Case Number: 1807117/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss Clare Earle**

Respondents: **(1) Vanilla Lettings Limited**
(2) Daniel Hellewell

Heard at: **Leeds** **On:** **24, 25 and 26 July 2018**
8 August 2018 (In Chambers)

Before: **Employment Judge Brain**
Mrs J Lancaster
Mr A Senior

Representation
Claimant: **Mr D Campion, Counsel**
Respondents: **Ms R Mellor, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The following complaints of disability discrimination succeed:

    1) That the claimant was treated unfavourably for something arising in consequence of her disability;

    2) That the respondents failed to comply with their duty to make reasonable adjustments.

2. The following complaints of disability discrimination fail and stand dismissed:

    1) That the respondents discriminated against the claimant by treating her less favourably than they treated or would have treated others because of the claimant's disability;

    2) That the respondents indirectly discriminated against the claimant in relation to her disability.

Remedy

3. The respondents shall pay to the claimant the sum of £12,468.24 by way of compensation calculated as follows:

    1) Loss of earnings for the period between 15 September 2017 and 17 November 2017 £92.05 per week (being the statutory sick pay contractually payable) £828.45

    2) Compensation for injury to the claimant's feelings £10,000.00

    Total £10,828.45

    Add interest

    3) Interest upon loss of earnings from 1 November 2017 – 8 August 2018 at 8% per annum £51.02

    4) Interest upon injury to feelings from 14 September 2017 – 8 August 2018 at 8% per annum £718.90

    5) Total inclusive of interest £11,598.37

    6) Add uplift of 7.5% on account of the respondents' failure to comply with the *ACAS Code of Practice: Disciplinary and Grievance Procedures* (2015) £869.87

    7) Grand total £12,468.24

4. The respondents have joint and several liability.

REASONS

1. Following a three day hearing the Tribunal deliberated in Chambers on 8 August 2018. These are the reasons for the Judgment that we reached.

2. The first respondent is a letting agency based in Huddersfield specialising in letting properties to students. Daniel Hellewell (the second respondent) is the sole director of the first respondent. He also has a controlling shareholding interest. Effectively, he is the proprietor of the first respondent. Mr Hellewell essentially is (and was at all material times) Vanilla Lettings Limited.

3. The claimant has brought claims against the respondents arising out of the employment of her by the first respondent as an Administration Coordinator. She worked for the first respondent between 13 February 2017 and 14 September 2017. She pursues complaints that the respondents discriminated against her during the period of her employment and that the discrimination was because of her disability. The complaints are brought pursuant to the Equality Act 2010. We shall set out the issues in the case and the relevant law in detail in the course of these reasons.

4. As Mr Campion said (in paragraphs 6 – 10 of his written submissions) the effect of Sections 109 and 110 of the 2010 Act is that an employee will be personally liable for a discriminatory act where he or she does something for which his employer is vicariously liable and which amounts to a contravention of the 2010 Act by the employer. Mr Hellewell is and was at the material time an employee of the first respondent. The acts of the first respondent and Mr Hellewell are indivisible. Ms Mellor did not make any submission to the effect that the respective actions of the respondents could be sensibly divided from one another. That being the case, the first respondent and Mr Hellewell have joint and several liability for those claims brought by the claimant which have succeeded.

5. As most of the relevant events with which we are concerned took place during the occurrence of the claimant's employment, reference to the dates in these reasons should be read as referring to 2017 unless otherwise stated. We shall firstly set out our factual findings before turning to the issues in the case and a summary of the relevant law. We shall then go on to set out our conclusions.

6. Before doing so, we observe that this matter benefitted from a private preliminary hearing that came before Employment Judge Little on 29 January 2018. There it was observed that in her claim form presented on 6 December 2017 the claimant complained that she had been subjected to various forms of disability discrimination. These are:

    1) Direct disability discrimination.

    2) Discrimination arising from disability.

    3) Failure to make reasonable adjustments.

    4) Indirect disability discrimination.

7. The claimant relied upon the mental impairment of depression. She contended that this was a disability for the purposes of Section 6 of the 2010 Act. In an email dated 5 March 2018, the respondents' solicitor notified the Employment Tribunal and the claimant's solicitor that the respondents concede that the claimant was at the material time disabled

within the meaning of the 2010 Act by reason of depression. However, as we shall see, the respondents put in issue the question of their actual or constructive knowledge of that disability.

8. The Tribunal heard evidence from Mr Hellewell. The respondents also called evidence from Elizabeth Housley who is employed by the first respondent as Office Manager. She was the claimant's line manager.

9. The Tribunal heard evidence from the claimant. She called evidence from James McCord. He is the claimant's fiancé.

10. In paragraph 2 of his witness statement, Mr Hellewell says that, "I helped found the first respondent in 2007. It is a lettings agency specialising in student accommodation and currently we employ three full-time and one part-time employee in addition to me. We also engage a self-employed contractor on a part-time basis. We deal with over 800 rooms within 200 plus houses to which we hold the keys".

11. It is a small business with few employees. Mrs Housley is the longest serving employee having worked for the first respondent since 2009. Also employed by the first respondent are Richard Edge and Ann Stott (who is Mr Hellewell's sister-in-law). Her daughter Emily works for the first respondent upon a casual basis at busy times. We understood Mrs Housley's evidence to be that Ann Stott works part-time. The other employee was Greeta *[we interpose here to say that her surname was not given by the respondents].* Mr Hellewell works for the first respondent about 80% of the time. Also on the payroll is his wife who, it seems, has no actual role within the first respondent's business.

12. In evidence given under cross examination Mr Hellewell clarified his reference to "200 plus houses" in paragraph 2 of his witness statement. He said that the first respondent manages 200 properties which are in four blocks of 50 properties each. There are 800 rooms in total.

13. The claimant was recruited through Cordant People Limited which is a recruitment agency.

14. The claimant's terms and conditions of employment were not in the bundle. Mr Hellewell told us that the claimant's contract had been found in a drawer within the office. Notwithstanding that it had been located a copy of it was not before the Tribunal. The written statement of main terms and conditions of employment within the bundle at pages 298 – 302 was in fact that of Natalie Germain. She commenced employment with the respondent on 1 October 2017. She occupied the Administration Coordinator role which had been undertaken by the claimant until her dismissal.

15. Mrs Housley, in paragraph 2 of her witness statement, gives a description of the claimant's role. She says:

> "[The] role was supposed to include emailing tenants regarding viewings and adding any deposits taken to the system or updating a master spreadsheet which contained details on all properties and tenants".

16. Mr Hellewell has this to say about the claimant's role at paragraphs 6, 7 and 8 of his witness statement,

> (6) "The role should have included emailing tenants regarding viewings, adding deposits taken to the system and updating a master document that held details of all tenants from properties…
>
> (7) Her role was effectively "front of house" in the office and so she mainly had the first contact with people who came to the office such as tenants, landlords or contractors. It was vital for the person in that role to be organised and professional in their approach.
>
> (8) One part of her role was to operate the key lock. This was the system by which we held and distributed the keys to the properties we managed. These are held in a safe and she would need to check in the diary which keys were needed on a particular day and ensure these were available to the people who needed them the following day. This ensured the tenants or contractors were dealt with quickly".

