



# EMPLOYMENT TRIBUNALS

**Claimant** Mrs K Armer

**Respondent** My Claim Solved Limited

**Heard at:** Exeter **On:** 12, 13 and 14 February 2018

**Before:**  
**Employment Judge** Goraj

**Members** Mrs W Richards Wood  
Mrs M Corrick

**Representation**  
**The Claimant:** Mrs P Douglass, Consultant  
**The Respondent:** Mrs B Huggins, Counsel

## RESERVED JUDGMENT

### THE UNANIMOUS JUDGMENT of the tribunal is that:-

1. The claimant's complaint of unfair dismissal contrary to section 104 of the Employment Rights Act 1996 is dismissed upon withdrawal by the claimant.
2. The claimant's complaint of disability discrimination contrary to sections 6, 13 and 39 of the Equality Act 2010 ("the 2010 Act") (Issue 2 of the List of Issues) is dismissed.
3. The claimant was unlawfully discriminated against by the respondent contrary to sections 6, 15 and 39 of the 2010 Act in respect of her dismissal (Issue 3.1(c) of the List of Issues). The remaining allegations relating to section 15 of the 2010 Act are dismissed (Issues 3.1 (a) and

- (b) and (c) (insofar only as Issue (c) does not relate to the claimant's dismissal).
4. The claimant was unlawfully discriminated against by the respondent contrary to sections 6, 26 and 39 of the 2010 Act (in respect of allegations 4.1 (d) and (e) of the List of Issues). The remaining allegations relating to section 26 of the 2010 Act are dismissed (Issues 4.1(a) – (c) are dismissed).
  5. The claimant was unlawfully discriminated against by the respondent contrary to sections 6, 27 and 39 of the 2010 Act in respect of her dismissal (Issue 5.2 of the List of Issues).
  6. The claimant was unlawfully discriminated against by the respondent contrary to sections 6, 20 and 21 of the 2010 Act in respect of the failure to make reasonable adjustments to her working hours (Issue 6 of the List of Issues).
  7. Any compensation awarded to the claimant pursuant to section 124 of the 2010 Act shall not be reduced for contributory fault (Issue 8 of the List of Issues).
  8. The respondent concedes that it failed to issue the claimant with a statement of terms and particulars of employment as required pursuant to section 1 of the Employment Rights Act 1996.

## **REASONS**

### **Background**

1. By a claim form presented to the tribunals on 22 May 2017 the claimant brought complaints of unfair dismissal contrary to section 104 of the Employment Rights Act 1996 ("the 1996 Act"), unlawful discrimination on the grounds of disability contrary to the Equality Act 2010 ("the 2010 Act") and various monetary claims.
2. A number of the claimant's claims settled and /or were withdrawn prior to the Hearing. Further, the claimant's complaint of unfair dismissal contrary to section 104 of the 1996 Act was dismissed upon withdrawal by the claimant at the commencement of the Hearing.
3. The claimant's extant claims are claims of disability discrimination namely complaints of (a) direct discrimination (b) discrimination arising from the claimant's disability (c) harassment (d) victimisation and (e) failure to make reasonable adjustments. The claimant has multiple sclerosis ("MS"). The claimant was therefore a disabled person at all relevant times by virtue of paragraph 6 of part 1 of Schedule 1 to the 2010 Act.

4. The respondent accepted that the claimant had MS at all relevant times and was therefore a disabled person in accordance with the above statutory provisions. The respondent however denied that it knew or ought reasonably to have known of the effects of the claimant's disability including that she experienced fatigue and/or that fatigue was, in any event, a symptom or effect of the claimant's MS. The respondent further denied that the claimant had been discriminated against because of her disability including that there had been any failure to make/maintain reasonable adjustments. The respondent contended in particular that the claimant was properly dismissed by reason of her conduct.
5. The respondent did not seek to rely upon section 109 (4) of the 2010 Act in respect of any proven acts of disability discrimination.
6. The claimant confirmed that her complaint relating to the alleged failure by the respondent to provide written particulars of employment as required pursuant to section 1 of the 1996 Act was confined to a complaint pursuant to section 38 of the Employment Act 2002. The respondent conceded that it had failed to provide the claimant with a statement of terms and conditions as required pursuant to section 1 of the 1996 Act and that this matter would therefore have to be considered further pursuant to section 38 of the Employment Act 2002 in the event that the claimant succeeded in respect of any of her claims.

### **The List of Issues**

7. The parties agreed a list of issues to be determined by the tribunal (" the List of Issues") a copy of which is attached to this Judgment. It was agreed that the tribunal would confine itself to the matters identified in the List of Issues and would deal with any award of compensation separately if the claimant succeeded in any of her claims.

### **The Bundle of documents**

8. The tribunal was provided with a main bundle of documents together with a small supplementary bundle from the claimant. The submission of the latter was initially disputed by the respondent but it was subsequently agreed that the tribunal would have regard to the document marked C1 in the supplementary bundle which together with the main bundle would form the agreed bundle of documents at the Hearing (" the bundle").

### **Witness statements**

9. The tribunal was provided with a witness statement and heard oral evidence from the claimant.

10. The tribunal was provided with witness statements and heard oral evidence from the following witnesses in behalf of the respondent :-
  - 10.1 Mrs Samantha Bartlett (nee Leonard at the time of the events in question). Mrs Bartlett is referred to as Miss Leonard in this Judgment. Miss Leonard is employed by the respondent as a team leader. Miss Leonard was also an acquaintance of the claimant outside of work at the relevant times.
  - 10.2 Miss Sarah Caulfield who is also employed by the respondent as a team leader.
  - 10.3 Mr Michael Cooke who is employed by the respondent as its Operations Manager.

## **FINDINGS OF FACT**

11. The following findings of fact applied at all material times unless otherwise specified below.
12. The claimant was employed by the respondent as a PPI claims handler from 3 October 2016 until her summary dismissal on 22 February 2017.

### **The claimant**

13. The claimant was diagnosed with multiple sclerosis ("MS") in 2005. This diagnosis is accepted by the respondent. In 2007 the claimant participated in a medical trial involving the use of chemotherapy which has arrested for the time being the progression of the claimant's MS. The claimant continues however to experience a number of symptoms of her MS including (a) fatigue on a regular basis which affects her in particular in the late afternoon/evenings and (b) difficulty sleeping at night because of pains in her joints and the frequent need to use the toilet.
14. The tribunal accepted the Claimant's oral evidence regarding such matters including as the claimant's contentions regarding fatigue are consistent with the available documentary evidence as referred to further below. The tribunal is further satisfied that the above mentioned symptoms were not inconsistent with the claimant's ability to work one late shift until 7pm per week with the respondent as this was only required once a week and the claimant did not start work until 10.am on such shift which enabled her to rest before starting work.
15. The claimant is under the medical care of a consultant neurologist at Derriford Hospital and has ongoing support when required from specialist MS nurses and also from physiotherapists.

16. During the claimant's period of employment with the respondent the claimant attended kick boxing classes in the evening from time to time on the recommendation of her neurologist to assist in the maintenance of muscle tone, coordination and balance. The tribunal is satisfied that the claimant's attendance at kickboxing classes was not inconsistent with the symptoms of fatigue identified above as the claimant had time to rest before attending the classes and only attended when she felt well enough to do so. The respondent was not aware of the claimant's attendance at kickboxing classes at the time of the events in question.
17. The claimant and Miss Leonard were acquainted prior to the claimant's employment with the respondent. Miss Leonard proposed the claimant for employment with the respondent when the claimant was made redundant from her previous job. The claimant's hours of work with her previous employers were such that she was not required to work in the late afternoon.

#### **The claimant's employment with the respondent**

18. The claimant was interviewed for employment with the respondent by Miss Sarah Caulfield and her fellow team leader Kathryn Hobbin. There is a dispute between the parties as to whether the claimant informed the respondent at the interview that she had MS. The claimant contended that she informed the respondent during her interview that she had MS and that this was also recorded in a personnel questionnaire which she subsequently completed on the commencement of her employment. The claimant did not contend that she had requested any reasonable adjustments at such times. The respondent denied that the claimant had informed them about her MS during her interview/upon the commencement of her employment.
19. Having weighed the available evidence the tribunal is satisfied, on the balance of probabilities, that the claimant informed the respondent during her interview and that it was subsequently recorded in the personnel questionnaire that she had MS. The tribunal is not however satisfied that there was any further discussion at such times regarding the claimant's MS or the effects thereof.
20. There is also a dispute between the parties regarding the facts relating to the claimant's engagement with the respondent including whether she was issued with/received the respondent's alleged letter of offer dated 14 September 2016 (page 76 of the bundle). The claimant denied having received such letter. The tribunal is not satisfied, on the balance of probabilities, that the claimant received such letter. When reaching this conclusion the tribunal has taken into account in particular that (a) the claimant denied receiving any such letter (b) there is no reference by the claimant to the letter of offer and/or the terms thereof in any contemporaneous or subsequent messages with her colleagues and/or in any subsequent correspondence with the

respondent and (c) the start date in the alleged letter of offer was incorrectly referred to as 4 October 2016.

