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# THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss M Adam**

**v**

**Scentric Information Security  
Technologies Limited**

**Heard at:** London Central

**On:** 6, 7, 8 and 12 December 2017

**Before:** Employment Judge J Wade

**Members:** Mr N Brockman  
Mr S Soskin

**Representation:**

**Claimant:** Mr R Elcho, Free Representation Unit  
**Respondent:** Mr J Mohammed, Head of Operations

## JUDGMENT

The unanimous Judgment of the Tribunal is that: -

1. The Respondent is not liable to pay the Claimant notice pay arising from her breach of contract claim.
2. The Respondent did not make unlawful deductions from the Claimant's wages on 11 July and 1 August 2016.
3. The Respondent did not subject the Claimant to the following detriments because of something arising in consequence of her disability: -
  - (a) Put pressure on the Claimant to work excessively hard;
  - (b) Deceive the Claimant about the fact that she was coming on the work trip to Thailand;
  - (c) Dismiss the Claimant/suggest that she should resign.

4. The Respondent did subject the Claimant to discrimination arising from disability in respect of not taking her on the work trip to Thailand.
5. The Respondent did not discriminate against the Claimant by failing to make reasonable adjustments, specifically the practice of making her travel by train to meetings.
6. The Respondent did not harass the Claimant.

## REASONS

- 1 As the Respondent agrees, the Claimant is disabled within the meaning of the Equality Act 2010. She has a diagnosis of Autism.
- 2 After the first Preliminary Hearing, the Tribunal approached the National Autistic Society to ask for guidance and support for Ms Adam who had been very distressed at the hearing. Ms Jones, Employment Training Manager at the National Autistic Society, provided a report suggesting adjustments which would be reasonable for Ms Adam during the hearing and also attended a Preliminary Hearing and the final hearing with her to provide direct support. We are grateful to her for her advice; a copy of her report is attached.
- 3 The advice was shared with the Respondent and we are also grateful to Mr Mohammed for doing his best to ask clear, accessible, closed questions and to stay calm when insults and accusations were directed at him during the hearing.
- 4 In her report, Ms Jones commented: -  
  
“Anxiety is a common characteristic of autism and will further impact on a person’s difficulties. This may impact with Ms Adam in the following ways:
  - (a) Her ability to use her communication strategies may be affected;
  - (b) Her body language and non-verbal communication may come across as aggressive;
  - (c) Her voice may become louder and she may shout;
  - (d) She may use stimming to self regulate anxiety. This could be rocking or shaking her hands;
  - (e) She may be visibly distressed and be crying.

- 5 Another accompanying issue is sensory sensitivity and we used a hearing room with as much natural light as possible and allowed Ms Adam to sit on the left in the room which is where she had asked to sit.
- 6 Mr Mohammed attended to represent the Respondent. He is not a lawyer and so the Respondent was a litigant in person whereas the Claimant had the valuable support not only of Ms Jones but also Mr Elcho from the Free Representation Unit. We were very conscious of the importance of ensuring that Mr Mohammed understood that, whilst we were making adjustments in order to allow the Claimant to communicate her case, we were not helping her to win it. To that end, we went through the legal issues carefully with both sides and explained them so that he understood.
- 7 The only disability which we considered was autism, the Claimant said that she had other impairments such as dyslexia but we did not consider them as free-standing disabilities as no separate allegations were made about their effect.

### **Interlocutory issues**

- 8 A few issues arose during the hearing concerning the evidence. The Claimant complained that the Respondent's bundle was incomplete, that the quality was poor and that items had been forged.
- 9 Whilst the Respondent was represented at the time the bundle was prepared, and we do not question that the Respondent's solicitors understood their disclosure duties, we did permit the Claimant to put in a small supplementary bundle just to be sure that we were not missing crucial evidence which she had not presented to us because of any misunderstanding of the process due to her disability.
- 10 We of course gave Mr Mohammed time to prepare additional questions and to look at the pages in the new bundle, many of which, we must say, were not of particular assistance to the Claimant and did not prove forgery. We also agreed to admit a couple more pages from the Respondent.
- 11 Thanks to the assistance of all involved, we were mainly able to keep to the general procedural rules. We explained that "rules were rules" and that they were there to ensure justice, and the Claimant, whilst at times unhappy, accepted this. We did show flexibility in that when she did stand up and shout and point at Mr Mohammed, and tell him that he would go to hell, we understood that this was a manifestation of her anxiety. Happily, Mr Mohammed also understood that. He was more cynical than us, however, and said that he had not experienced such extreme behaviour whilst the Claimant was employed by his company and that he felt that she was to some extent "putting it on". Ms Jones is not a clinical expert and so we did not have expert help with such issues. We did our best to navigate our way through so that we delivered a fair hearing to both parties, understanding the

Claimant but still ensuring fairness for the respondent. Happily, we were unanimous in our conclusions.