17. Mr Hellewell and Mrs Housley both refer, in these passages (and elsewhere in their witness statements) to issues around the claimant's performance. We shall consider these in further detail in due course.

18. Within the bundle is a job description for the Administration Coordinator role (page 303). We shall not set this out in detail here. The parties are familiar with it. The claimant said that she had not received the job description at any point. This appeared to be accepted by the respondents. That said the claimant fairly accepted that the job description was accurate.

19. Amongst the of tasks covered by the job description was the managing of and maintenance of the properties via FIXFLO. In supplemental evidence Mrs Housley told us that where a tenant reports a maintenance issue, an entry is made upon FIXFLO in order that an appropriate contractor can be assigned to deal with the matter. She said that this is a software package. The idea of FIXFLO was that all maintenance information and records are kept in one place. The job description also refers to the logging in and out of all keys. Mrs Housley told us that each key has a code. The idea is that the log enables the easy location of keys and a maintenance of a record of their whereabouts.

20. Mrs Housley also gave supplemental evidence concerning the *'master doc'*. She told us this is a central document in the form of an Excel spreadsheet. It lists all the properties, rooms, the names of tenants and their contact

details. It also records where deposits have been paid by tenants and registered with a deposit protection scheme.

21. The respondents' case was that their systems are not difficult to operate. On the job training was provided. The claimant fairly accepts that the FIXFLO spreadsheet was straightforward, although she qualified this observation with the remark that other members of the team seemed less conversant with it than was Greeta (who was absent on maternity leave during the early part of the claimant's employment with the first respondent). The claimant fairly accepted that there was little practical training that could have been given to her to become familiar with the respondents' systems other than by undertaking the role and asking for assistance as and when required.

22. During the course of the hearing, the respondents produced a copy of a flowchart which was inserted into the bundle at pages 430 – 436. This gives the address of a number of properties, action required in the event of notification of an issue and then names of contractors appropriate to the issue concerned. The claimant said that the flowchart was in a folder given to her when she commenced her role. Mr Hellewell's case was that the flowchart was created for the claimant because she was experiencing difficulties with the role. The claimant said that she annotated her copy of the flowchart with contractors' telephone numbers and other information. She said that she used the flowchart throughout the entire period of her employment as she found it easier to use then referring to the FIXFLO system.

23. Mr Hellewell said in evidence before us (given under cross examination) that he wasn't sure who had prepared the flowchart. He thought it may have been Mrs Housley or possibly Greeta. In paragraph 9 of his witness statement Mr Hellewell said, "we also created a flowchart for [the claimant] which gave simple instructions on what to do in the event of an issue with a property".

24. Upon the issue of the flowchart we prefer the evidence of the claimant. Mr Hellewell's assertion at paragraph 9 of his witness statement may be contrasted with the evidence that he gave under cross examination. In the printed witness statement the impression is given that he was a party to the creation of the flowchart whereas in fact this transpired not to be the case. Further it would have been straightforward for the respondents to produce the date of the creation of the flowchart to corroborate their case that it was created during the claimant's employment. We found the claimant's evidence that she was given this upon the first day to be plausible. It is difficult to see why the respondents sought to criticise the claimant for using a document which the respondents had created for her in any event.

25. In her witness statement Mrs Housley says that she had a number of conversations with the claimant about her performance. She says that, "it soon got to the stage where I needed to have what I would view as more formal meetings to try and resolve the issues".

26. Mrs Housley says that the first of those meetings took place on 29 March. She refers in paragraph 5 of her witness statement to repeatedly emailing the claimant about sorting out a replacement key for a property. The final email to which she refers about this issue is dated 28 March. It is likely therefore, in our judgment, that the meeting of 29 March was precipitated by Mrs Housley's concerns about the claimant not having sorted out the issue of the replacement key.

27. The first respondent has a staff handbook. This is in the bundle at pages 417 – 428. Amongst other things, the handbook contains a disciplinary procedure (which should more properly be termed a performance management procedure) for use where an employee's performance or conduct is unsatisfactory. The procedure provides for a series of warnings and ultimately for dismissal. Mrs Housley said that she was aware of the contents of the employee handbook. The performance management procedure in the handbook was not utilised by the respondents at any stage.

28. Mrs Housley's account of the meeting of 29 March is at paragraphs 7 – 10 of her witness statement. Mrs Housley says that she raised the following issues with the claimant:

    1) Wrong key numbers were being handed by her to other members of staff for viewings and to contractors for maintenance. This caused issues as wrong keys were then distributed.

    2) The claimant was incorrectly using the key log. Mrs Housley said that "Clare would often fail to get the correct number of keys that were required, so for example if ten were needed she might only get out eight". This again caused delays with viewings and repairs. Mrs Housley says that the key log was amended with colour coding to make it easier for the claimant to understand.

    3) Emails were being sent by the claimant containing grammatical errors.

    4) The claimant had sworn in the office in front of prospective tenants for which the claimant apologised.

29. The claimant's account of the meeting of 29 March is at paragraphs 10 and 11. The claimant says that the meeting was informal and that Mrs Housley said that on the whole her performance was very good. The claimant accepts that Mrs Housley mentioned a need for the claimant to pay attention to detail but denied that she had been rebuked for swearing in the office and that specific mention of grammatical errors had not been made. The claimant accepts that Mrs Housley said that she would give the claimant some more training "in regard to the diary" but says that that did not materialise. The claimant fairly accepted that she was having issues with operating the diary and calendar system.

30. The following emerged from the cross examination of Mrs Housley about the meeting of 29 March:

    1) Mrs Housley maintained that the discussion had taken place in the meeting room. The claimant said that the discussion had taken place at the claimant's desk.

    2) Although Mrs Housley did not accept that she had told the claimant that her performance was good, she fairly accepted that she may have said words to the effect that the claimant was "ok with some bits".

    3) Mrs Housley accepted that she had not shown the claimant any examples of poor grammar in her emails.

    4) She also accepted that on the whole the claimant was doing a good job. She said that there was no formal training in the operation of the respondents' systems and informal help or guidance was given to the claimant.

    5) Mrs Housley accepted that mistakes with keys are frequent occurrences which and may beset all of the first respondent's employees.

    6) She said that the claimant had not been warned for swearing. Mrs Housley said that the claimant had only sworn upon one occasion and had not repeated that conduct.

31. The following emerged from the cross examination of the claimant about the meeting of 29 March:

    1) The claimant maintained that the meeting had taken place at her desk. She also referred to a discussion by the photocopier that day. She denied meeting with Mrs Housley in the meeting room.

    2) The claimant denied that Mrs Housley had spoken to her about her spelling and her grammar but accepted that there had been a discussion about the issue around keys. However she accepted that Ann Stott had spoken to her about her grammar. She fairly accepted that poor grammar made the respondents' business look unprofessional.