### **The terms of the claimant's employment**

21. The tribunal is however satisfied on the balance of probabilities that (a) the claimant was offered employment with the respondent on the basis that the claimant's working hours would be from 9 AM to 5:30 PM (b) the claimant was offered a rate of £7.20 per hour and was told during her interview that her salary would be increased to £7.41 per hour upon the satisfactory completion of her probationary period. When reaching the above conclusions the tribunal accepted the oral evidence of the claimant regarding the above matters in dispute including as such oral evidence is consistent with subsequent events. The claimant subsequently agreed to work from 10AM to 7PM one day a week.

### **The respondent**

22. The respondent is a claims handling business which provides services to the public who wish to pursue claims for the alleged inappropriate sale of financial products such as payment protection insurance and endowments. The respondent is regulated by the Claims Management Regulator in respect of its claims management activities. The respondent is precluded from making claims related telephone calls to clients before 9 AM in accordance with guidance from the Regulator.

23. The respondent has three departments including an administration department in which the claimant was employed. The administration department has 4 teams which are each led by a team leader who report to the respondent's Operations Manager Mr Michael Cooke. Three of the teams handle general claim related activities and the fourth team deals with accounts and recoveries. Each team leader manages their staff on a daily basis including work delegation and management and their training and development. Miss Leonard is the team leader of the accounts and recoveries team.

24. The principal role of a PPI claims handler such as the claimant is to contact clients by telephone in order to obtain additional information needed to progress their claims and to assist them in the completion of standard questionnaires. A claims handler would normally deal with an average of 250 claims at any one time.

25. The claimant's team leader at the time of the principal events in question was Lucy Dawson Wells. Miss Caulfield became involved in the management of the claimant's team from in or around the beginning of February 2017 in anticipation of Ms Dawson Wells' impending maternity leave.

26. Mr Cooke is responsible for the day-to-day management of the respondent. Mr Cooke also has responsibility for HR/ related issues

and regulatory compliance. Mr Cooke has access however to external HR advisers for employment matters including for the preparation of contracts of employment. Mr Cooke did not contact the respondent's HR advisers to obtain advice regarding any issues relating to the claimant including in respect of her disability and/or with regard to reasonable adjustments notwithstanding that he accepted in his evidence that he did not have any detailed understanding of the provisions relating to reasonable adjustments.

### **The adjustments to the claimant's working hours**

27. On 4 October 2016 the claimant texted her work colleague/acquaintance Ms C Knutton informing her that she was experiencing extreme fatigue as she was not used to working such long days and that she did not know if her MS could hack it (page 113f of the bundle). The claimant also advised Miss Leonard that she was struggling with fatigue as her previous employer had only required her to work in the mornings. The claimant further advised Miss Leonard that she was struggling with the hours and might consider leaving. Miss Leonard advised the claimant to speak to Mr Cooke.

### **The meeting on or around 18 October 2016**

28. The claimant met with Mr Cooke on or around 18 October 2016 to discuss the difficulties which she was experiencing. Miss Leonard was also in attendance. There are no notes of the meeting. Mr Cooke accepted in his witness statement (paragraph 19 thereof) that the claimant requested a variation to her working hours so as to start at 8:00 AM and leave at 4:30 PM as she became fatigued later on in the afternoon because of her disability and that an earlier start was therefore preferred. Mr Cooke contended however that the claimant requested the adjustment as a temporary variation as the claimant wanted time to get used to the hours as she had not worked such hours in her previous role. The claimant denied that it was requested as a temporary variation.

29. Having weighed the evidence and had regard to the available documentary evidence, including Mr Cooke's subsequent email dated 16 February 2017 to Mr Hope (a director of the respondent) (page 95 of the bundle) the tribunal is satisfied, on the balance probabilities, as follows:-

29.1 Mr Cooke was made aware by the claimant during the meeting that the claimant had MS (which he recognised was a disability) and that her working hours were making her fatigued.

29.2 Mr Cooke agreed to make an adjustment on a temporary basis to assist the claimant to return to full-time work.

30. Mr Cooke subsequently agreed with Miss Leonard that she would attend work at 8 AM to ensure that the office was open for the claimant. Mr Cooke however left the detailed arrangements of the work which would be undertaken by the claimant between 8 AM and 9 AM to be determined by her team leader. Mr Cooke sent an internal email dated 18 October 2016 confirming that the claimant was trialling working 8AM to 4:30 PM that week (page 86 a of the bundle). Mr Cooke did not however write to the claimant at that time confirming the terms of the arrangement.
31. The claimant performed her duties working from 8 AM until 4:30 PM, with a late shift one night a week, without any reported concerns or incidents until the end of January 2017. In the period between 8 AM and 9AM the claimant prepared/processed the paperwork associated with her role including the scanning of documents. There is no evidence that any concerns were raised with Mr Cooke, including by the claimant's team leader, regarding the work undertaken by the claimant between 8 AM and 9AM during such period.
32. There was a dispute between the parties as to the number of occasions when Miss Leonard was unable to attend work at 8 AM and the claimant was therefore waiting outside the premises / the degree to which alternative arrangements had to be made to enable the claimant to access the respondent's premises at 8 AM.
33. Having weighed the oral evidence and limited documentary evidence the tribunal is satisfied, on the balance of probabilities that :-
- 33.1 There were only a couple of occasions between October 2016 February 2017 when alternative arrangements had to be made for the claimant to obtain access to the respondent's premises before 9 AM/the claimant/ other staff were waiting outside the premises for access.
- 33.2 Miss Leonard was not the only person who arrived at work before 9 AM and a number of other staff including Miss Caulfield and Mr Ashley Coley, who are both team leaders, were regularly in attendance from around 8.15/ 8.30am.
34. When reaching the above conclusions the tribunal has also taken into account that (a) the only correspondence which the tribunal has been provided with relating to such matters is an email at page 86 b of the bundle dated 19 October 2016. In this email Miss Leonard requested Miss Caulfield to attend for work at 8 AM to let the claimant into the respondent's premises as she had a personal commitment and (b) Mr Cooke did not contend in his evidence that anyone had raised any issues with him regarding such matters until February 2017.



### **The claimant's probationary period**

35. The claimant was advised at the beginning of January 2017 that she had passed her probationary period. The claimant emailed Mr Cooke on 5 January 2017 asking him to confirm the position with her wages as she had been told when she first joined the respondent that her salary would be increased when she passed her probationary period. Mr Cooke responded that he would have to run it past a director. Mr Cooke also praised the claimant for passing her probation and urged her to keep up the great work.

### **The events of 27 January 2017**

36. There is a dispute between the parties regarding the events of 27 January 2017. In summary, the claimant contended that (a) on 27 January 2017 Miss Leonard approached the team and informed them that Mr Cooke was angry that the team had not done enough late shifts or made the respondent enough money that month (b) during this discussion the team raised concerns that they were working hard with no recognition or incentive (c) during such discussion the claimant raised her concerns including that she had not received a contract or the promised pay rise and (d) that during a subsequent discussion Miss Caulfield acknowledged that it had been a stressful week and advised the claimant not to let things get to her as she was doing fine. The claimant accepted that she had a loud voice and could have sounded abrupt. The claimant denied however that she had acted inappropriately.

37. In summary, the respondent contended that Miss Leonard had approached another member of the team to ask why he had not worked a late shift, that the claimant had interrupted and acted disruptively and disrespectfully towards Miss Leonard and that it had been necessary for Miss Caulfield to take the claimant into a side room to calm her down.

38. The matter was reported to Mr Cooke who asked for written reports of what had happened including from the claimant. The subsequent emails from the claimant and Miss Leonard are pages 91-92a of the bundle. In the claimant's account of the matter she advised Mr Cooke that she did overtime wherever possible including an extra hour earlier that week notwithstanding that she had been struggling with her MS that week.

39. The claimant contended that there was a further email from a former colleague which supported her position which he had shown to her at the time. The respondent has however been unable to produce this email. The work colleague concerned is no longer in the employment of the respondent.

40. Having weighed the available evidence the tribunal is satisfied on the balance of probabilities that (a) the claimant understood Miss Leonard's comments to have been addressed to the whole team (b) the claimant was not the only person who raised concerns with the respondent and (c) the claimant became upset, expressed her views forcefully and loudly and it was necessary for Miss Caulfield to take the claimant to one side to calm her down.
41. No further action was taken by the respondent regarding the matter at that time and the tribunal is satisfied that the respondent considered the matter to be closed. When reaching this conclusion the tribunal has taken into account in particular that (a) Miss Caulfield informed the tribunal that following her discussions with the claimant she considered the matter to be closed (b) the claimant and Miss Leonard messaged each other outside work following the incident (page 113 g) (c) Mr Cooke took no further action at that time and (d) the claimant subsequently received a cash bonus and a favourable review as referred to further below.