- 12 The Claimant emailed and then tried to deliver more documents to the Tribunal after the close of the hearing. They cannot, of course, be admitted and we have not looked at them.

### **The Issues**

- 13 The Claimant said that the Respondent failed to pay her the 1 month's notice pay to which she was entitled. This was a breach of contract claim under the Employment Tribunal Extension of Jurisdiction Order.
- 14 Further, she said that she had been underpaid in respect of two invoices paid on 11 July and 1 August 2016. She had been paid £3,015 and says that she should have been paid £3,750. This is an unpaid wages claim under the Employment Rights Act 1996 Part II.
- 15 The Claimant also said that she suffered detriment and dismissal because of something arising in consequence of her disability, the Equality Act section 15. There were four allegations: -
  - (a) Exploitation because of naivety and vulnerability arising from her autism;
  - (b) Deception again due to naivety and vulnerability arising from her autism;
  - (c) Not taking her on a trip to Thailand because of extreme distress and distressed conduct arising from her disability; and
  - (d) Dismissing her (including constructive discriminatory dismissal) because of her distressed conduct.
- 16 The Claimant also says that the Respondent failed to make reasonable adjustments when it imposed on her a practice of making her travel to work by train, the Equality Act section 20.
- 17 Finally, the Claimant cites seven incidents of harassment related to her disability which she says breached Section 26 of the Equality Act.

## The Evidence

- 18 We heard from Mr Mohammed, Head of Operations, on behalf of the Respondent. His manager and Chief Executive Officer, Mr Chandrasekaran, (known in the office as "Paran") provided a short statement saying that he agreed with Mr Mohammed. He said that he had not harassed the Claimant. We were not able to give this witness statement much weight because it was not at all detailed and Mr Chandrasekaran did not attend the hearing to be cross examined.

## The Facts

- 19 The Claimant has a first-class degree in computer science, she describes herself as a highly skilled software engineer, and her former employers agree.
- 20 Scentric has been operating for about 10 years and Paran is its CEO. They are working to develop a software product and so guard their valuable intellectual property carefully. The company is currently in its "pre-revenue stage", the development work is being funded by investors with the aim that the product will become profitable.
- 21 In this pre-revenue stage, it claims to employ no staff as such but works with a team of specialist who it considers to be contractors. Even Mr Mohammed, Head of Operations, considers himself to be a contractor and not an employee, although we view that label with some cynicism.
- 22 Not only does the company not have an equal opportunities policy, it does not have fairness at work measures in place to support its contractors and indeed seems to have thought very little about such things. Mr Mohammed has no workplace experience of disability although he does know someone socially who is autistic.
- 23 The recruitment process was through an agency who put the Claimant forward as a skilled software developer of an android function. Mr Mohammed first spoke to her on the telephone and then met her in late May 2016. Whilst the Claimant understood that the company was looking to employ workers in the long term, she was told and understood that her working relationship with the Respondent would initially be as a contractor.
- 24 The Claimant started work on 1 June 2016. Mr Mohammed was her Line Manager and a colleague called David was the Project Manager. At the time the team was working towards a project meeting with a big Thai telecoms company. The Claimant's main job was to develop an App for the android function.

***The contract***

- 25 On 26 May the Claimant signed a non- disclosure agreement but she did not sign her contract until 23 June.
- 26 Clause 2.2 of the contract said that she was not an employee and was responsible for her own tax. Clause 3.1 said that Scentric's would identify the services it required and then the contractor should perform those services within such time frames as might be agreed in return for the fees. The company was not specifying particular working hours but rather commissioning the contractor to provide specific services within a timeframe.
- 27 Clause 3.4 says that the contractor was appointed on the basis of their personal skills and abilities and that they should not subcontract.
- 28 Clause 3.5 says that the contractor should not provide any services to any third parties.
- 29 Paragraph 6.1 says that she would be paid a fee of £3,750 a month exclusive of VAT but that the figure would be less on a pro rata basis if the contractor did less work that month than had been agreed.
- 30 Notice was 30 days on either side with a provision for Scentric's to terminate immediately in certain situations.
- 31 The Claimant provided her own computer and paid her own travelling expenses, the only expenses that the Respondent paid were for her mobile telephone.