32. Mrs Housley says that after the discussion things did not improve. She then refers to another meeting that took place in April. She complains of continuing daily errors with the key log and further spelling and grammatical errors. Details of tenants and properties were getting mixed up and the claimant was not updating the FIXFLO record as she should have been.

33. Mrs Housley says, however, that "the main issue that I had to raise at this time however, was an email that she sent out on 18 April. She [the claimant] had incorrectly sent this to a large number of people who should not have received it. The email highlighted issues following an inspection report on a current tenancy that was sent to prospective tenants and

landlords of other properties. Clare had also attached to the email a number of pictures of the property, one of which contained an item that was deemed offensive. This resulted in future tenants emailing us (page 324) which looked unprofessional. One recipient in particular wrote a very strong email of complaint (pages 357 – 358) as the email was about a property not related to him and also he was offended by the photographs attached. Other jobs were just not given to her any longer".

34. It is no part of the respondents' case that the claimant was responsible for the arrangement of the attachments to the email. She was therefore not responsible for inappropriately attaching the offensive image to the email. The issue from the point of view of the respondents was that the claimant had sent the email to incorrect recipients.

35. The claimant deals with this issue in paragraph 13 of her witness statement. She fairly accepts that she made a mistake which caused inconvenience. She also acknowledges that Mrs Housley spoke to her: we refer to paragraph 15 of the claimant's witness statement. The claimant says that Mrs Housley commented that she was generally doing well in her role.

36. The claimant says that after Mrs Housley spoke to her she asked Mr Edge whether he thought that Mr Hellewell *"going to sack me?"* The claimant explains "I did not have a genuine belief that he would do so, however I am a natural worrier and was so upset by the mistake I had made the previous day that I just wanted some reassurance from a fellow colleague".

37. The respondents were unable to give a date for the second meeting. However, piecing it together as best we can, it appears from paragraph 13 of the claimant's witness statement that Mrs Housley spoke to the claimant on 19 April as the claimant had expressed concerns about a possible dismissal arising out of a mistake which had occurred "the previous day" (that being 18 April).

38. In evidence given under cross examination about the April meeting, Mrs Housley said that the claimant did apologise for her error with the email. She denied that she had told the claimant that generally she was performing well. Mrs Housley said that she was becoming frustrated by the claimant's mistakes and it would have "seemed contradictory" to compliment her upon her work. Mrs Housley fairly acknowledged that the claimant was not told that jobs were not being given to her any longer and that had she been informed that they were being removed from her she would have been disabused of the incorrect notion (on the respondents' case) the claimant had about her performance in the role.

39. In evidence given under cross examination about the April meeting, the claimant acknowledged that she was making mistakes "every so often". She fairly acknowledged to having expressed concerns about the possibility of Mr Hellewell dismissing her.

40. The third meeting referred to by Mrs Housley took place on 18 May. Mrs Housley says in paragraph 16 of her printed statement that mistakes with the key log were continuing and there was no improvement with the claimant's spelling or grammar. She was also not properly updating documents. Mrs Housley refers to page 321 which is an email from Mr Edge to her dated 19 May. Mr Edge informed Mrs Housley that the 'master doc' had not been updated correctly. Mrs Housley responded on 22 May saying "Thanks Richard…ffs!" (*'ffs'* being an abbreviation for an expression of frustration expressed in *'Anglo-Saxon terms'*).

41. Mrs Housley says that she was becoming concerned about the claimant's ability particularly as the busiest time of year for the respondents was looming. The end of June and early July is a very busy time. Generally, tenancies would be let to the students commencing on 1 July for a period of twelve months ending on 30 June. Outgoing students will therefore be leaving around mid-to-late June. Before the incoming students take up their tenancies the properties need to be checked, maintenance and repairs attended to and deposits returned.

42. The claimant says that she does not recall the conversation of 18 May. The claimant explains in paragraph 17 of her witness statement that, "at this stage my mum was so poorly that I knew she could possibly die any day, and I was suffering terribly with my depression. My employer knew that my mum was very poorly at this time".

43. Mrs Housley and Mr Hellewell both fully and fairly acknowledged that the claimant was having a difficult time because of her mother's very unfortunate terminal illness. Mrs Housley acknowledged that when the error pointed out to her by Mr Edge occurred on 19 May the claimant's mother was in a hospice. Mrs Housley says that in order to help the claimant she was given a pack of information explaining what she had to do for the check-in and check-out process taking place in June and July. It was suggested that she had managed matters reasonably well in those months. Mrs Housley said that the claimant's work had "not been up to scratch" but acknowledged that the claimant had not been spoken to or warned about her performance around this time.

44. The claimant said, in evidence given under cross examination, that Mrs Housley had not spoken to her on 18 May. She said that she would have remembered had such a conversation take place. The reason why she was so confident in her recollection is that sadly her mother passed away on 21 May. As the claimant put it, "I'll never forget those days". The claimant did recall Mrs Housley going through the check-in and check-out form (referred to in paragraph 17 of Mrs Housley's witness statement) and demonstrating how busy the respondents were likely to be by taking a number of keys and pouring them out onto the meeting room table. The claimant took the view that Mrs Housley was doing this in an effort to simply impress upon her size of the task that was looming for the first respondents and its employees.

45. Although the claimant's contract of employment and a statement of her principal terms and conditions was not before the Tribunal, it was common ground that the first six months of employment were to be a probationary period. This is in fact mentioned in the handbook (pages 419 and 420).

46. The relevant provision says that if an employee does not reach the requisite standards the first respondent may terminate the contract of employment or alternatively the probationary period may be extended. The respondents and Mrs Housley accept that as at 12 August the probationary period was not extended.

47. Mrs Housley accepted that at no stage was the claimant informed that she was being given a verbal warning. The handbook (page 426) says that a verbal warning may be given (and recorded in writing) if it is felt that the matter is serious enough to warrant an immediate verbal discussion about a performance or conduct issue. As Mrs Housley candidly accepted, a warning of that nature was not issued to the claimant "in those terms". She accepts that the issues did not warrant a verbal warning in accordance with the first respondent's employee handbook let alone any form of written warning. Mrs Housley fairly accepted that to be the case. She said that "the issues looked minor but taken together impact upon our professional image".

48. The respondent produced a number of emails which demonstrated poor grammar, wrong information/instructions, sending information to incorrect recipients and the claimant's misunderstanding of the respondents' systems. The emails are helpfully set out at paragraph 10 of Ms Mellor's written closing submissions. We shall not set them out here.

49. Mrs Housley accepted that most if not all of these examples had been discovered by her when she went through the claimant's email account following her dismissal. These were then forwarded to Mrs Housley's own email account on 20 December 2017 with a view to demonstrating the type of mistakes being made by the claimant. Mrs Housley accepted that none of the emails had in fact been put to the claimant during the course of her employment. The respondents contented themselves, she said, with speaking to the claimant as and when mistakes arose as they went along.