#### **The cash bonus and subsequent review**

42. A few days later the claimant was given a £50 cash bonus and issued with a certificate for her achievement in securing referrals during January 2017.
43. Miss Caulfield and Ms Dawson Wells conducted individual reviews with the members of the claimant's team on 6/7 February 2017 in the light of the concerns which had been raised on 27 January 2017. The tribunal has not been provided with any notes of the reviews. It is not disputed that the claimant's review was positive and that no concerns were raised by the respondent concerning the claimant's performance or the events of 27 January 2017.

#### **The events of 16 February 2017 and associated matters**

44. The claimant emailed Mr Cooke on 15 February 2017 querying the position regarding her wages and the issue of a contract of employment (page 93).
45. On the morning of 16 February 2017 Mr Cooke responded to the claimant's email dated 15 February 2017 advising her that he would speak to a director about her requested pay increase that day and that he would have a contract prepared for her by the end of the week. This email is at page 94 of the bundle. Mr Cooke also advised the claimant that "In the meantime we need to go over working hours, the current 8 AM-4:30 PM hours that were amended when you first started to assist with you settling in will have to revert back to the normal business operating hours of 9 AM-5:30 PM as of Monday, 20 February 2017" (with the late shift remaining the same).

46. Mr Cooke contended in his evidence that he had amended the claimant's working hours because (a) Miss Leonard had advised him that she was no longer able to attend for work at 8 AM (b) Miss Leonard had raised concerns about the claimant's productivity between 8AM and 9AM when she was unsupervised and (c) the change to the claimant's working hours had only been agreed on a temporary basis and were not compatible with the respondent's normal working hours which were in line with the permitted contact hours with clients.
47. Miss Leonard contended in her evidence that she had informed Mr Cooke that she was struggling at that time to get into work for 8 AM. Miss Leonard did not however contend in her evidence that (a) she had told Mr Cooke that she was unable to attend at 8AM on a permanent basis and/or (b) that she had raised any concerns regarding the claimant's productivity between 8 AM and 9 AM.
48. The tribunal is not satisfied, in the light of the inconsistencies in the oral evidence given by Mr Cooke and Miss Leonard and in the absence of any associated documentary evidence, that Miss Leonard advised Mr Cooke that she was unable to attend at 8AM on a permanent basis and/or raised any wider concerns regarding the claimant's productivity between 8 AM and 9AM.
49. Mr Cooke did not discuss the proposed change in the claimant's working hours with the claimant's team leader Ms Dawson Wells or with Miss Caulfield prior to the issue of his email to the claimant dated 16 February 2017. Further, Mr Cooke did not seek advice from the respondent's HR advisers.

#### **The discussion on 16 February 2017**

50. There was a brief discussion between the claimant and Mr Cooke regarding the changes to the claimant's working hours shortly after Mr Cooke sent the email dated 16 February 2017. This discussion was initiated by the claimant who was distressed and anxious about the notified changes to her working hours. The discussion lasted for about 10 minutes. There are no notes of the discussion.
51. Mr Cooke contended in his oral evidence that he explained to the claimant why he was no longer able to facilitate the office being open before 9 AM and offered the claimant the opportunity to work between 9 AM to 4.30PM and spoke about alternative positions. The claimant denied that Mr Cooke offered her the opportunity to work between 9 AM and 4:30 PM or that there was any particularised discussion regarding any other role. The tribunal prefers the claimant's evidence regarding such matters. When reaching this conclusion the tribunal has had regard in particular to the contents of (a) Mr Cooke's subsequent email to Mr Hope dated 16 February 2017 (page 95 of the bundle) referred to below and to the claimant's subsequent detailed

email to Mr Cooke dated 16 February 2017 (pages 96- 97 of the bundle).

52. The tribunal is satisfied that the claimant was distressed by the changes to her working hours and the manner in which the matter was dealt with by Mr Cooke. When reaching this conclusion the tribunal has taken into account in particular the oral evidence of the claimant together with the contents of her subsequent email to Mr Cooke dated 16 February 2017 (pages 96-97 of the bundle) referred to below and to the contents of Mr Cooke's email to Mr Hope dated 16 February 2017 (page 95 of the bundle) referred to below in which he acknowledges that the claimant was "less than happy" with the changes. The tribunal has also had regard to the exchange of messages between the claimant and Miss Leonard at pages 97 a – 97c of the bundle.

#### **Mr Cooke's email dated 16 February 2017**

53. Mr Cooke emailed Mr Hope on 16 February 2017 advising him of the changes which he was making to the claimant's working hours. This email is at page 95 of the bundle. In summary, Mr Cooke advised Mr Hope (a) of the background to the matter including that he had made adjustments to the claimant's working hours shortly after the commencement of her employment on a preliminary basis for a short time to ease the claimant back into work as she suffered from MS and said that her working hours were making her fatigued (b) that he had spoken to the claimant that day and told her that she would be required to resume her normal working hours from 9 AM until 5:30 PM with effect from the following Monday (c) acknowledged that the claimant had a disability but felt that the respondent had made reasonable adjustments for 2 ½ months and that it was now time to put the claimant back on normal hours, "mainly for productive work reasons and to see how it goes". There is no reference in Mr Cooke's email to any offer to the claimant to work from 9 AM to 4:30 PM or to any alternative job role.

#### **Mr Cooke's absence on leave**

54. Mr Cooke was absent on leave between the afternoon of 16 February 2017 and morning of 22 February 2017. Mr Cooke was unable to access any work emails on his mobile phone during this period due to technical problems.

#### **The claimant's email dated 16 February 2017**

55. The claimant sent a detailed email to Mr Cooke on the evening of 16 February 2017 (pages 96-97 bundle) raising concerns about the changes to her working hours. In summary:-

- 55.1 The claimant disputed that the changes to her working hours had been a temporary adjustment and contended that it was

discriminatory to believe that a temporary adjustment would be sufficient as a reasonable adjustment for a permanent disability.

- 55.2 The claimant contended that Miss Leonard was usually in the office by 8 AM but that she was happy to work from 9 AM to 5:30 PM if there was no-one available to let her in on a particular day.
- 55.3 The claimant stated that she would struggle to work from 9 AM until 5:30 PM on a daily basis as the symptoms of her MS were far more pronounced later in the day and that this was why she had asked for the change to her working hours. The claimant further contended that she had been able to make good use of the time between 8 AM and 9 AM.
- 55.4 The claimant stated that she felt patronised by Mr Cooke's suggestion that if she struggled with working from 9 AM till 5:30 PM they would have to find her a different more suitable role and did not understand why it was necessary for her to do a different role when there were no issues with the standard of her work.
- 55.5 The claimant further stated that the respondent was aware of her disability from the outset of her employment, that the hours which she had been working had worked well for her and had enabled her to manage the workload and the effects of her MS without having to take more than very minor time off due to feeling unwell.
- 55.6 The claimant asked Mr Cooke to reconsider his decision to enable her to continue to work to the best of her ability with the necessary minor adjustments for her disability
56. Mr Cooke did not receive the claimant's email dated 16 February 2017 until the morning of 22 February 2017 when he returned from leave in the light of the technical difficulties which he had experienced accessing work emails on his mobile phone.

### **The review of the claimant's work**

57. On 20 February 2017 Miss Caulfield undertook a review of the files of the members of the claimant's team including the claimant. Miss Caulfield's review identified a number of issues with the claimant's files as identified at page 113 of the bundle. The issues identified related to matters completed at the end of January/beginning of February 2017 save for one issue relating to a matter which was completed on 25 November 2016. Miss Caulfield did not discover any similar issues with the files of the remaining team members.

58. The claimant contended that the review of the alleged errors was instigated by Mr Cooke in response to her email dated 16 February 2017. The respondent contended that (a) the review of the team files had been instigated by Miss Caulfield and Ms Dawson Wells without the knowledge or involvement of Mr Cooke (b) Miss Caulfield was unaware of Mr Cooke's decision to require the claimant to revert to her normal working hours and/or any exchange of correspondence between Mr Cooke and the claimant concerning such matter and (c) Mr Cooke was unaware of the review until he was notified during his absence on leave on 21 February 2017 of the events that day.

59. Having given careful consideration to the conflicting evidence the tribunal is satisfied, on the balance of probabilities, that:-

59.1 The review on 20 February 2017 was initiated by Ms Caulfield and Miss Dawson Wells without the knowledge/involvement of Mr Cooke. Further, Miss Caulfield was unaware of Mr Cooke's decision to require the claimant to revert to normal working hours and/or the exchange of correspondence relating to such matter when she undertook such a review.