***Knowledge of Disability***

- 32 The Claimant says that she had a "meltdown" after about two weeks in the job and when Mr Mohammed asked if she had obsessive compulsive disorder (OCD), like a colleague of hers called Omar, she said that she had Asperger's (which is on the autistic spectrum). She says that Mr Mohammed knew of her disability from that time, as did Omar. She also told a colleague at UCL, but not until the 26<sup>th</sup> July which was three days before her employment terminated.
- 33 The Claimant says that nobody else asked her anything about her condition and Mr Mohammed denied that she came across as even eccentric. We find this odd, particularly given the observations of her previous employer, in a letter apparently written for subsequent High Court proceedings. They commented that at interview:

"it was noticeable that her style was very direct and blunt. I found her outspoken and it is more refreshing and entertaining than

anything else but I did wonder if she was normally like this or if it was just the tension of the interview ... In meetings she could get very agitated and spoke fast and loud, often accompanied by jerky movements. Marlana could not work within any kind of structure, this led to her frustration and increased anxiety. It was clear that Marlana was not a normal employee and her position required to be reframed. She started working mainly from home and only came into the office occasionally.”

These observations chime with Ms Jones’s comments that not only do people with autism often manifest extreme anxiety but also have difficulties in “social communication and interaction and also with restricted, repetitive patterns of behaviour, interests or activities”.

- 34 Mr Mohammed also denied that Ms Adam was hard to understand or anxious except when she had been late for a meeting. We think it unlikely that he did not notice some atypical behaviour.
- 35 There is no documentary or witness evidence of the Claimant again raising that she had an impairment or, indeed, ever asking for adjustments. There was a reference to a possible joke when the Claimant had said that she was dyslexic but on the face of it this did not relate to her autism.

***Possible adjustments***

- 36 The Claimant says that the Respondent discriminated against her by failing to make reasonable adjustments. She says that they imposed a provision, criterion or practice upon her that she should travel to work by train for the weekly team meeting. In the eight weeks that she worked for the Respondent, she was mainly allowed to work from home and to follow her own timetable. Once, or perhaps occasionally twice, a week she was expected to come to a team meeting where all the developers sat together and discussed the product, mainly at UCL in Central London.
- 37 The only manifestations of the Claimant’s difficulty in travelling to work were:
  - 
  - 1. She was often late, but there is documentary evidence to show that when that happened she told the Respondent that it was because her train had been delayed, she did not say she had had difficulty coping with the trip.
  - 2. Mr Mohammed remembers that the Claimant sometimes asked if she could be excused from the meeting but he told her that she needed to come, her reason being not that she struggled to travel but that she did not see the point and wanted to get on with her work.

There were other meetings but they were all conducted via Skype.

- 38 It seems that the Claimant raised the travel difficulties on the day she resigned and at that point, as recorded in the statement of Luke Tolaini, the Respondent's solicitor, Mr Mohammed offered adjustments such as not requiring her to attend meetings to accommodate her. This shows that when alerted to what the Claimant wanted or needed, Mr Mohammed was prepared to make adjustments.
- 39 The Claimant said she also had difficulties with things such as a loud fan in meeting rooms and having too many people around her when she went to meetings, but she has not pleaded failure to make adjustments in that regard. We did think about whether the Claimant's pleadings were unduly restricted, whether this was because of her disability and we should expand them. We decided that it would not be fair on the Respondent to depart from the issues as agreed between their then representative and the legal volunteers from the Free Representation Unit. The level of clarity which Mr Elcho managed to achieve was impressive as a great deal of the claimant's communications to the Tribunal were very difficult to follow.
- 40 The Claimant says that the Respondent would not let her take a taxi to work, but there is no evidence at all it required her to travel to work in a particular way, after all it was her choice as she was responsible for her own travel to work. She lived in Isleworth so there were several options. When we say "travel to work" what we mean is attendance at one or a maximum of two team meetings a week. Mr Mohammed says that once she made it to the meeting she seemed happy to be there and did not complain, the issue always being her arriving late and being distressed by that rather than being distressed because of the travel experience which he did not know about.
- 41 We must say that a rather odd feature of this case is that the Claimant was very upset about not being taken to Thailand, but to get there she would have had to undergo a gruelling plane trip of 12 hours which must be considerably more difficult than being stuck on a train from Isleworth to Waterloo and we do not know how she would have managed to do it.

### ***Excessive hours***

- 42 The Claimant said that she was constantly exploited because of her naivety and vulnerability and made to work excessive hours. She was woken up at night and sometimes made to work all hours to get parts of her project done. There was a suggestion that she was expected to work hours that fitted in with Thailand.
- 43 There is evidence that she did work long and unusual hours, but this was partly because, as she herself says, she suffered from insomnia as part of her autism.