50. Some of the errors discovered by Mrs Housley are in themselves minor. For example, the mistake made by the claimant at page 330 was to place a full stop after the question mark at the end of the sentence. A similar error appears at page 331: the claimant placed a full stop after an exclamation mark.

51. In of themselves, those emails (and other like examples) are small pegs upon which to hang the heavy coat of the respondents' case of substandard performance upon the part of the claimant. However, the Tribunal accepts (taking matters in the round) that the respondents had well founded concerns about her performance. The claimant fairly acknowledged having made mistakes and having been spoken to by Mrs Housley on 29 March

and 19 April. We also accept the respondents' case that Mrs Housley spoke to the claimant about her performance on 18 May. In our judgment, the claimant's recollection of events around that time would, understandably, be overshadowed by concerns about her mother. It is credible that Mrs Housley would speak to the claimant given that the respondents' busiest period was just around the corner. Further, the claimant did not take issue with Mrs Housley's evidence that she was given an information pack to help her with the check-in and check-out process which is indicative of a lack of confidence by the respondents in the claimant's abilities.

52. All that having been said the Tribunal accepts that the claimant's mistakes were relatively small. While the Tribunal can understand the respondents' frustrations we find that they took the view that the claimant's mistakes were not so serious or egregious as to warrant invoking their own performance procedure by serving the claimant with verbal and/or written warnings. Had the respondents been so concerned that was plainly the step that they would have taken. We accept the claimant's account that the 29 March meeting was not held in the meeting room. The respondents produced no notes of any meetings (at which the venue for the meting may have been recorded) and accept the claimant's account of the venue as consistent with the informality adopted by the respondents. Holding a meeting away from her workstation may have impressed the seriousness of the respondents' concerns upon claimant. The respondents did not choose that course of action. Furthermore, the respondents did not extend the claimant's probationary period and of course did not dismiss her upon the expiry of it. In our judgment, therefore, the reality of the claimant's performance lies somewhere between the parties' respective accounts. The claimant was not performing as well as she perceived herself to be doing but the respondents did not harbour concerns sufficient to bring her employment to an end either during the probationary period or at its expiry or to issue her with any performance warnings.

53. Following the passing of her mother the claimant was certified as unfit to work by her General Practitioner. The relevant sick note is at page 304. He assessed the claimant on 25 May 2017 and certified her as unfit to work for a period of two weeks until 11 June because of bereavement.

54. The claimant had in fact booked a week's leave prior to the passing of her mother to be taken between 5 and 9 June. It is common ground that Mr Hellewell telephoned the claimant and that it was agreed that the claimant would in fact take the week commencing 5 June as annual leave and not sick leave. This was to the claimant's financial advantage as otherwise her contractual entitlement during the period of sick leave was to statutory sick pay. The statutory sick pay at the relevant time was in the sum of £92.05. We agree with Ms Mellor's submission this was a generous and supportive upon the part of Mr Hellewell.

55. The claimant's account is that Mr Hellewell telephoned her twice during the two weeks between 21 May and 4 June inclusive. She says that she took a telephone call from him on 26 May. She says that "after briefly asking how I

was he said "are you coming to work next week? Do you want to use the week commencing 29 May 2017 as holiday as opposed to being off sick?" I told him that I was poorly and was having the week commencing 29 May as sick leave and that I intended to keep my holiday week for the week commencing 5 June 2017. The second respondent's response was "ok as long as you don't take the whole year off". She then goes on to say that she received another telephone call from him "at some point in the week commencing 29 May 2017". The purpose of that call was to inform the claimant about "some personal difficulties that my line manager [Liz Housley] was suffering and that she was unable to work". The claimant says in paragraph 21 of her witness statement that she did not wish to be any more specific to protect Mrs Housley's privacy.

56. The claimant says that she felt pressured into returning to work because of Mr Hellewell's actions in telephoning her twice over this period. She returned to work notwithstanding that she was contemplating returning to her GP for further medical advice about her fitness to work.

57. Mr Hellewell says that he only telephoned the claimant once. He says that he telephoned to "check she was ok and to see if she was coming back to work on 12 June on the expiry of her sick note". Mr Hellewell says that during the course of that telephone conversation he asked the claimant whether she wished to use the second week covered by the sick note as holiday in order to be paid in full.

58. The claimant did not in the event return to her GP for further advice and she returned to work on 12 June. When asked about the telephone calls during the duration of the sick note, the claimant said that Mr Hellewell had indicated that he would employ an agency worker (or "temp" as she put it) to cover her absence. She gave similar evidence in her printed witness statement. The claimant's account was that she perceived that he said this to her in an intemperate tone which led to her feeling pressurised. Furthermore, the claimant fairly acknowledged that Mr Hellewell suggested that the second week be taken as annual leave and that this was financially beneficial for her. In addition, the claimant acknowledged that Mr Hellewell had paid her when she had been absent for a day before her mother's passing.

59. Notwithstanding the dispute as to whether there was one or there were two telephone calls over this period, it is common ground that Mr Hellewell telephoned the claimant. The Tribunal sees nothing unreasonable about him taking that step. His is a small business. The busiest time of the year was fast approaching. It was in our judgment a reasonable step for Mr Hellewell to take to telephone the claimant, enquire as to her welfare and ask if she was going to be fit to return to work. He needed to know where he stood. Mr Hellewell and Mrs Housley both accepted that the absence of even one employee is such a small concern had a significant impact upon the others working there. The Tribunal accepts that subjectively the claimant may have perceived that Mr Hellewell was putting pressure upon her to return to work even if that was not in fact his intention. That was a

reasonable conclusion for the claimant to draw from Mr Hellewell's enquiry as to her likely return date.

60. The issue of whether there were one or two telephone calls could, it seems to us, have been easily resolved by the production of telephone records. Neither party placed their records before the Tribunal. Plainly, two telephone calls maybe considered to be more pressuring than one. In our judgment, however, whether there was one or there were two calls is less significant than the import of the message being conveyed to the employee by the employer.

61. On balance, we prefer the respondents' account there was only one telephone call at around this time. It is to Mr Hellewell's credit that he was generous to the claimant as we have described. An employer generous to an employee in that manner is, in our judgment, unlikely to place unreasonable pressure upon the employee to return to work. We also again observe that the claimant was naturally very upset at the passing of her mother to the extent that her GP had advised her medically that she was unfit to work following her bereavement. We can accept the claimant's case that in the one telephone call which (as we have found) took place she subjectively and reasonably interpreted Mr Hellewell's actions as asking when she was likely to return to work and that she felt pressured accordingly.

62. Mrs Housley went off sick on 6 June and did not return to work until 21 August. The Tribunal was not told the reason for Mrs Housley's absence from work for such a significant period over the respondents' busiest time of year. It is to the claimant's credit that she acknowledged in her witness statement Mrs Housley's right to privacy and that Mr Campion made clear to Mrs Housley that he would in no way pry into the matter.