59.2 Ms Caulfield had genuine concerns about the matters identified at page 113 of the bundle and considered that they needed to be addressed as a training issue as soon as possible

60. When reaching the above conclusions the tribunal has had regard in particular to (a) Miss Caulfield's evidence (b) there is no reference in Mr Cooke's email to Mr Hope dated 16 February 2017 to the initiation of any such review (c) Mr Cooke was absent on leave from the afternoon of 16 February 2017 and did not receive the claimant's email dated 16 February 2017 until he returned to the office on the morning of 22 February 2017.

61. The tribunal accepts however that from the claimant's perspective (a) the adverse review of her work would have been unexpected and unexplained/ disturbing particularly as (a) the claimant had passed her probationary period in January 2017 and the subsequent favourable reviews which she had received in January and at the beginning of February 2017 (b) it had been conducted by Miss Caulfield who was not the claimant's team leader and (c) the unexpected adverse review had followed immediately after her email to Mr Cooke dated 16 February 2017 and which all led the claimant to believe that the two events were connected.

### **The meetings on 20 and 21 February 2017**

62. Ms Caulfield and her fellow team leader Mr Coley met with the claimant on 20 February 2017 to discuss the outcome of Ms Caulfield's review of her files. There are no notes of this meeting.

63. The tribunal is satisfied, on the balance of probabilities that:-

- 63.1 The claimant was taken aback by the issues identified by Miss Caulfield in the light of the previously positive reviews and therefore approached the matter in a defensive manner.
- 63.2 Miss Caulfield perceived the claimant to respond in a defensive and hostile manner. Mr Coley advised the claimant the errors could potentially constitute gross misconduct.
- 63.3 By the end of the meeting the claimant agreed to review the notes which Miss Caulfield had prepared and to undergo further training with Mr Coley which the claimant understood would be provided the following morning.

64. When the claimant attended for work on the morning of 21 February 2017 she was required by Ms Caulfield and Mr Coley to sign a feedback form which summarised the areas of concern identified and the proposed way forward including further training. The claimant became distressed when she was requested to sign this form as she was not aware of anyone else being required to do so and she believed that she was being singled out because of the requests which she had made for the retention of the adjustments to her working hours.

65. The claimant eventually agreed to sign the form under duress after taking advice from her representative. The claimant became very distressed and spoke loudly. The claimant told Miss Caulfield that she felt that the training form was going to be used against her. Miss Caulfield did not understand why the claimant was so upset. Miss Caulfield construed the claimant's insistence upon signing the form under duress to mean that she was also refusing to accept training. Miss Caulfield further perceived the claimant to be difficult and tried unsuccessfully to contact Mr Cooke by telephone for advice. Miss Caulfield subsequently sought advice from a more senior manager regarding the matter.

66. Mr Cooke was contacted whilst on leave on 21 February 2017 by the respondent's IT manager who informed him that a member of staff was refusing to undergo training and had signed a training form under duress and sought advice. Mr Cooke advised him that he would deal with the matter on his return to the office the following day.

### **The events of 22 February 2017**

67. Mr Cooke returned to the office on the morning of 22 February 2017. Mr Cooke was briefed by Miss Caulfield about the events of the previous day.

68. Mr Cooke accepted that he had received the claimant's email dated 16 February 2017 including that he was aware on the morning of 22

February 2017 that he had an email from the claimant. Mr Cooke however contended that (a) it had gone into his junk mail and (b) he did not have an opportunity to read prior to his meeting with the claimant on 22 February 2017.

69. The tribunal is satisfied on the balance of probabilities that the email had gone into Mr Cooke's junk mail. The tribunal is further satisfied however, on the balance of probabilities, that Mr Cooke would have read the email prior to his meeting with the claimant. When reaching this conclusion the tribunal has taken into account in particular that (a) Mr Cooke accepted that he had received/ was aware of the email on the morning of 22 February 2017 (b) the events of the previous two days including that Mr Cooke had been contacted about the claimant during his absence on leave and (c) Mr Cooke did not meet with the claimant until noon on 22 February 2017. In all the circumstances, the tribunal is satisfied, on the balance of probabilities, that Mr Cooke would have read the email prior to his meeting with the claimant.

### **The meeting on 22 February 2017**

70. Mr Cooke emailed the claimant at 11.26 AM on 22 February 2017 asking the claimant to make herself available for a meeting at noon. Mr Cooke did not provide the claimant with any explanation of the purpose of the meeting.
71. There are no notes of the meeting. There were no witnesses. It was a brief meeting lasting for a maximum of 15 minutes. Both parties contended that the other acted inappropriately.
72. It is agreed between the parties that Mr Cooke began the meeting by slapping down on the table the training form which the claimant had signed "under duress" (as was demonstrated by Mr Cooke during the tribunal Hearing). The only issue between the parties was whether Mr Cooke asked the claimant "what the fuck" or "what the hell" the document was. The tribunal is satisfied on the balance of probabilities that Mr Cooke use the word "hell" as it is consistent with Mr Cooke's use of such language elsewhere in the bundle of documents. Mr Cooke accepted during the tribunal hearing that he had acted inappropriately in respect of the conduct referred to above.
73. Having weighed the conflicting oral evidence regarding the remainder of the meeting and having had regard to the limited associated near contemporaneous documents the tribunal is satisfied on the balance of probabilities that the meeting continued as follows:-
- 73.1 Mr Cooke continued to conduct the meeting in an aggressive manner castigating the claimant for signing the training form under duress, refusing training and because he had been disturbed by telephone calls whilst on leave and during which he had been told that the claimant had caused a scene in the office.



- 73.2 The claimant defended her position including she questioned why Miss Caulfield had been involved in the matter as she was not her team leader and why she was the only person who had been required to sign a training form.
- 73.3 The claimant asked Mr Cooke whether he had received her email dated 16 February 2017 about her working hours and he told her that it had gone into his junk mail. The tribunal is not however satisfied that Mr Cooke told the claimant that he had put it into his junk mail as contended by the claimant.
- 73.4 Mr Cooke refused to discuss the claimant's working hours and told the claimant that the recently notified hours were the hours which she was required to work.
- 73.5 The claimant told Mr Cooke that the adjusted hours were a reasonable adjustment because of her disability in response to which Mr Cooke (a) instructed the claimant to stop going on about reasonable adjustments and (b) that no-one received special treatment and that if she wanted to be treated equally she had to do the same as everybody else.
- 73.6 The claimant persisted in seeking to explain to Mr Cooke that she needed adjustments to her working hours to place her on an equal footing with her non-disabled colleagues and expressed distrust of employers regarding such issues including because of her previous experiences. The tribunal is not satisfied that the claimant also advised Mr Cooke during the meeting that she experienced the "pseudobulbar effect" and/or that it was a symptom of her MS.
- 73.7 Mr Cooke responded angrily and questioned whether the claimant wished to continue to work with the respondent. Mr Cooke told the claimant that he did not wish her to work for the respondent any more as she was difficult and disrespectful and instructed her to collect her belongings and leave. The claimant asked Mr Cooke for the reasons for her dismissal and he told her that he would put it in writing.
- 73.8 The claimant was distressed by Mr Cooke's conduct including his response to her request for the reinstatement of the adjustments to her working hours. Further the claimant considered the conduct of the meeting by Mr Cooke to be hostile and intimidating and to violate her dignity including that her disability was perceived as a nuisance to her employer.
74. When reaching the above conclusions the tribunal has taken into account in particular (a) the respondent accepted that the claimant had done a protected act during the course of the meeting (b) Mr Cooke

admitted his limited understanding of the purpose/ legal provisions relating to reasonable adjustments (c) the contents of Mr Cooke's email to Mr Hope dated 22 February 2017 referred to below (d) the exchange of messages between the claimant and Miss Leonard shortly after the claimant's dismissal (pages 105 and 106 of the bundle) and (e) the contents of the claimant's claim form.

### **Mr Cooke's email to Mr Hope dated 22 February 2017**

75. Mr Cooke emailed Mr Hope immediately following the conclusion of the meeting. This email (page 104 of the bundle) which is timed at 12.18 PM stated as follows:-

"Hi Wayne

I terminated Krystyna's employment today.

I pulled her into a meeting to discuss the issues over the past two days of my absence, as I predicted, argumentative, blaming everyone else for her work mistakes and issues, continuing to make a big deal about the hours and my reasons to change them back after we made some small adjustments previously.

Her last words, "I don't care what Sarah has to say she isn't my team leader" and "I don't trust you and I don't trust this company" made the decision quite easy".

### **Subsequent events**

76. There was a subsequent exchange of messages between the claimant and Miss Leonard (pages 105-16 the bundle) and between the claimant and Ms Knutton (page 1 of the supplemental bundle) later that day concerning the claimant's dismissal. Miss Leonard informed the claimant that Mr Cooke had returned from the meeting with the claimant in a horrible mood.