- 44 Looking through the Skype exchanges (typed exchanges not video exchanges) we see no evidence of compulsion to do evening work but rather that the Claimant was choosing her hours and telling the Respondent when she was going to be working.
- 45 There is also evidence of the Claimant choosing to work for another company which the Respondent agreed to even though the contract said that she was not to do this. The Claimant says this is a lie but we have seen evidence that she did some work, probably very much, for Alemba, who had been her employers before she moved to Scentric.
- 46 The Claimant said that the Skype records had been doctored to fit in with the Respondent's story but the evidence is so consistent, and the Claimant has not produced anything to contradict it in her bundle, and therefore there is no room for doubt.

### ***Harassment***

- 47 The Claimant also complains about harassment from the CEO, Paran. The first thing to note is that nearly all her contact was with Mr Mohammed who was her Line Manager and who she says was her friend so the scope for harassment was limited.
- 48 She cites seven occasions on which she says Paran was angry and shouted at her resulting in harassment and says that she was frightened of him.
- 49 Mr Mohammed tells us that he never heard her say that she was frightened, nor did he hear Paran shout at her although he was not necessarily present at every meeting.
- 50 We quote one Skype exchange which took place on 20 June, which sets the tone of the working relationship and also shows that the claimant worked the hours she chose. The conversation takes place between 17.47pm and 17.54pm on 23 June:

Mr Mohammed: "how are you getting on today with the App?"

Claimant: "hmm I only started working now."

Claimant: "I don't think I fit into your company too well".

Mr Mohammed: "Why do you say that".

Claimant: "I will stay as long as it is necessary to get the App up and running but I need to be honest with you, you need to find a replacement for me".

Mr Mohammed: "Ok why is that".

Claimant: "It is to do with me hating Paran".

Mr Mohammed: "Ok then I agree".

Claimant: ☺

Mr Mohammed: "It is important that you respect the owner and founder however I do not think you have even begun to know who he is and what he has and will achieve".

Claimant: "Yes I know but I respect you to let you know in advance and not cause trouble".

Mr Mohammed: "Which I appreciate".

Claimant: ☺ ...

Mr Mohammed: "Do you even know how hard the CEO works?"

Claimant: "Yes but I don't like him".

Mr Mohammed: "OK".

Claimant: "So I don't care".

Mr Mohammed: "So be it".

- 51 In cross examination, the Claimant agreed that Paran did often praise her as well as allegedly criticise. She also agreed that she was sometimes rude and that perhaps Paran was under stress and that they did not get on because they were very similar. She also said that perhaps she reacted to Paran when he used words she did not understand because she was more frightened of the work environment than others.
- 52 There was an incident on 15 June, when the Respondent says that the Claimant was late getting to a meeting so she was asked not to join it because it would be distracting. Mr Mohammed says that this was not done in anger but because the meeting would be disrupted if she joined it late. He says he would remember Paran shouting at the Claimant or himself being angry with her, but all he did was ask her not to join the meeting. The Claimant may have misread this simple instruction as being anger.
- 53 There was another alleged incident on 17 June when the Claimant says that Paran shouted at her. It seems that the reason he may have been irritated

was because she had turned on a “screen share” in the middle of the talk that he was giving to the team which was very disruptive. He was not irritated for a reason related to her disability.

- 54 The same day, 17 June, the Claimant had another conversation by Skype message with Mr Mohammed in which she said “I have sent you a screen shot, you can tell Paran when are you going to see my App he is going to beg me for forgiveness”. Again, these are not the words of somebody has just been frightened by her CEO.
- 55 On 23 June, the Claimant tried to resign but she was persuaded not to. This decision to stay on indicates that events to that date were not so undermining that she felt she had no choice but to resign; instead she affirmed her contract and signed the document. She put in an invoice for 3 weeks and 3 days work which was the number of days she had worked and it was for £3,015 which was the pro rata figure, 4 weeks being £3,750. There is no basis for thinking that the Respondent had made an unlawful deduction.
- 56 The Claimant says she signed a second contract on 24 June, the first one having been signed on 23 June after the Respondent had persuaded her to stay. Since she agrees that the second contract was in all material terms the same, nothing turns upon this point.
- 57 There was a discussion with Mr Mohammed about working for Alemba on 9 July. The fact that Mr Mohammed was flexible and allowed the Claimant to work for Alemba, and overlooked the fact that she was already working for it, indicates that the Claimant was not in a weak bargaining position and that she was being treated well by the company, not least because she had important skills which the project needed.
- 58 This is emphasised by the Claimant’s evidence that on 11 July whilst Paran shouted at her he also told her she had made great progress.
- 59 She complains that he mocked her on 21 July but told us in her evidence that he mocked everybody and so it would be hard to say that she was singled out for harassment. Also, she said that on reflection she did think that he was trying to be funny.
- 60 There is a second invoice in the bundle dated 22 July which we understand was paid on 1 August. This was also for 3 weeks and 3 days. The two invoices do not seem to match the total number of days worked but the allegation is that these invoices were forged and deductions were made from them, which was not the case on the evidence.