63. The claimant's evidence is that at the time that she returned to work on 12 June she was trying to obtain bereavement counselling. She was on a waiting list with St Gemma's hospice. During her first week back, St Gemma's telephoned and spoke to Ann Stott. Mrs Stott put the call through to the claimant. Mr Hellewell acknowledged that Ann Stott told him that the claimant was seeking bereavement counselling from St Gemma's.

64. On 28 June, the whole team along with some temporary workers were tasked with checking all the rooms as they were vacated by the students. Unsurprisingly, this was a long day for all. The claimant says that she got into work at around 8.00 in the morning and did not leave until 9.30 in the evening. The claimant was given some properties to inspect and photograph. She says that she had completed visiting her properties at 9.00pm and upon her return to the office she was told that she could go home bearing in mind that she had already worked for over 12 hours that day without taking a break.

65. About the events of that day Mr Hellewell says:

> "On 28 June I sent Clare home early from work even though we were in the middle of our busiest time. The reason for this was the fact that her mistakes were affecting us so much. Other staff were asked to stay on and work extra hours. The bottom line was her presence was having a negative effect on the business and it was better that she was out of the way. We had temporary staff in during this busy time and it was telling that they were given more responsible tasks than she was. At this point, Clare was struggling to put the keys in alphabetical order which caused chaos at times".

66. When cross examined about this passage in his witness statement (at paragraph 24) Mr Hellewell said that the rest of the team worked until one o'clock in the morning. He said that the claimant had had no need to work for as long as he had done without a break. He said that she was on the road inspecting properties and therefore could have taken a break whenever she liked. Mr Hellewell purchased Chinese food for the team at about 6.30 that evening although it appears that the claimant was inspecting properties at the time and appears to have missed out on the food.

67. It was put to Mr Hellewell that the claimant's account is that Ann Stott told her to go home because she had had a long day. Mr Hellewell said that he was not there at the time that the claimant was sent home. This contrasted with the evidence in Mr Hellewell's printed witness statement to the effect that he himself had sent the claimant home. It was suggested to Mr Hellewell that he had been untruthful in paragraph 24 when suggesting that the claimant was hampering the operation of the business that day and was sent home as a consequence. Mr Hellewell replied, "I don't know what happened".

68. Matters at around this time were not helped by the fact that Mr Edge and Ann Stott were on annual leave at the same time. It was not clear exactly when they were off. It must have been for a period of time after 28 June given that it was Ann Stott who had sent the claimant home that day. At all events, Mr Hellewell accepted that the claimant was having to work during one of the busiest periods without experienced staff given the absence of Mrs Housley, Mr Edge and Mrs Stott. Mr Hellewell accepted that he had not highlighted to the claimant any performance concerns during this time. Indeed, there was no evidence from the respondents of any performance meetings of any kind after 18 May. Mr Hellewell said that the claimant had made an error in connection with a property at 28 Bath Street. She had given out wrong keys. It was suggested that in the circumstances mistakes were inevitable.

69. On 4 and 5 September the claimant was off sick due to gastroenteritis. She self-certified this absence. She prepared a supplemental witness statement about it. She explained that she was suffering from a very painful stomach and considered that the symptoms were probably not caused by gastroenteritis but due to the impact of depression upon her. She acknowledges that she did not mention depression or stress and anxiety when she self-certified this absence. The claimant had some difficulty

articulating whey she had felt the need to prepare a supplemental witness statement about those two days.

70. The claimant attended at her GP's surgery the next day (6 September). This was for an unrelated and planned health check. The claimant's evidence is that she broke down in the GP's surgery. We accept entirely the claimant's account. The relevant entry of her GP notes for that day corroborates what she says. The relevant entry at page 166 reads:

> *"Started crying immediately as she sat down. Very tearful as she has recently lost her mum and is not coping. Awaiting counselling from St Gemma's. Unable to afford private counselling, listened and reassured".*

71. This note was in fact made by the practice nurse who advised the claimant to see a doctor.

72. The claimant arrived at work at 9.30am that day. The respondents have made no criticism of the claimant's timekeeping generally. To the contrary, Mr Hellewell and Mrs Housley acknowledged that she was never late for work. She was slightly late on 6 September but the respondents acknowledge that this was a planned consultation and that they were prepared to allow her a little time.

73. The subsequent discussion between the claimant and Mrs Housley is an important feature of the case. The claimant's evidence about this is as follows:

> "(28) "…….I went back to work [on 6 September] and arrived at about 9.30am. As soon as I walked in Liz [Housley] looked at me and asked if I was ok, I must have been visibly upset and she took me upstairs to talk to me privately.
>
> (29) I told her that I couldn't get myself together, that I didn't know what to do, I told her that I missed my mum so much and that I felt so low all the time. Liz said I should go to the doctors and ask for antidepressants. I told her that I'd already been taking them and that I had been on them for five years since I was diagnosed with depression following nana's death. Following my nana's death in 2011 and my subsequent diagnosis of depression I suffered from alcoholism and I have been in recovery for five and a half years. I didn't tell Liz I had suffered from alcoholism but I did tell her that I suffered from depression ever since my nana had died. Liz said that I needed to go back to the doctors and ask them to increase my medication, she said that they had really helped her. Liz also said I couldn't work in the state that I was in and she told me to go home and ring the doctors.
>
> (30) That afternoon, on 6 September 2017, I telephoned the doctors and said I needed an emergency appointment, they arranged for a

telephone consultation with a doctor. The doctor called me and said I shouldn't go into work due to how I was feeling. I communicated this with Liz via text message (376 – 377). I attended the doctors on 7 September 2017 and I was signed off work for two weeks with anxiety and stress (167 and 375) and the doctor also increased the dosage of my medication. On 8 September 2017 the sick note was handed to the first respondent".

74. Mrs Housley's account is as follows:

> (19) "Clare was away from work with gastroenteritis on Tuesday 4 and Wednesday 5 September. She came back into work slightly late the following day as she had had a GP appointment. We work in a small office and so I was aware when she came in that she appeared upset. I saw her take off her coat and then go upstairs. I went up after her. She said that she was still struggling to cope after the loss of her mother in May and that she was on medication to cope with it. She did not tell me that she had depression. I said to her that she was not fit to be in work and therefore she should go home and contact her GP for an appointment".

75. Mrs Housley says that following her own return to work from her ill health absence on 21 August she remained concerned that the claimant was making mistakes. She points out a number of grammatical and spelling errors, emailing incorrect people and mixing up flats. We refer to paragraph 18 of Mrs Housley's witness statement. Notwithstanding those errors, Mrs Housley took no action against the claimant after 21 August.

76. The following emerged from the cross examination of Mrs Housley about the events of 6 September:

    1) She fairly acknowledged the claimant appeared upset when she arrived at work.

    2) She said that the claimant had said that she missed her mother. Mrs Housley said that the claimant had said so and that she also appeared down.

    3) Mrs Housley denied the claimant had made any reference to antidepressants. She said that the claimant had said that she was on (unspecified) medication following the death of her grandmother for a period of five and a half years.