77. The respondent contended that Mr Cooke had subsequently written to the claimant confirming the reasons for her dismissal and sought to rely upon a letter dated 27 February 2017 at pages 108-110 of the bundle. In summary, the respondent contended in the letter that the claimant had been dismissed because of conduct/performance in relation to (a) a verbal altercation with a team leader on 27 January 2017 (b) the claimant's conduct on 21 February 2017 during which she refused to agree to additional training despite a direct instruction from a team leader and (c) her conduct during the meeting on 22 February 2017 during which she was extremely argumentative and did not understand the scope of the issues which she may have been causing.

78. The claimant denied that she received this letter of dismissal. The tribunal is not satisfied on the balance of probabilities that the claimant

received the alleged letter of dismissal. When reaching this conclusion the tribunal has taken into account in particular (a) the exchange of messages between the claimant and her representative on 9 March 2017 (page 111 of the bundle) in which the claimant informed her that she had not received a letter of dismissal as promised by Mr Cooke and (b) the above findings of the tribunal regarding the claimant's letter of offer.

## **THE CLOSING SUBMISSIONS**

79. The tribunal has had regard to the oral closing submissions of the parties together with the written submissions of the respondent (including the various authorities referred to therein).

## **THE CONCLUSIONS OF THE TRIBUNAL**

80. We have considered the issues in this case in the order adopted in the List of Issues unless otherwise indicated below.

### **1. Disability**

81. Paragraph 1 of the List of Issues.

82. As stated above the respondent conceded that the claimant had MS and was therefore a disabled person by virtue of paragraph 6 of Part 1 of Schedule 1 of the 2010 Act. The respondent however denied that it knew or ought reasonably to have known of the effects of the claimant's disability including that fatigue was caused by or was part of the claimant's disability of MS.

83. When determining the issues at Paragraph 1 of the List of Issues the tribunal has had regard in particular to the following statutory and associated provisions and/authorities namely:-

83.1 Sections 6 and paragraphs 1-6, and 8 of Part 1 of Schedule 1 of the 2010 Act.

83.2 Chapter 2 (paragraphs 2.8 – 2.20 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) ("The Code") and Appendix 1 to the Code.

83.3 The authorities of **Gallop v Newport City Council [2014] IRLR 221** and **Edith Donelien v Liberata UK Limited UK Ltd [2018] EWVA Civ 129**.

84. Paragraphs 1.2 -1.3 of the List of Issues.

84.1 The tribunal is satisfied that (a) at all material times the claimant regularly experienced fatigue in the late afternoon and (b) that this was a symptom of the claimant's MS.

- 84.2 When reaching such conclusions the tribunal has had regard in particular to the claimant's evidence regarding such matters and the associated findings of fact at paragraphs 13-14 above.
- 84.3 There is also a dispute between the parties as to whether the respondent had the requisite knowledge of the alleged effects of MS on the claimant including in particular, knowledge (actual or constructive) that the claimant experienced fatigue because of her MS.
- 84.4 There are three alleged discriminators in this case namely (a) Miss Caulfield (b) Mr Coley and (c) Mr Cooke. The tribunal has therefore considered whether all or any of the alleged discriminators had the requisite knowledge (actual or constructive) of the symptoms of fatigue referred to above.

### **Miss Caulfield**

- 84.5 The tribunal has considered first the position with regard to Miss Caulfield.
- 84.5.1 The tribunal is satisfied that the claimant informed Ms Caulfield during her interview for employment with the respondent that she had MS and that this was subsequently also recorded in the respondent's personnel questionnaire (paragraphs 18-19 above).
- 84.5.2 The tribunal is not however satisfied that the claimant informed Miss Caulfield during her interview or subsequently (or that Miss Caulfield was otherwise aware) of the symptoms of the claimant's MS including that she became fatigued in the late afternoon.
- 84.5.3 When reaching the above conclusions, the tribunal has taken into account in particular (a) the findings at the paragraphs referred to above (b) the claimant's primary team leader at the time of the events in question was Lucy Dawson Wells and there is no evidence that the claimant and Miss Caulfield had any significant day-to-day dealings or that they were acquaintances outside of work (c) there is no evidence that there was any discussion on 27 January 2017, 6/7 February 2017 or on 20/ 21 February 2017 of the claimant's MS and (d) the tribunal was not satisfied on the evidence that Miss Caulfield was aware of the fact or content of the claimant's e-mail to Mr Cooke dated 16 February 2017 or that there was any discussion between Mr Cooke and Miss Caulfield prior to the claimant's dismissal regarding

the claimant's disability or any effects thereof (paragraphs 36,43, 49 and 58-60above).

- 84.5.4 In all the circumstances, the tribunal is satisfied that Miss Caulfield was aware at all relevant times that the claimant had MS. The tribunal is not however satisfied that Miss Caulfield had any knowledge, at any relevant time of the effects on the claimant of her MS.

#### **Mr Coley**

- 84.6 The tribunal has considered next the position with regard to Mr Coley.

84.6.1 Mr Coley has not given any evidence to the tribunal. Mr Coley was not however identified as an alleged discriminator until the commencement of the Hearing.

84.6.2 The claimant did not contend that she had had any discussions with Mr Coley regarding her MS or the symptoms/effects thereof (including on 20 and 21 February 2017). Further, there is no evidence that the claimant and Mr Coley had any significant day-to-day dealings or that they were acquaintances outside of work.

84.6.3 Further the tribunal is not satisfied on the evidence that Mr Coley was aware of the fact or content of the claimant's email to Mr Cooke dated 16 February 2017 or that there was any discussion between Mr Cooke/ Miss Caulfield and/or Mr Coley prior to the claimant's dismissal regarding the claimant's disability or any effects thereof (paragraphs 58-60 above).

- 84.7 In all the circumstances, the tribunal is therefore not satisfied that Mr Coley had, at any relevant time, any knowledge (actual or constructive) that the claimant had MS or of any effects thereof.

#### **Mr Cooke**

- 84.8 The tribunal has gone on to consider the position with regard to Mr Cooke.

84.8.1 The tribunal is satisfied in the light of its findings of fact that Mr Cooke was aware of (a) the claimant's MS (b) that the claimant experienced fatigue in the late afternoons because of her MS and (c) that working in the late afternoons therefore placed her at a disadvantage because of her MS.

84.8.2 When reaching the above conclusions the tribunal has had regard in particular to (a) its findings in respect of the meeting on 18 October 2016 (paragraphs 28-29 above) (b) the contents of Mr Cooke's email to Mr Hope dated 16 February 2017 (page 95 of the bundle) (b) the contents of the claimant's e-mail to Mr Cooke dated 16 February 2017 (page 96-97 of the bundle) which for the reasons stated at paragraph 68-69 above the tribunal is satisfied would have been read by Mr Cooke on the morning of 22 February 2017 and (d) the discussions between Mr Cooke and the claimant at the meeting on 22 February 2017 leading to the claimant's dismissal (paragraphs 73-74 above).

84.8.3 The tribunal is further satisfied that (a) although Mr Cooke agreed at the meeting on 18 October 2016 to make adjustments to the claimant's working hours on a preliminary basis to assist the claimant to adjust to revised working arrangements, Mr Cooke was nevertheless aware that working the hours of 9 AM to 5:30 PM had caused the claimant to feel fatigued in the late afternoon because of her MS (b) that he should therefore have reasonably been aware of the potential ongoing effects of fatigue and (c) the claimant, in any event, confirmed to Mr Cooke during their discussions on 16 February 2017/in her e-mail later that day and during their meeting on 22 February 2017 that the requirement to revert to the working hours of 9 AM to 5:30 PM placed her at a disadvantage because she became fatigued in the late afternoons by reason of her MS (paragraphs 29,50,55 and 73 above).

84.8.4 In all the circumstances, the tribunal is satisfied that Mr Cooke was made aware on 18 October 2017, as confirmed again by the claimant on 16 and 22 February 2017, that (a) the claimant experienced fatigue in the late afternoon because of her MS and (b) the requirement to work the respondent's standard hours of 9:30 AM to 5:30 PM would therefore place the claimant at a disadvantage because of her disability and associated symptoms of fatigue.

85. Paragraph 1.4 of the List of Issues – the tribunal is not satisfied on the facts (paragraph 73.6 above) that the claimant advised Mr Cooke at the meeting on 22 February 2017 that she experienced the “pseudobulbar effect” and/or that Mr Cooke was in any event aware of the alleged effects thereof on the claimant.