**Thailand**

- 61 The team were planning a trip to Thailand to see an important prospective partner/customer. Mr Mohammed plays down the importance of the trip and in contrast the Claimant emphasises that it was a high point which the team were working towards. It was a business trip to meet with the Thai customer in Bangkok but the Claimant also had high hopes that it would be a good bonding experience for her and the team and so she was looking forward to it. This was even though she says that she had great difficulty travelling on the train, and therefore presumably in all confined spaces such as aeroplanes.
- 62 The Claimant says that she was deceived into working hard for the Respondent to be ready by the time of the Thai trip when in fact it never intended to take her. We have seen a copy of the ticket which had been booked for her and we do not doubt that the Respondent had planned to take her.
- 63 There was a meeting on 26 July to discuss the work leading up to the Thai trip. There was confusion over the venue for the meeting which was only confirmed at 7.30am that morning. The evidence that we have seen in the bundle shows that the Claimant was copied into the email confirming the venue, but she says she never got it. It seems that she did not instead ask Mr Mohammed or one of her colleagues to confirm the venue, which would have been sensible. She emailed her colleagues at 10.52am saying "Hi everyone, I did not receive any confirmation about the location of today's meeting. This is the reason I will not attend". There is no suggestion that her disability was the cause.
- 64 Mr Mohammed replied "I am very annoyed by this email. I told you this was a meeting crucial to the Thai trip! Now you will have to join via Skype".
- 65 It may have been that at this point the Respondent decided that the Claimant's behaviour had become unacceptably difficult. There had by that time developed a pattern of her coming to meetings but arriving late and this had been disruptive.
- 66 Anyway, on or shortly after 26 July, the decision was made not to take Ms Adam to Thailand after all. This was not a decision made to encourage the claimant to resign, the work on her App had not finished and there was no reason at all why they would sack a key developer at this crucial point. In fact, they needed more Android developers and there was never any doubt that her work was good.
- 67 Mr Mohammed denies that the reason for not taking the Claimant to Thailand was to do with her behaviour but we note: -

1. In the Claimant's bundle a statement for the High Court injunction (the proceedings related to the Claimant's threatening to misuse the Respondent's intellectual property) by the respondent's solicitor says that the reason why the Claimant was not taken to Thailand was that she had become increasingly difficult. He says;

"the Respondent [the Claimant in these proceedings] began to exhibit behaviour of an unsatisfactory nature, including that she frequently refused to come to meetings, refused to handover relevant code and files when asked to do so and refused to commit her code daily as she was required to do. As a result of the Respondent's behaviour I understand from Mr Mohammed that a decision was made by Mr Mohammed and members of management that the Respondent should not attend scheduled meetings in Bangkok ... I understand that Mr Mohammed told her that, as a result of her behaviour over the proceeding weeks, he had concerns about her attending those meetings. I also understand from Mr Mohammed that the Respondent became very upset on receiving the news and that, before Mr Mohammed was able further to explain the reasons for that decision, the Respondent became very emotional and abusive and accused Mr Mohammed of terminating her employment. I am told by Mr Mohammed that he attempted to calm the Respondent down, assured her that he was not terminating her consultancy agreement, but that if she wanted to leave she would need to send something in writing to him to that effect".

This is a contemporaneous document written on 4 August 2016 and it could not, frankly, be clearer that Ms Adam's behaviour caused the decision.

2. The same scenario is repeated in the Grounds of Resistance, paragraph 22. This document was written by a different set of lawyers in January 2017 and so Mr Mohammed, Operations Director, repeated this reason to two solicitors and it was put into formal pleadings. Mr Mohammed's explanation that two sets of solicitors misunderstood what he was saying does not really persuade us.
3. By contrast, Mr Mohammed says that the reason for the cancellation was a business reason, but it is hard to see why the decision would be made at the last minute unless triggered by the Claimant. It was a potentially inexplicable business decision at that point because a ticket had been brought for the Claimant and Mr Mohammed was not sure that the company had received a refund. It seems to us more likely that the reason was that the Claimant might have been a liability given her behaviour and also the fact that she had threatened to leave.

68 From everything we have heard we find that the Claimant's work was important to the Thai project and that there was no last-minute change in the business strategy, certainly not one that is documented.

69 Mr Mohammed's experience of the Claimant's behaviour at this time was consistent with Alemba's and also ours at the hearing and it is probable that

the Claimant did manifest agitated or angry behaviour during this time. Mr Mohammed's position is that all was calm and normal and that the Claimant's behaviour was no worse than the behaviour of many software developers who he describes as an "odd bunch", but whilst we accept that this may be so, her behaviour stood out.