    4) Mrs Housley was taken to paragraph 27 of the respondents' grounds of resistance (at page 32 of the bundle). There the respondents pleaded that in the discussion that day, the claimant had mentioned to Mrs Housley that she had not dealt with the loss of her mother and had been on medication for some years and felt that it was not working. The pleading goes onto say that it was agreed that the claimant could go home, take the rest of the day off, seek advice on her medication from her GP and that the claimant texted Mrs Housley on 6 September to

confirm that she had an appointment with her GP the following day. Mrs Housley accepted this to be a fair summary of what had transpired. Reasonably (in our view) she said that she could not accept that the claimant's reference to "medication" must necessarily indicate the presence of a mental impairment. As Mrs Housley put it, she was not qualified to say what the medication was for and that she herself was taking medication of the same type as the claimant (as Mrs Housley now knows to be the case) but not for depression. Mrs Housley said that she had not questioned the claimant further as she did not think it appropriate to pry given that the claimant was upset.

5) Mrs Housley considered that her duty was to refer the claimant to somebody who could help her. She said that she had no reason to consider that the claimant had a disability. She said that she had suggested that the claimant go and see her GP because the claimant had said that the medication that she was on had not worked as well for her since the passing of her mother. Mrs Housley acknowledged the claimant's medication was to help with mood and sleep.

6) Mrs Housley did not accept that the claimant's presentation on 6 September was suggestive of depression. She said that it was a brief discussion in the kitchen which lasted only around three minutes.

7) Mrs Housley acknowledged that the claimant had indeed texted her later the same day. We can see that the claimant texted Mrs Housley at 15:16 on 6 September (page 376). The message said *"Hiya, I've rung the doctors again to see is they have had any cancellations. One of the doctors is going to ring me at some point today. Thank you for today. I wish I would have spoken to you earlier. X".*

77. In cross examination of the claimant the following evidence emerged:

1) The GP appointment that she made for the morning of 6 September was a routine matter.

2) The claimant said that Mrs Housley had mentioned that she herself had been on antidepressants and that an increase in dosage may be beneficial for her (the claimant). She maintained that there was a discussion of antidepressants and that she had not used the term "medication" as contended by the respondent.

3) The claimant was referred to the texts at pages 376 and 377. Here, the claimant refers to a doctor's appointment in order to *"sort out my tablets"* and Mrs Housley saying to the claimant that, *"I can't stress enough how much the tablets I was prescribed helped me over the last few months".* The claimant said that the word "tablets" was easier to type in a text message than was "antidepressants".

4) The claimant said that she did specify the period of time that she had been upon medication by reference to her grandmother's passing.

5) It was suggested to the claimant that the fit note at page 375 was consistent with the respondent's case referring as it does to *"anxiety and stress"* as opposed *to "depression".* While acknowledging what the sick note says, the claimant said that her stress and anxiety was related to her depression. That said, the claimant fairly acknowledged that the respondents may reasonably have thought that the anxiety and stress was related to the bereavement diagnosis made soon after the passing of the claimant's mother.

78. There is in reality much common ground between the accounts given by the claimant and Mrs Housley. There is no issue that the claimant appeared at work that morning looking very upset and that Mrs Housley quickly acted to help her by acknowledging that she was not fit to work and sending her home. Whether or not the claimant referred to a specific period of time following the passing of her grandmother the fact remains that Mrs Housley fairly acknowledged the claimant to have told her that she had been on medication for some years. This is conceded by the respondents in their grounds of resistance. It is also common ground that there was some discussion about Mrs Housley's condition (or at any rate how medication had helped her with it).

79. In truth, the dispute between Mrs Housley and the claimant centres upon whether the word(s) "depression" and/or "antidepressants" were used. Upon this issue we prefer the evidence of the respondents. The text messages passing between Mrs Housley and the claimant refer not to 'antidepressants' but rather to 'tablets'. Had the discussion between them been about antidepressants one may have expected the text messages to have said so. Firstly, in this age of predictive texting the claimant's explanation that it takes less time to type 'tablets' than 'antidepressants' is not convincing. Secondly, Mrs Housley was (as she was entitled to be) concerned for her privacy around her condition. She maintained that position before us (as is her prerogative). Therefore, it is credible in our judgment that she would have used the more general expression "tablets" or "medication" as use of the term "antidepressants" may give away more than Mrs Housley was prepared to reveal about her condition. Thirdly, Mrs Housley was in our judgment a most impressive witness. Plainly, she is a very capable individual. She also readily made concessions where appropriate and in particular did not seek to elevate the three discussions that she had with the claimant in March, April and May into formal performance meetings when they were not. That is very much to Mrs Housley's credit.

80. In an email sent in the evening of 6 September Mrs Housley told the claimant that she should send her (Mrs Housley) the sick note and she would pass the matter onto Mr Hellewell. In the event, the sick note was not handed to the respondent until 8 September. The claimant put the sick note into the hands of Mr McCord. It appears that he intended to deliver it on 7 September but was too busy to do so and did it the next day. We refer, as corroborative contemporaneous evidence of this, the text from the claimant to Mrs Housley sent at 19.35 on 7 September (page 377).

81. Although he was not present on 6 September, Mr Hellewell was properly and quickly appraised of events. We refer to paragraph 27 of his witness statement. He also says at paragraph 28 that he spoke to the claimant on 11 September asking to meet her. On 12 September he sent her a text suggesting that they meet at Costa Coffee on Leeds Road in Huddersfield on 14 September. The claimant agreed. Text messages passing between Mr Hellewell and the claimant of 12 September to make this arrangement may be found at page 429.

82. Mr Hellewell's account of the meeting of 14 September is at paragraph 29 of his witness statement. He says:

> "Her partner James [McCord] was also there. I said to [the claimant] that I was letting her go as her work was not up to the standard that we required at the company. James did question this and I asked him whether he wanted me to go through all the detail but he confirmed he did not. She was not sacked due to her disability or her absence. She had taken only one previous period of sickness following the bereavement. Other staff have had more time off due to sickness and they have not been dismissed. The reason for that is their performance was far better than Clare. I do not dismiss people who can do their job well. In this case there was overwhelming evidence over the seven months that she could not do the job to the standard we required".

83. Mr Hellewell then goes onto say at paragraph 30 of his witness statement:

> "Even though I wanted to dismiss earlier I could not due to the fact that we were incredibly busy and Liz was off with long-term sickness. I just did not have the time to recruit for another member of staff. That would have left me reliant on temporary staff at the most important time of the year. It was a case of struggling through until the work slowed down and Liz came back. Soon after Liz returned I made the decision to let Clare go".

84. The claimant gives the following account:

> "(32) I attended with my boyfriend James as I wasn't in a fit state to drive because of how I was feeling. The second respondent wanted to know why James was there and James said he was there to support me and to drive as I wasn't able to due to how I was feeling. We got drinks and sat down together. The second respondent then said "you do realise why you are here don't you? I'm going to have to let you go as it's not working out". I was absolutely gobsmacked, he went onto say "I have got a team of six people and when you are off it has a massive impact on them". He also alleged that my work had been slacking, which had never previously been communicated to me, I hadn't received any verbal or written warnings".
>
> (33) The second respondent said he was going to give me a month's notice effective from that day and gave me the choice of working it or

not working it, he also said that he would pay any accrued yet untaken holidays as well. I was so shocked I sat in silence. The second respondent then said "why do you think I called you here?" to which I told him "I honestly thought it was because he was concerned and cared about me and thought he was a nice person". The second respondent said he still wanted me to consider him as a nice person and said he would still give me a reference".