### **Section 13 : Direct Disability discrimination**

86. Paragraph 2 of the List of Issues.

87. When determining the issues identified at paragraph 2.1 of the List of Issues the tribunal has had regard in particular to the following statutory and associated provisions/authorities namely :-

87.1 Sections 6, 13, 23 (1), 39 and 136 of the 2010 Act.

87.2 The guidance contained at Chapter 3 of the Code.

87.3 The authorities of **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** and **Shamoon V Chief Constable of the Royal Ulster Constabulary [2002] ICR 337 HL**.

88. The alleged discriminator in respect of this allegation is Mr Cooke.

(a) Changing the claimant's working hours back to 9am to 5.30pm.

89. The tribunal has considered first the above allegation as follows:-

89.1 The Claimant has established the factual basis of her claim namely, that she was notified by Mr Cooke by e-mail dated 16 February 2017 that her working hours (save for the late shift) would revert to 9 AM-5:30 PM with effect from Monday, 20 February 2017. The claimant also established that she was subjected to a detriment as she became fatigued in the late afternoons by reason of her MS.

89.2 The tribunal is also satisfied that Mr Cooke had the requisite knowledge of the claimant's MS and the associated effects thereof as referred to above.

89.3 The tribunal has therefore gone on to consider the reason for the claimant's treatment including in particular what was in the mind of Mr Cooke when he notified the claimant of the requirement to change her working hours to revert to 9 AM to 5:30 PM.

89.4 In summary, the claimant contended that she was treated this way because of her disability. The claimant has not identified any actual or hypothetical comparator.

89.5 In summary, the respondent contended that the decision was unrelated to the claimant's disability, the previously adjusted hours had been agreed on a temporary basis to allow the claimant to settle into her role and that the claimant had been required to revert to the respondent's normal working hours for

operational reasons including as Miss Leonard was no longer able to attend at 8 AM to allow the claimant access to the respondent's premises.

90. The tribunal has asked itself why the claimant was subjected to such treatment in accordance with **Shamoon**.
91. Having had regard to its findings of fact the tribunal is satisfied that the reason for the claimant's treatment was (a) the claimant's repeated requests for a pay rise (paragraphs 35 and 44 above) (b) Mr Cooke had been informed by Miss Leonard that she was experiencing difficulties at that time in attending for work at 8 AM to allow the claimant access to the Respondent's premises (paragraph 48 above) and (c) further that the above matters were unrelated to the claimant's disability.
92. Further, the tribunal is, any event, satisfied that the claimant was not treated less favourably than a non-disabled comparator would have been treated in similar circumstances as the claimant was being required to revert to the respondent's standard working hours which was a requirement of all staff working in a similar role.
93. This allegation is therefore dismissed.

(b) The claimant's dismissal

94. The tribunal has considered the above allegation as follows: -
- 94.1 The claimant has established the factual basis of her claim namely, that she was dismissed by Mr Cooke on 22 February 2017. The claimant does not rely upon any comparator.
- 94.2 As stated above, the tribunal is also satisfied that Mr Cooke had the requisite knowledge of the claimant's MS/ the effects thereof.
- 94.3 The tribunal has therefore gone on to consider the reason for the claimant's dismissal including in particular what was in the mind of Mr Cooke on 22 February 2017 when he summarily dismissed the claimant.
- 94.4 In summary, the claimant contended that she was dismissed by Mr Cooke because she had fought to retain her reasonable adjustments to her working hours including asserting her right to such adjustments because of her MS.
- 94.5 In summary, the respondent contended that the reason for the claimant's dismissal was her conduct on 27 January 2017, and 20-22 February 2017 which was unrelated to her MS.



- 94.6 Having given careful consideration to its findings of fact the tribunal is satisfied that the claimant was dismissed by Mr Cooke for the following reasons:-
- 94.6.1 Mr Cooke believed that the claimant had refused to accept responsibility for the errors which had been found in her work including that she had refused training and signed the feedback form under duress. Further, Mr Cooke was annoyed that he had been disturbed during his absence on leave in respect of such matters.
  - 94.6.2 The claimant continued to challenge during the meeting on 22 February 2017 Mr Cooke's assertions regarding the matters alleged in the above paragraph.
  - 94.6.3 Mr Cooke was annoyed by the claimant's attempts/continuing attempts (in the claimant's email dated 16 February 2017 and during the meeting on 22 February 2017) to raise with him her request to retain her revised working hours as a reasonable adjustment which she contended was required because of the fatigue experienced by her in the late afternoons by reason of her MS including the claimant's assertion that she was entitled to such adjustments because of her disability.
- 94.7 When reaching the above conclusions the tribunal has taken into account in particular (a) the findings of fact at paragraphs 53,66,69 and 72-75 above including the contents of Mr Cooke's e-mail to Mr Hope dated 22 February 2017 which was sent minutes after the conclusion of the meeting and in which he complains about the claimant," continuing to make a big deal about the hours and my reasons to change them back after we had made small adjustments previously" and (b) the respondent's acknowledgement that the claimant had done protected acts on 16 and 22 February 2017.
95. The tribunal is not however satisfied that the claimant was dismissed for the purposes of section 13 of the 2010 Act because of her disability as the tribunal is not satisfied in the light of the above findings that the claimant's disability, namely her MS (as opposed to matters relating to / arising from her MS namely the request for reasonable adjustments because of her fatigue / her assertion of her rights in respect thereof) was an effective cause of her dismissal.
96. When reaching the above conclusion the tribunal has taken into account, in addition to the matters already referred to above, that Mr Cooke was proposing to retain the claimant in the employment of the respondent, notwithstanding his knowledge of her MS, after 16 February 2017 on the basis set out in his e-mail to the claimant of that date (page 94 the bundle).

97. This allegation is therefore dismissed.

### **Section 15: discrimination arising from disability**

98. Paragraph 3 of the List of Issues.

99. When determining the issues identified at paragraph 3.1 of the List of Issues the tribunal has had regard in particular to the following statutory and associated provisions/authorities namely:-

99.1 Sections 6, 15, 39 and 136 of the 2010 Act.

99.2 The guidance contained at Chapter 5 of the Code

99.3 The guidance contained in the judgment of **Pnaiser v NHS England [2016] IRLR 170** and **R (Elias v Secretary of State for Defence [2006] IRLR 934 CA**.

### **Paragraphs 3.1 (a), 3.1 (b) and 3.5 of the List of Issues**

100. The tribunal has considered first paragraphs 3.1 (a) and paragraph 3.5 of the List of Issues. It is alleged in paragraph 3.1 (a) of the List of issues that Ms Caulfield and Mr Coley called the claimant to meetings on 20 and 21 February 2017 about her work performance because she had asked for reasonable adjustments. The alleged discriminators in respect of such allegation are therefore Ms Caulfield and/or Mr Coley.

101. As indicated previously above the tribunal is not however satisfied that Mr Coley had any knowledge of the claimant's disability of MS.

102. This allegation against Mr Coley is therefore dismissed.

103. The tribunal is however satisfied that the Miss Caulfield was aware at the time of the claimant's interview and appointment for employment with the respondent that the claimant had MS as indicated previously above.

104. In summary, the claimant contended that Miss Caulfield looked for mistakes in the claimant's work, called her to meetings relating thereto on 20 and 21 February 2017 and insisted that the claimant signed the training feedback form because of her e-mail to Mr Cooke dated 16 February 2017 requesting the reinstatement of her revised working hours by way of a reasonable adjustment.

105. In summary, the respondent contended that Miss Caulfield's review of the claimant's work on 20 February 2017 was wholly unrelated to the claimant's email to Mr Cooke dated 16 February 2017 of which Miss Caulfield was unaware. Further the meetings on 20 and 21 February 2017 and the request to sign the training feedback form

were made to address concerns relating to the errors discovered by Ms Caulfield in the claimant's work and were completely unrelated to the claimant's disability of MS.

106. The claimant has established on the facts that (a) her work was reviewed by Miss Caulfield on 20 February 2017, that she was called to meetings with Ms Caulfield on 20 and 21 February 2017 to address such matters and that Miss Caulfield also required her to sign the training feedback form (paragraphs 57,62 and 64-65 above).
107. The tribunal is however not satisfied on the facts that there is any evidence that Ms Caulfield's review of the claimant's work on 20 February 2017, the subsequent meetings on 20 and 21 February 2017 and/or the requirement to sign the training feedback form were related in any way to the claimant's disability (including in respect of any request by the claimant for the reinstatement of the adjustments to her working hours in her e-mail to Mr Cooke dated 16 February 2017).
108. Further the tribunal is satisfied on the facts that the reason for such review, the subsequent meetings and Miss Caulfield's requirement that the claimant sign the training feedback form was because of legitimate concerns by Miss Caulfield concerning the claimant's work (paragraphs 59-60 and 64 above).
109. Allegation 3.1(a) and (b) against Miss Caulfield are therefore dismissed.
110. Paragraph 3.1 (c) of the List of Issues-the tribunal has gone on to consider the allegation against Mr Cooke namely that he invited the claimant to the meeting on 22 February 2017 and subsequently dismissed her because she had sought reasonable adjustments.
111. The tribunal is satisfied that the claimant was subjected to unfavourable treatment namely (a) she was summoned to an unexplained meeting with Mr Cooke on 22 February 2017 and (b) the claimant was summarily dismissed by Cooke during that meeting.
112. The tribunal is not satisfied on the facts that the claimant was summoned to the meeting on 22 February 2017 for a reason arising in consequence of the claimant's disability. The tribunal is satisfied, notwithstanding that Mr Cooke had received and read the claimant's e-mail dated 16 February 2017 regarding reasonable adjustments prior to the commencement of the meeting on 22 February 2017, that the reason for the meeting was to address the matters which had arisen during Mr Cooke's absence on leave including in particular as Mr Cooke was annoyed that (a) he had been disturbed during his absence on the leave regarding such matters and (b) he understood that the claimant had refused training and had signed the training feedback form under duress.

