonable adjustments was engaged?

153. The case law – O'Hanlon and Griffiths – is very much against the Claimant. It suggests that the facts would have to be exceptional or, at least, very unusual for it to be reasonable for an employer to have to pay more in company sick pay for disability-related absences then it would pay for other absences, pursuant to the duty to make reasonable adjustments. In terms of the facts surrounding this particular period of sickness absence of this particular claimant, there is nothing particularly unusual, let alone exceptional, about this case.

154. It does seem to us that whether or not something is a reasonable step for an employer to have to take is a question of fact, not one of law. Certainly, if there were no binding authority on the point, we would take the view that, in principle, a reasonable employer might well pay company sick pay, for a limited duration, to a disabled employee in relation to disability-related absence in circumstances where it would not be paid to non-disabled employees. We don't think this is an issue to be examined in the abstract. The steps it would be reasonable for an employer to have to take in terms of sick pay for disabled people are steps to be taken on a case-by-case basis. And just such steps were taken by this respondent in relation to this claimant up to November 2015.

155. Would it, then, have been reasonable in all the circumstances for the Respondent to have to pay the Claimant company sick pay for the period of sickness absence from 2 December 2015, as a reasonable adjustment for disability? Our answer to that question is: clearly no, because the operation was not, on the evidence, related to her disability.

156. Further, even if we were satisfied that the operation was connected with CRPS, we don't think it would have been reasonable for the Respondent to have to pay the Claimant company sick pay in relation to it, bearing in mind her sickness absence record (both disability-related and non-disability-related) and the fact that it was of relatively long duration.

157. The reasonable adjustments claim – and for similar reasons, the near-identical indirect discrimination claim - therefore fail.

Miscellaneous complaints

158. In closing submissions, Claimant's counsel identified some further complaints that the Claimant was apparently making. She is, he told us, claiming unauthorised deductions from wages and/or disability discrimination of some kind in relation to particular days' absence for which she was apparently not paid company sick pay.

159. We have twice used the word "*apparently*" in what we have just written because this claim isn't made in her witness statement, was not set out in any further information provided pursuant to Employment Judge Ahmed's order,

and there is no substantial evidence to support it. It seems to us that it is not even before the Employment Tribunal.

160. We dismiss any such claim, in so far as it is before the Employment Tribunal, on the basis of lack of adequate supporting evidence.

161. The Respondent concedes a certain sum in unauthorised deductions from wages and we gave judgment for that sum, by consent, during the course of the hearing.

Wrongful dismissal

162. The final complaint before the Tribunal is of wrongful dismissal. This is based on an allegation that the Claimant was constructively dismissed. The issue we have to decide boils down to: was there a breach of trust and confidence term made up of the facts and matters set out in the Claimant's resignation letter?

163. We shall now go through the resignation letter from top to bottom.

164. The Claimant refers to her grievance. It seems to us that the grievance is something of a red herring when it comes to her resignation. The Claimant evidently took a positive decision not to resign because of the original grievance outcome, which came more than 3 months before her resignation, and instead to pursue a kind of appeal process. So far as concerns the contents of the grievance itself, the things she was complaining about in her grievance are even more distant in time from her resignation, mainly being things that happened up to July 2015; and, again, she evidently took a positive decision not to resign because of those things but instead to follow a grievance process. The appeal process relating to the grievance had, effectively, been entirely successful and the reason why matters were not taken further after the meeting on 16 December 2015 was because the Claimant (despite repeated requests from the Respondent) had not told the Respondent how it was she wanted to proceed. If the events forming the subject matter of the grievance did form any part of the Claimant's reasons for resigning (and we are not satisfied that they did), then, if and insofar as they constituted or formed part of the breach of the trust and confidence term at the time of those events – and again we are not satisfied that they did – that breach was affirmed by the Claimant going through a grievance process and remaining an employee from August to January.

165. The Claimant also complains in her resignation letter about: the stopping of reasonable adjustments that were supposedly made for her; things that were allegedly said and done at the 13 November [2015] meeting (incorrectly referred to as being a meeting on 16 November); what allegedly happened in relation to the Mains Gas role. We have made our findings in relation to these matters and have, broadly, accepted the Respondent's case.

166. In relation to the 13 November meeting, there is a complaint in the resignation later that Mrs Platts had said to the Claimant that she understood that the Claimant was more adversely affected by stress than other people. If something along those lines was said, then, as was highlighted by

Respondent's Counsel in submissions, that was saying no more than that which the Claimant has said about her own condition.

167. There is something in the resignation letter relating to Harriet Woodman working from home and not being in the office. We heard no evidence about that. The only related evidence that we had was substantially unchallenged evidence from the Respondent that, in or around late October 2015, Ms Woodman working from home was increasingly perceived as a problem; that the reason she had been allowed to work from home was because she had a 'field' contract rather than an 'office' contract; and that at around this time, she was taken off a field contract and required to enter into an office contract with the Respondent. We accept that evidence, having no good reason to do otherwise.