85. The following evidence emerged during the cross examination of Mr Hellewell about the events between 11 and 14 September:

1) The claimant had not been forewarned by him ahead of the meeting of the possibility that she would be dismissed.

2) Mr Hellewell answered the charge put by Mr Campion that he could have dismissed her between 21 August and the claimant's departure on sick leave by saying that he himself was on paternity leave during that time. Mr Hellewell accepted that notwithstanding that he was on paternity leave he could have dismissed the claimant. He said he wanted to ensure that Mrs Housley had returned to work before doing so.

3) Mr Hellewell accepted that he had not given the claimant any particulars of sub-standard performance prior to the meeting.

4) Mr Hellewell denied that he decided to dismiss the claimant only after 4 September when she went on her final period of sickness absence. He said that he had "mentally decided to dismiss her before that date". He maintained that he had made this decision "at the end of August maybe".

5) Mr Hellewell accepted that he was very nervous when he attended the meeting on 14 September. He did not discuss with the claimant the reason for her absence. The impression formed by the Tribunal was that Mr Hellewell simply wanted to convey the message to the claimant that she was dismissed as quickly as possible. Mr Hellewell accepted that he had given no thought to the possibility of allowing the claimant a period of time to return to work or whether allowing her to return upon a phased return to work would help her.

6) Mr Hellewell denied that he had told the claimant that her work was "slacking" although he did accept that he told her that her work "was not up to scratch". He said he was prepared to furnish details but Mr McCord had discouraged him from so doing.

7) Mr Hellewell said that he offered to give the claimant a reference.

8) Mr Hellewell accepts that it was affordable for the respondent to engage a temporary worker to cover the claimant's absence over a relatively short period or to assist with a phased return to work for her.

86. The following emerged from the evidence of the claimant upon this aspect of the matter:

1) The claimant, Mr McCord and Mr Hellewell in fact coincidently met in the coffee house car park having arrived more or less at the same time.

2) The claimant said that Mr Hellewell had asked why Mr McCord was accompanying her but had raised no objection to Mr McCord joining them in their meeting. The claimant said that Mr McCord had informed Mr Hellewell that he was there in order to support her and because he did not want the claimant to drive to the meeting.

3) The claimant says that Mr Hellewell purchased a coffee for her. Mr Hellewell himself had water. (This evidence was in fact unchallenged and corroborates our finding that Mr Hellewell approached the matter by wishing to get the meeting over and done with as quickly as possible hence not buying a hot drink for himself).

4) The claimant accepted that she had not indicated in her printed statement that Mr McCord protested about Mr Hellewell's course of action by saying words to the effect that Mr Hellewell could not dismiss the claimant while she was on sick leave. The claimant pointed out that Mr McCord has said this in his own witness statement. She could not satisfactorily explain why it was omitted from her own.

5) The claimant acknowledged that Mr Hellewell was nervous. She said that he was shaking. She acknowledged that he was "not nasty".

6) The claimant considered that Mr McCord had been impressed with Natalie Germain's performance when she had been taken on temporarily over the difficult summer caused by the absence of Mrs Housley, Mrs Stott and Mr Edge and that Mr Hellewell was set upon engaging Natalie to replace the claimant. It was suggested to the claimant by Ms Mellor that Natalie Germain was not in fact recruited as a permanent employee until 1 October 2017.

7) The claimant fairly acknowledged that her GP had not indicated any adjustments may be made to enable the claimant to return to work in the sick note (in particular at page 375).

8) The claimant maintained that a phased returned to work was feasible particularly as the respondents' business was quieter in September.

87. Paragraph 10 of Mr McCord's witness statement gives the following evidence:

- (10) When we sat down in Costa Coffee the second respondent said to Clare "I am letting you go, you being off sick has a massive impact on the rest of the team". The second respondent then subsequently said that Clare's work had been slacking. I said to the second respondent "you can't do this, she was off sick and not well, you should be supporting her". The second respondent simply replied by stating that he could dismiss Clare. Clare was in utter disbelief at this point and was very upset and became very tearful during the meeting. The second respondent said to Clare that she could come down and collect her belongings from the office and he would send her a dismissal letter and pay her notice. The second respondent also said that he would offer Clare a reference.

- (11) When we got back to the car Clare was absolutely devastated. Clare said to me that she felt like she was useless and worthless. I tried to reassure her over the coming days that she hadn't done anything wrong. I recall immediately after she was dismissed she would sit on the sofa for days on end and not leave the house. She would sit in the house with the curtains closed. She also avoided going into town and still now she does not go to the area of town where the first respondent's offices are in she runs into any of her formal work colleagues".

88. In evidence given under cross examination, Mr McCord fairly accepted that although Mr Hellewell was taken aback by Mr McCord appearing at the coffee house, he raised no objection Mr McCord joining the meeting. Mr McCord said that Mr Hellewell had mentioned the impact of the claimant's sickness absence. He denied that Mr Hellewell had mentioned the claimant's performance as the reason for dismissal. It was suggested that Mr McCord was there to support the claimant. He replied that "I'm just stating facts".

89. Mr Hellewell wrote to the claimant on 15 September (page 378). No particulars were given in the letter as to the reason for the dismissal. He said:

- "I regrettably write to you to confirm your termination of employment on 14 September 2017 within the business. As per your contract, you are entitled to one month's paid notice period. Normally you would be required to work this period but we have made the decision that you do not have to be in the business. You will be paid your notice and owed holiday entitlement on 21 September 2017".

90. It is common ground that the claimant's contract of employment ended on 14 September.

91. On 22 September the claimant wrote to Mr Hellewell. She notified him of her wish to appeal against his decision to dismiss her. Mr Hellewell replied on 25 September seeking her grounds of appeal. The claimant emailed the same day. She said "I wish to appeal because you dismissed me because I am disabled.". Mr Hellewell replied on 25 September to say, "I wasn't

aware of any disability. Could you please provide me with all the relevant details". No reply having been received from the clamant he emailed her on 16 October informing her that he considered the matter closed. The relevant pages are at 379 – 381 of the bundle. When asked why she had not pursued the appeal the claimant said that she was acting upon legal advice.

92. Paragraph 38 of her witness statement the claimant says:

> "Since the second respondent dismissed me I felt even worse and my condition has deteriorated, immediately after our meeting ended James and I went to the car and I burst out crying, I felt like a failure. In the same year I was told I could not have children, I lost my mum and I lost my job. I am still on antidepressants. Since I was dismissed from the first respondent I feel like my confidence was knocked terribly, in the days and weeks after I was dismissed I suffered from palpitations and felt like my condition worsened".