113. When reaching the above conclusions the tribunal has had regard in particular to its findings at paragraphs 66-69 and 72-73 including the way in which Mr Cooke demonstrated to the tribunal how he had slapped the training feedback form down on the table at the commencement of the meeting on 22 February 2017.
114. The tribunal has therefore gone on to consider whether the claimant's dismissal was because of something arising from disability.
115. The tribunal has considered this allegation in the light of its previous findings relating to the claimant's dismissal above. In the light of the above findings regarding the claimant's dismissal the tribunal is satisfied that one of the effective causes of such dismissal was the claimant's request for the reinstatement of the previous adjustments to her working hours and the associated matters referred to at paragraph 94 above.
116. The tribunal is also satisfied that this was something arising in consequence of the claimant's dismissal for the purposes of section 15 of the 2010 Act namely, that the claimant had requested/asserted her entitlement to the reinstatement of the adjustments to her working hours to allow her to start her employment at 8:00 AM in the morning as she became fatigued in the late afternoons because of her MS. The tribunal is also satisfied as previously explained above, that Mr Cooke was fully aware of such matters at the time of the claimant's dismissal.
117. The tribunal is further satisfied that the claimant's dismissal for the above-mentioned reasons was not objectively justified as a proportionate means of achieving a legitimate aim. When reaching this conclusion the tribunal has had regard in particular to the legal protection afforded to the claimant pursuant to section 27 of the 2010 Act together with the provisions contained in the 2010 Act relating to the provision of reasonable adjustments.
118. The tribunal has also taken into account the circumstances in which the claimant had raised her concerns/requested the reinstatement of the previous adjustments to her working hours including that the changes to her working hours had been notified to the claimant without any prior warning or discussion, Mr Cooke's dismissive attitude to the claimant's concerns/requests and his lack of understanding of the relevant legal provisions.
119. In all the circumstances the tribunal is satisfied that the claimant's dismissal by Mr Cooke on 22 February 2017 was in breach of section 15 of the 2010 Act and that this element of her claim therefore succeeds.

## **Section 26: Harassment on the grounds of disability**

120. Paragraph 4 of the List of Issues.

121. When determining the issues identified at paragraph 4 of the List of Issues the tribunal has had regard in particular to the following statutory and associated provisions/authorities namely:-
- 121.1 Sections 6, 26, 39 and 136 of the 2010 Act.
- 121.2 The guidance contained at Chapter 7 of the Code.
- 121.3 The authorities of **Chawla v Hewlett Packard Limited [ 2015] IR LR 356EAT** and **Prospects for People with Learning Difficulties v Harris [2012]EqLR 781** (relied upon by the respondent).
122. The tribunal has considered first the allegation against Mr Coley at paragraph 4.1 (b) of the List of Issues.
123. The claimant has established that Mr Coley advised the claimant on 20 February 2017 that the errors which had been discovered could potentially constitute gross misconduct (paragraph 63.2 above).
124. However, for the reasons previously explained above the tribunal is satisfied that Mr Coley was unaware at the relevant time of the claimant's disability and/or any effects thereof. The tribunal is therefore further satisfied that such comments were wholly unrelated to the claimant's disability and the claim against Mr Coley is therefore dismissed.
125. The tribunal has gone on to consider the allegation against Miss Caulfield at paragraph 4.1 (a) of the List of Issues
126. The claimant has established on the facts that (a) Miss Caulfield required the claimant to sign the feedback form on 21 February 2017 and (b) that Miss Caulfield was aware of the claimant's disability of MS. However, for reasons previously explained above the tribunal is not satisfied on the facts that there is any evidence that such requirement by Miss Caulfield related in any way to the claimant's disability (paragraphs 107 and 108 above) and this allegation is therefore dismissed.
127. The tribunal has gone on to consider the allegations against Mr Cooke at paragraphs 4.1 (c)-(e) of the List of Issues.
128. The tribunal has considered first the allegations against Mr Cooke at paragraph 4.1 (c) of the List of Issues. The claimant has established on the facts (and it was admitted by Mr Cooke) that he had thrown the training feedback form onto the table at the commencement

of the meeting on 22 February 2017. Further the tribunal has found that Mr Cooke made the comments identified at paragraph 71 above.

129. The tribunal is satisfied that such conduct by Mr Cooke could constitute harassment having regard to the factors identified at section 26 of the 2010 Act and the findings in particular at paragraph 71 above. The tribunal is not however satisfied that the above conduct related to the claimant's disability of MS. The tribunal is satisfied on the facts of this case that Mr Cooke acted in such a manner for the reasons previously identified at paragraphs 112 and 113 above which were unrelated to the claimant's disability of MS.

130. This allegation is therefore dismissed.

131. The tribunal has therefore gone on to consider the remaining allegations at paragraph 4.1 (d) and (e) of the List of Issues.

132. The claimant has established the factual basis for such claims including that (a) Mr Cooke made (substantially) the above mentioned comments at the meeting on 22 February 2017 (b) which the claimant perceived to violate her dignity and create an intimidating and hostile atmosphere. Further the tribunal is satisfied that, viewed objectively, it was reasonable, in all the circumstances, for such conduct to be considered to have such effect. When reaching this conclusion the tribunal has had regard in particular to its findings at paragraphs 73.7 and 73.8 above.

133. The tribunal is further satisfied on the facts that such conduct "related" to the claimant's disability of MS as the comments made by Mr Cooke were in respect of the claimant's request for the reinstatement of the adjustments to her working hours which she had sought by reason of her MS and associated fatigue.

134. The above allegation therefore succeeds.

## **Section 27: Victimisation**

135. Paragraph 5 of the List of Issues.

136. When determining the issues identified at paragraph 5 of the List of Issues the tribunal has had regard in particular to the following statutory and associated provisions/authorities namely:-

136.1 Sections 6, 27, 39 and 136 of the 2010 Act.

136.2 The guidance contained at Chapter 9 of the Code.

136.3 The judgment in **Nagarajan v London Regional Transport and others [1999] IRLR 572HL**.

137. In summary, the respondent accepted that the claimant had done protected acts for the purposes of section 27 (1) of the 2010 Act namely (a) by reason of the claimant's e-mail dated 16 February 2017 and (b) the claimant's requests/ contentions regarding the reinstatement of adjustments to her working hours at the meeting on 22 February 2017. Further the claimant was subjected to a detriment namely, dismissal. The respondent did not contend that the claimant had acted in bad faith for purposes of section 27 (3) the 2010 Act in respect of either of the protected acts.

138. The respondent denied however that (a) Mr Cooke had read the claimant's e-mail dated 16 February 2017 at the time of the claimant's dismissal and (b) in any event, there was any causal connection between either or both of the protected acts and the claimant's dismissal as the reason for the claimant's dismissal was conduct in respect of the claimant's conduct on 27 January 2017, 20-21 February 2017 and 22 February 2017.

139. The tribunal is satisfied that the above-mentioned acts relied upon by the claimant are protected acts for the purposes of section 27 (1) (2) (c) and/or (d) of the 2010 Act including as Mr Cooke had read the claimant's e-mail dated 16 February 2017 on the morning of 22 February 2017 (prior to his meeting with the claimant that day) (paragraph 69 above).

140. The tribunal is also satisfied in the light of its findings at paragraph 94 above that one of the effective causes of the claimant's dismissal was that Mr Cooke was annoyed by the claimant's attempts/continuing attempts by way of the claimant's e-mail dated 16 February 2017 and during the meeting on 22 February 2017 to raise with him the matters relating to reasonable adjustments to her working hours.

141. The tribunal is further satisfied having regard to the guidance contained in **Nagarajan** and at paragraph 9.10 of the Code that the claimant has established the necessary causal link between the protected acts and the claimant's dismissal as the protected act/s do not need to be the only reason for the treatment. It is sufficient if they have a significant influence on the decision to dismiss. Further, a significant influence for such purposes is, "an influence which is more than trivial" which we are satisfied is the case having regard to the findings above.