168. There is an allegation that Mr Gannon had telephoned DRS on or about 13 November 2015 and had said "*I don't give a shit about existing arrangements, they need to stop and she needs to be in the office*", referring to the Claimant. The only direct evidence we had about this was from DRS. He denies that any such comment was ever made. The Claimant does not allege that she herself overheard this conversation. As best we can tell, the allegation is that at some unspecified date, an unspecified person told her that it had been made. We think it inherently unlikely that such a comment would have been made specifically in relation to the Claimant. It may be that Mr Gannon made a comment along the lines of that alleged, but in relation to employees generally. For him to have done so would fit with the contents of his email to DRS of late October. And we can see how such a general comment by Mr Gannon could have been misheard or misinterpreted by somebody as being a specific reference to the Claimant. Be that as it may, we are not satisfied on the evidence we have that the specific comment the Claimant complains about was made.

169. Another allegation in the resignation letter is that, "*David had said at the meeting that I was in an impossible position and questioned what I was going to do*". We heard no evidence about that and it was not put to DRS when he was giving evidence. The allegation – in so far as it is relied on in these proceedings – is unproven.

170. The Claimant states in the letter that she didn't believe that there would be adequate support provided for her when she returned to work. On the evidence we have, there was no objective basis for any such belief. There was an ongoing process involving OH. At that stage, the Claimant had not expressed a desire to come back to work at any particular time and there was no way for the Respondent to know what adjustments the Claimant would need when she returned to work. It was therefore impracticable for the Respondent to put adjustments in place at the time of the Claimant's resignation. The Respondent had given her general assurances and told her what process was being followed, i.e. that OH advice would be taken and that reasonable adjustments would be put in place. There was in practice nothing more the Respondent could reasonably do.

171. On the final page of the resignation letter, there are two allegations, which also found their way into the claim form, about – at some unspecified stage "*in the past*" – having to park in an overflow car park because someone had taken a disabled parking spot and problems when the lift in the Respondent's offices was out of action. We heard no evidence about either allegation. They appear to us, in the context of the resignation letter, to be afterthoughts. We are not satisfied that they genuinely formed part of the Claimant's reasons for resigning, nor is the Claimant's case in relation to them made out on the evidence.

172. The final complaint in the resignation letter is about "*pressure tactics being used to stop me from filing the appeal and now reopening the grievance*". The allegation that the Claimant was pressurised into not appealing against the grievance decision was not an allegation that was ever put to any of the Respondent's witnesses and is not supported by the Claimant's own evidence, which was to the effect that DRS had positively supported and assisted the Claimant in relation to her appeal. Any allegation about "*pressure tactics*" being used to avoid the Claimant pursuing her grievance appeal is one we have already rejected.

173. In conclusion on wrongful dismissal, we are not satisfied that the facts and matters set out in the Claimant's resignation letter – insofar as they are made out on the evidence before us – whether taken individually or cumulatively, and, indeed, even taken in combination with facts and matters that aren't mentioned in the resignation letter but that have been referred to in evidence before us, constituted conduct, without reasonable and proper cause, calculated or likely to destroy or seriously damage the relationship of trust and confidence at the point of which the Claimant resigned. Accordingly the Claimant was not constructively dismissed and her wrongful dismissal complaint fails.

174. We would add in relation to the constructive dismissal allegation that we are in great difficulties in identifying a potentially valid 'final straw' (in accordance with Omilaju) that happened after affirmation of any fundamental breach of contract relating to the original grievance. The only conceivable candidate that we can identify is the Claimant being informed that she had been overpaid salary and that the overpayment would be deducted from her salary, meaning she wouldn't get paid for a time even after returning to work.

175. The thing the Claimant relies on as the final straw is the lack of resolution of her grievance. The reason it was not resolved was that the Claimant had not told the Respondent what she wanted to do in relation to it. We are not suggesting that the Claimant was in any way at fault in relation to this; but neither was the Respondent, in our view.

176. Neither or these things was a valid "final straw" because: there was reasonable and proper cause for the respondent's conduct; objectively judged, neither would add anything to any breach of the trust and confidence term.

Conclusion

177. The Claimant was not subjected to any unlawful disability discrimination, nor was she constructively dismissed. Her claim therefore fails.

178. It will, we imagine, be cold comfort to the Claimant, but we have considerable personal sympathy for her. Our decision should not be taken as meaning we think she is to any extent at fault or to blame for the position she now finds herself in; nor does it mean we necessarily think the Respondent is blameless.

179. All we have decided is that the Claimant has not been able to meet the technical legal and evidential requirements she had to in order to win the particular tribunal complaints she brought and pursued before us. In reaching that decision, we have not made any moral or ethical judgement on her or on the Respondent; nor have we used some abstract concept of fairness or justice. Instead, we have simply applied the law, as made by Parliament and interpreted by appellate Courts and Tribunals, as we are obliged to do.

Employment Judge Camp

5 June 2017

SENT TO THE PARTIES ON
6/6/17
.....
S.Cresswell
.....
FOR THE TRIBUNAL OFFICE