### ***Resignation***

- 70 On 29 July Mr Mohammed rang the Claimant and told her that she was not going to Thailand. She says that he told her that she was "not suitable". He says that he said that she was not needed, but either way she became very upset, and still is when she thinks about this incident. She felt that she had been deceived and that the company had never intended to take her, but we do not agree with that.
- 71 This is difficult because the Claimant has drawn far worse conclusions than we have from this incident. Looked at more objectively, the situation was that the Claimant had every reason to feel hurt and upset by suddenly being cancelled when she had been looking forward to the trip. However, we have no doubt that Mr Mohammed, who is a very tranquil character, explained this to her as kindly as possible and did not come across as angry or reactive. The Respondent had not told her the real reason for cancelling her trip, and being an intelligent person, she would have found the reasoning suspicious, but this was not part of a wider strategy to get Ms Adam to leave or to undermine her.
- 72 Indeed, Mr Mohammed asked the Claimant not to leave and she agrees that he said this to her. He texted Paran at the time to say that she had resigned. The Claimant told a team member that she had been fired but Mr Mohammed clarified that she had resigned and asked her to put her resignation in writing.
- 73 In her evidence the Claimant agreed that Mr Mohammed had told her that he had not dismissed her and she effectively agreed that she had resigned, we say "effectively" because sometimes her evidence was hard to follow. Of course, this does leave open the possibility of constructive dismissal which is a legal concept meaning that somebody is treated so badly that they have no option but to resign.
- 74 Unfortunately, after that things got very difficult and the Claimant cut Mr Mohammed off from her Skype account and refused to talk to him. The respondent understood that she had threatened to disclose the company's intellectual property, at which point injunction proceedings started in the High Court.
- 75 The Claimant's contract ended on 29 July.

- 76 The Claimant did not receive notice pay because she resigned without notice.
- 77 No tax was deducted or paid on behalf of the Claimant. The Claimant says that the Respondent had told her that it would help her with her tax, but even if this was said there was no contractual promise to pay the Claimant's tax for her or to put her on a PAYE system. The written contract was perfectly clear on that point.
- 78 The legacy of the High Court proceedings has been very damaging for both sides. Orders have been made, costs awarded against the Claimant and now there are some bankruptcy proceedings against her. The Respondent says that she has retaliated with threats to kill. None of this is directly relevant to these proceedings but it is very sad to know that the litigation has been so destructive.

### ***The ET1***

- 79 The Claimant first submitted an ET1 on 25 October which was within the primary time limit in respect of the termination of her contract. Although she had in fact got an ACAS Certificate which was for a conciliation period of only one day, 25 October, she did not provide the certificate number on the ET1 and wrote that she was exempt. She says that she had been confused by the fact that the respondent's solicitors, Pitmans, had told her that it was unnecessary to go to ACAS. The claim was rejected because there was no evidence that the claim was exempt and so the early conciliation certificate number was required. The Claimant says that her confusion was exacerbated because she was very ill and suicidal at this time and also her English was poor; Polish is her first language.
- 80 The Respondent says that the Claimant is a bright person who works regularly in an electronic format and so when submitting the ET1 from the website she should have got it right.
- 81 The Claimant finally submitted a rectified claim on 7 December, which was out of time.

### **Conclusions**

#### ***Breach of Contract***

- 82 Only employees can bring a breach of contract claim and we conclude that the Claimant was not an employee so there is no jurisdiction. We also conclude that the Claimant resigned and was not dismissed. She resigned without notice and is therefore not entitled to notice pay.

83 The reason she was not an employee is that she worked under a contract where it was mutually agreed from the beginning that she was a contractor. She had to deliver on projects but how she did so was considerably up to her: she decided her own working methods and hours, generated invoices, was paid a monthly fee which could be reduced if she did not work for the whole period and was in practice allowed to work for others. Also, she was paid gross and was working in an environment where everybody was a contractor. This was a world that she understood and where the arrangement had been specifically negotiated through an agency; she did not, as a skilled software professional, need to take on this contract and so there was no inequality of bargaining power.

### ***Unlawful Deduction***

84 Whilst the Claimant was not an employee, she may well have been a worker and so entitled to bring a claim under Section 13 of the Employment Rights Act 1996. The reason we consider that she was a worker was that she was not working under a contractual arrangement with the Respondent where she was in business on her own account. She was engaged by the Respondent specifically to perform personal services and specifically not allowed to sub contract. Although she did work for another company during the time that she was working for the Respondent, she was not running a business in the classic sense as an independent business woman.