142. This allegation therefore succeeds.

## **6. Section 20/21 Reasonable adjustments**

143. Paragraph 6 of the List of Issues.

144. When determining the issues identified at paragraph 6 of the List of Issues the tribunal has had regard in particular to the following statutory and associated provisions authorities namely:-

144.1 Sections 6, 20, 21, 39, 136, and paragraph 20 (1) of Schedule 8 to the 2010 Act.

144.2 Chapter 6 of the Code.

144.3 The guidance contained in **the Environment Agency v Rowan [2008] ICR 218 EAT.**

145. It was agreed that the respondent had applied a provision criterion or practice namely, that the claimant was required to work the normal business operating hours of the respondent (apart from the late shift which remained the same) of 9 AM till 5:30 PM with effect from 20 February 2017 ("the PCP") (the e-mail from Mr Cooke to the claimant dated 16 February 2017 at page 94 of the bundle).

146. The respondent denied however that the claimant satisfied any remaining aspects of the statutory provisions including that (a) the standard working hours placed the claimant at a substantial disadvantage because of her disability of MS (b) that the respondent had in any event the requisite knowledge thereof and (c) that it would have been a reasonable adjustment in all the circumstances in the light of the operational requirements of the business/the difficulties in facilitating the claimant access prior to 9 AM and concerns regarding her productivity during such time.

147. The tribunal is satisfied having regard to the guidance referred to above and its relevant findings of fact that:-

147.1 The above PCP was applied to/ notified to the claimant with effect from 20 February 2017.

147.2 The provision of such PCP placed the claimant, as a disabled person with MS, at a substantial disadvantage in relation to her non disabled work colleagues as the claimant became fatigued if she was required to work on a regular basis until 5:30 PM by reason of her MS. When reaching this conclusion the tribunal has had regard in particular to its findings at paragraphs 13 – 14 above. The tribunal has also reminded itself that substantial for these purposes means more than minor or trivial.

147.3 The tribunal is not however satisfied on the facts that the PCP placed the claimant at a substantial disadvantage in respect of any cognitive difficulties and/or the likelihood of making errors in her work as contended paragraph 6.2 of the List of Issues as this has not been established on the facts/ supported by any medical evidence. Further consideration of the established



substantial disadvantage is therefore confined below to the effects of fatigue.

- 147.4 The tribunal is satisfied that the respondent had the requisite knowledge that (a) the claimant had the disability of MS and (b) that she was likely to be placed at the disadvantage identified above by the application of the PCP.
- 147.5 When reaching this conclusion the tribunal has had regard in particular to paragraphs 84.8.3 and 84.8.4 above including that Mr Cooke was (a) initially notified of such matters on 18 October 2016 and (b) further notified of them during his discussions with the claimant on 16 February 2017, on 22 February 2017 (when he read the claimant's e-mail on the morning of 22 February 2017) and during the subsequent meeting later that day).
148. The tribunal has therefore gone on to consider whether the respondent took such steps as it was reasonable to have taken, in all the circumstances of the case in order to make adjustments. This is an objective test.
149. The claimant's primary case was that the respondent should have restored the adjusted working hours which were implemented following the meeting of on or around 18 October 2016 namely working from 8 AM to 4:30 PM (save on the late shift) as this alleviated the substantial disadvantage of fatigue caused by the claimant's MS.
150. The claimant further contended, in response to Mr Cooke's evidence that a further/alternative reasonable adjustment (if it had been offered by the respondent), would have been for the claimant to have worked from 9 AM to 4:30 PM with a corresponding adjustment to her pay.
151. The respondent's position was that even if the claimant established the necessary substantial disadvantage and knowledge thereof on the part of the respondent it was not a reasonable step to take, viewed objectively, to restore the revised working hours including in the light of (a) Miss Leonard's inability to attend at 8 AM in the morning (b) concerns regarding the claimant's productivity between 8 AM and 9 AM (c) and the operational requirements of the business which prohibited the respondent from making contact with clients by telephone prior to 9 AM.
152. Having given the matter very careful consideration the tribunal is satisfied that the restoration of the claimant's adjusted working hours of 8 AM to 4:30 PM ("the adjustment") would, viewed objectively have been a reasonable adjustment for the purposes of the 2010 Act in this case.

153. When reaching this conclusion the tribunal has taken into account in particular the following matters:-

153.1 The adjustment had been in place without any significant difficulties been reported between October 2016 and February 2017 including as (a) there were only a few occasions upon which Miss Leonard was unable to attend at 8 AM to facilitate the claimant's access to the respondent's premises (b) other people were also in attendance on a regular basis prior to 9 AM (including Miss Caulfield and Mr Coley) (c) Miss Leonard did not on the facts notify Mr Cooke that she was thereafter unable to attend at 8 AM on a permanent basis (d) the claimant indicated that she was prepared to vary her start time if there was any particular problem on a given day (d) the tribunal is not satisfied on the facts that Miss Leonard had reported any concerns regarding the claimant's productivity between 8 AM and 9 AM further there is no evidence that any such concerns had been raised by the claimant's team leader Ms Dawson Wells who was responsible for the allocation of work during such period.

153.2 The adjustment had on the facts alleviated the disadvantage experienced by the claimant between October 2016 and February 2017 as there was no evidence of the claimant having had any significant absences from work by reason of any fatigue whilst the adjustment was in place.

154. Further, if for any reason, the tribunal is wrong with regard to the reasonableness of the adjustment, the tribunal is, in any event, satisfied that it would have been a reasonable adjustment to have revised the claimant's working hours to 9 AM to 4:30 PM (with the commensurate adjustment in pay) as this would in any event have aligned with the respondent's normal working hours and would have alleviated the claimant's substantial disadvantage of experiencing fatigue in the late afternoons.

155. This complaint therefore also succeeds.

## **7. Section 1 written statement of particulars**

156. Paragraph 7 of the List of Issues.

157. The respondent conceded for the purposes of Section 38 of the Employment Act 2002 that it had not issued the claimant with a written statement of particulars of employment as required by section 1 of the 1996 Act.

## **9. Section 123 (6) of the Employment Rights Act 1996.**

158. The respondent contended that if the claimant succeeded in her claims any award of compensation should be reduced pursuant to

section 123 (6) of the Employment Rights Act 1996 by reason of the claimant's conduct on 27 January 2017, and 20-22 February 2017 which had contributed to her dismissal.

159. The tribunal is satisfied that section 123 (6) of the Employment Rights Act 1996 is of no relevance in this case as this is a case of disability discrimination not unfair dismissal.
160. The tribunal is satisfied however that it has power pursuant to section 124 of the 2010 Act to reduce if appropriate compensation for a tortious act to reflect the fact that the claimant's conduct had contributed to any losses. The tribunal has also had regard on this point to the authority of **Way and anor v Crouch 2005 ICR 1362 EAT**.
161. The tribunal is not however satisfied, in the particular circumstances of this case, that it is appropriate to reduce any compensation awarded to the claimant pursuant to section 124 of the 2010 Act for the following reasons: --
- 161.1 The tribunal is not satisfied on the facts that the conduct of the claimant on 27 January 2017 contributed to the claimant's dismissal.
- 161.2 When reaching this conclusion the tribunal has taken into account in particular its findings that the respondent considered the matter to be closed shortly thereafter including that the claimant received a cash bonus at the end of January 2017 and received a favourable performance review at the beginning of February 2017 (paragraphs 41-43 above).
- 161.3 Miss Caulfield considered the matters which she had discovered to be training issues. Further the tribunal is not satisfied on the facts that the claimant refused to undergo training on 21 February 2017 (paragraphs 63-64 above).
- 161.4 Further, the tribunal is satisfied that it is appropriate to consider the claimant's conduct on 20 and 21 February 2017 in the context of the events at that time including her perception of the situation particularly as (a) Miss Caulfield was not her team leader (b) the claimant had not previously been notified of any concerns regarding her work and had been praised at the end of January/ the beginning of February 2017 for her achievements (c) the claimant had received on 16 February 2017, without any prior warning or consultation, an e-mail from Mr Cooke removing the adjustments to her working arrangements with effect from 20 February 2017 and (d) she was fearful of her position following her discussion with Mr Cooke on 16 February 2017 and the sending of her subsequent e-mail.

161.5 Moreover, the tribunal is satisfied that it is appropriate to consider the events of 22 February 2017 in the context of the events that day including (a) that the claimant was summoned to a meeting with Mr Cooke at short notice without any prior warning or explanation of the purpose of the meeting and (b) the wholly inappropriate manner in which the meeting was conducted by Mr Cooke who is a senior manager within the respondent.

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Employment Judge Goraj  
Date: 26 March 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE OFFICE OF THE TRIBUNALS