85 However, and as we have explained, we must keep to the issues as pleaded. The reason the Claimant was paid £3,115 against the two invoices not £3,750 was not because an unlawful deduction had been made but because the invoices were pro rata of a month's pay and were for 3 weeks and 3 days only. There is no doubt in our minds that even if a deduction had been made it was not made for tax because the amount of the reduction is 16%, not a recognisable tax per-centage.

86 The Respondent should consider our findings when considering its contractual relationships with future workers.

### ***Discrimination arising from disability***

#### *Excessive hours*

87 As noted above we have not seen any evidence that the Claimant was forced to work excessive hours. We have also not seen any evidence that the Respondent exploited the Claimant's naivety and vulnerability in making her work the hours that she did. The hours that the Claimant worked were very much part of the culture that she worked in and part of her part of her particular lifestyle. It was she who chose to work them.



*Deception*

88 Again, we are unanimous in finding that the Claimant was not misled by the Respondent and that it did not pretend that it was going to take her on a trip to Thailand when it had no intention of doing so. They had planned to take her and bought the ticket, but then they changed their minds. There was no conspiracy to end the Claimant's working relationship with the company in July 2016 because her work had not been finished and she was a skilled professional whose continued involvement was needed.

*The Trip to Thailand*

89 We do find that the reason why the employer did not take the Claimant to Thailand was her behaviour, and this was behaviour which arose because of her disability. The reason was not business reasons.

90 We must go on to decide whether the Respondent knew or ought reasonably to have been expected to know that the Claimant was disabled at this time. On balance we think that the Respondent ought reasonably to have been expected to know. Whilst we appreciate that the Claimant's behaviour may have been worse in the Employment Tribunal than it was on an ordinary working day, her very unusual personality, as recognised by Alemba, must have been evident. This must have been more unusual and surprising than, for example the symptoms of OCD which the Respondent was familiar with.

91 We would not say that the Respondent should have recognised that the Claimant had an autistic condition because her behaviour was quite complex and triggered for complex reasons. However, it is not necessary for an employer to identify the precise condition in knowing or being expected to know that an individual is disabled.

92 The really persuasive factor for us is Mr Mohammad's complete denial that he noticed anything wrong. This is in direct contrast to the observation from Alemba that at interview they realised the Claimant was very unusual. In other words, he "protesteth too much" and if he did not know that she was disabled this was because he shut his eyes to it. He should reasonably be expected to have known that the Claimant had very atypical behaviour arising from an impairment. We know that he realised that the Claimant's behaviour was extreme back in June when the Claimant said that she hated Paran and that he would have to beg for forgiveness. This was not the behaviour of a "normal" employee. His solicitors recoded that he *did* notice her extreme behaviour.

93 It is hard to know whether the Claimant told Mr Mohammed that she had Asperger's as she alleges. There is no corroborating evidence from either side. However, we think it possible that some sort of conversation took place

where the Claimant explained that she did have atypical responses and this would be likely given that there may well have been a “meltdown”. From then on, Mr Mohammed had been alerted.

- 94 We want to record that we are not blind to the fact that the Claimant also said things to us which were not accurate and so we do not want to leave an impression that our finding against Mr Mohammed is one sided. For example, she accused the Respondent of forgery on several occasions without any corroboration.
- 95 We then turn to the question of whether the detriment was justified. Because Mr Mohammed denies having cancelled the trip because of the Claimant’s behaviour, he has not offered justification; this was argued simply as “it was justified” in his closing submissions in the alternative to his main argument. We can imagine that the Claimant would have been a difficult companion on a trip to Thailand and indeed she might have struggled considerably on the flight, but, as Alemba described, she was a valuable colleague, good at her job and a key member of the project team. We cannot therefore say that cancelling her trip to Thailand at the last minute for a reason which was not truthful can be justified.
- 96 The Claimant suffered injury to feelings because of this decision. There will have to be a remedy hearing but points to note are: -
1. Mr Mohammed is even tempered and was not cruel in the way he communicated the news to the Claimant. He may have been clumsy in his delivery but he was not nasty or retaliatory.
  2. Straight afterwards he tried to persuade the Claimant to stay in employment.
  3. The Claimant overacted and suspected a conspiracy.
  4. She had been quite difficult and unpredictable and did contribute to the situation following which a decision to cancel her trip was made.
  5. The decision not to take her to Thailand was not the same as firing her.
  6. The Claimant must accept that in business sometimes these things happen.
  7. The Claimant had been excited about the trip and hoped that it would improve bonding in the team.
  8. The short notice given was especially bad and damaging to the Claimant.

- 97 For all the above reasons we would award compensation for injury to feelings, but in the lower band.

#### *Dismissal*

- 98 Following *Amnesty International v Ahmed* [2009] ICR 1450, we do not find that the Respondent's behaviour towards the Claimant in this one act of discrimination, cancelling her trip to Thailand, was serious enough to trigger a constructive discriminatory dismissal. It did not go to the heart of the contract, not least because the respondent clearly wanted the claimant to stay on. There was no earlier discriminatory behaviour to amount to a course of discrimination ending in a last straw. The Claimant resigned and was not dismissed and her reasons for doing so were complex as she had been complaining for some time and had threatened to resign. Viewed objectively, the respondent's behaviour was considerably less calculated or likely to undermine the employment relationship than the claimant believed. The reality was that she was in a strong bargaining position with the respondent and her reaction to the cancellation of the trip was disproportionate.

#### ***Reasonable Adjustments***

- 99 There was no PCP to travel to work by train and so this part of the claim fails. In any event, it was the claimant's decision how she got to meetings and she was not expected to attend very often; some meetings with the team were however necessary. Whilst a claimant is not obliged to alert a respondent to any reasonable adjustments she requires, the respondent needs some awareness before they can be considered. In this case it had no idea that train travel was a problem.

#### ***Harassment***

- 100 Harassment as defined by the Equality Act is not the same as everyday behaviour which causes upset. First, the conduct must be related to disability. Second, it must have the purpose or effect of undermining dignity or creating a hostile or intimidating environment. These are strong words and there was no sign that the claimant had this reaction. The higher courts have warned against more minor incidents being characterised as harassment.
- 101 The National Autistic Society report notes that situations that create stress can vary from person to person, but could be likely to involve heavy workloads, unrealistic timeframes, shortened deadlines or conflict among co-workers. We cannot tell exactly, and are not experts, but it seems to us that the Claimant's perception of being harassed was related to the stress that she felt in this job. We note that Alemba's conclusion was that after a short time the Claimant found it impossible to work in a full-time work environment.

- 102 The test for harassment is mainly objective and, whilst we sympathise with her perception, we do not find that the Respondent's staff, and Paran in particular, harassed her. From the exchanges that we have quoted in these reasons, the Claimant was rude about her Chief Executive and had a tolerant line manager, one who she could have spoken to about feeling harassed if she had needed to, but did not. He left her largely free to say that she hated her Chief Executive and to set the tone. She was in a safe place with strong bargaining power and did not manifest fear. She knew that she had strong bargaining power because she expected her CEO to beg for forgiveness when he saw her work.
- 103 Theirs may have been a stormy relationship, although we have not seen much evidence of it, but we know that the CEO, Paran, was complimentary towards the Claimant at times. We also know that he could be cross with others as well as the Claimant, indicating that he did not single her out. Thus, there is no evidence that his behaviour was related to her disability and we do not know if he, as opposed to Mr Mohammed knew about it.
- 104 We also know that the Claimant could be exasperating when she did not turn up on time to the important team meetings which usually happened only once a week.
- 105 Paran was not here to give evidence and this could have been a significant problem but the evidence gleaned from cross examination, from the documents and from Mr Mohammed is in this case sufficient. We also recognise that this hearing is at the end of a very long stream of litigation which started in August 2016 and that the Respondent has been left tens of thousands of pounds worse off because of legal fees. That is why they no longer have legal representation and we do recognise that this fatigue may have affected the Respondent's evidence as well as the Claimant's.

### ***Time***

- 106 It was just and equitable to allow the one successful claim to proceed. We appreciate that given the Claimant's esoteric approach to the litigation she did not manage to get her ACAS Certificate in with her claim first time round, although she did have one. This was connected to her disability and so we should make allowances for that.

107

### ***Overall conclusions***

- 108 We are very grateful to all concerned in enabling us to finish this hearing on time. It has been a long and difficult route. We appreciate the help of Ms Jones and Mr Elcho from the Free Representation Unit. We appreciate Mr Mohammed's broad shoulders and his equanimity in the face of behaviour which would have been upsetting.

**Remedy hearing**

- 109 A remedy Hearing is required to assess a figure payable to the claimant for injury to feelings in respect of paragraph 4 of the Judgement. A hearing is only avoidable if the figure for injury to feelings is agreed by the parties beforehand, in which case they are to write in with confirmation.
- 110 In the absence of an agreement the parties are to write to the Tribunal with dates to avoid for a three-hour hearing. The Tribunal may be available on 13, 19 or 27 February but other dates can be found.
- 111 Any witness or other evidence is to be submitted and copied to the other side seven days before.

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Employment Judge Wade

Dated: 12 November 2018

Judgment and Reasons sent to the parties on:

14 November 2018

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For the Tribunal Office