93. Mr McCord gave corroborative evidence about the impact of her dismissal upon the claimant. He says that she is nervous and terrified of going into town in case she runs into her former colleagues. He also said that the dismissal had had had an impact upon her employment and she felt that she was unable to return to work full-time and has gradually eased herself into work part-time. She is anxious about the prospect of being dismissed by any new employer.

94. Within the bundle (pages 55 and 56) is a letter from the claimant's GP to her solicitor. We shall not set this out in full. In summary, however, her GP says:

1) The claimant has been suffering from anxiety and depression since 2011.

2) She received a sick note between 28 July 2011 and 1 November 2011 for bereavement of her grandmother. She began drinking heavily at this time.

3) She currently suffers anxiety and depression. The loss of her mother combined with inability to conceive a child and stress at work resulted in her feeling mentally and physically exhausted. She is seeing a private counsellor.

4) It is hoped that her anxiety and depression will improve as counselling for her bereavement continues. The GP also opines that if she is able to foster a child this would improve her wellbeing.

5) Finally, he says that she will need to continue medication to deal with alcoholic, peripheral neuropathy and antidepressants for the foreseeable future.

95. The claimant's schedule of loss is at pages 52 and 53. From this it seems that she was out of work between 14 September and 13 November 2017. She was then able to return to work through the recruitment agency Cordant People. The payslips at pages 388 – 416 demonstrate variable hours, most of which are part-time. That is consistent with the evidence given in paragraph 39 of her witness statement that she feels unable to return to work full-time at present which she attributes to the impact upon her of her dismissal from the first respondent.

96. We find as a fact that the principal reason why Mr Hellewell dismissed the claimant was because of her sickness absence. We accept that the respondents and Mrs Housley continued to harbour concerns about the claimant's performance. However, the fact of the matter is that there had not been any kind of informal discussion with the claimant about her performance after 18 May. The claimant had worked through the respondents' busiest period. The probationary period was not extended. Whatever concerns there had been on or before 18 May had not been serious enough to warrant the respondents invoking their performance procedure and after 18 May had not been serious enough either to warrant the taking of that step or even embark upon informal performance review such had occurred earlier.

97. Mr Hellewell had had ample opportunity to take such steps before he went on paternity leave on 21 August, during it and upon his return from paternity leave on 4 September. He also had an opportunity to dismiss the claimant for poor performance before receipt of the sick note on 8 September. That the claimant was physically absent on 4, 5, 6 and 7 September did not preclude him from dismissing her for poor performance. He did not do so. The Tribunal thus infers that the decision to dismiss was precipitated by his receipt of the sick note on 8 September. We accept that the respondents were motivated to dismiss in part by reason of performance but find that the principal reason for the decision to dismiss her when they did was the production of the sick note.

98. Further, Mr Hellewell's credibility is badly affected by the evidence that he gave in paragraph 24 of his witness statement about the circumstances of the claimant leaving work on the evening of 28 June. We therefore do not accept as credible his evidence that he resolved to dismiss the claimant prior to 8 September. In all the circumstances therefore, the Tribunal is satisfied that the fact which persuaded him to dismiss the claimant was the receipt of the sick note on 8 September and the prospect of the claimant being absent from work for a further period. If Mr Hellewell truly had decided to dismiss the claimant at around the end of August he had plenty of opportunity so to do before 8 September and his inaction until receipt of the sick note is telling.

99. We accept Mr McCord's evidence that Mr Hellewell did mention the claimant's sickness absence at the meeting in Costa Coffee. The Tribunal was impressed with Mr McCord. Like Mrs Housley, he made appropriate concessions (particularly, to the effect that his evidence about what was happening in the workplace should be treated with caution given that he

was not there and was reliant upon what the claimant was telling him). The claimant's omission to mention what Mr McCord had said when protesting about Mr Hellewell's actions is not fatal to the claimant's case that Mr Hellewell did say this. As we say, in balancing the accounts of Mr McCord and Mr Hellewell we prefer that of Mr McCord for the reasons given.

100. As has been said, this case benefitted from a preliminary hearing held on 29 January 2018. The issues were identified by Employment Judge Little and are set out at paragraph 3 of the Case Management Summary (pages 46 and 47). We shall not set them out *verbatim* here. The parties are familiar with them and they will be considered when we reach our conclusions.

101. We now turn to the relevant law. The prohibited conduct of which the claimant complains is made unlawful in the workplace pursuant to the provisions set out in Part 5 of the 2010 Act. The relevant prohibited conduct is that of disability discrimination, in particular:

    1) Direct disability discrimination.

    2) Unfavourable treatment for something arising in consequence of disability.

    3) A failure to make reasonable adjustments.

    4) Indirect discrimination.

102. By Section 136 of the 2010 Act, the initial burden of making out a *prima facie* case of discrimination rests with the claimant. If she succeeds in so doing then the burden shifts to the respondents to prove that the matters complained of are in no way tainted by discrimination. It is for the claimant to prove that she suffered the treatment complained of and not merely to assert it. It is only after hearing all of the evidence, including the respondents' explanations, that the Tribunal can decide whether the claimant has shown primary facts that could give rise to an inference of discrimination. Should she do so then the Tribunal must consider whether the explanations advanced by the respondents were in no way whatsoever connected to the protected characteristics alleged. If the Tribunal does not accept the reasons put forward by the respondents then the Tribunal must find that the claimant was discriminated against unlawfully.
103. We shall deal firstly with the reasonable adjustments claim. An employer's duty to make reasonable adjustments arises where a 'provision, criterion or practice' (meaning broadly any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with those who are not disabled. The employer must then take such steps as it is reasonable to have to take to avoid the disadvantage.

104. The relevant provision, criterion or practice (PCP) in this case (and which is asserted for both the reasonable adjustments and indirect disability discrimination claims) is **'***requiring the claimant to maintain a certain level of attendance in order not to be subjected to dismissal***.'** It is not in dispute that this was a PCP applied to the claimant by the respondents in particular because of the handbook (page 422). The handbook says that, *"Regular, punctual attendance is an implied term of every employee's contract of employment and we ask each employee to take responsibility for maintaining good attendance and reporting absence according to the procedures set out in this handbook".*

105. Having identified the relevant PCP, the Tribunal must then go onto consider the nature and extent of the substantial disadvantage suffered by the claimant in comparison to non-disabled comparators. *'Substantial'* in this context means *'more than minor or trivial.'* The claimant bears the burden of proof to establish a *prima facie* case that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. There must be evidence of apparently reasonable adjustments which could be made. The claimant must therefore identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage and having done so the burden will then shift to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

106. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective one. As the reasonable adjustment provisions are concerned with practical outcomes rather than procedures the focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about a proposed adjustment.

107. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. However, there does not necessarily have to a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for a Tribunal to find simply that there would have been a prospect of it being alleviated.

108. A significant change brought about by the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when that was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with the duty, regard should be had to a number of factors. Those factors are not mentioned in the 2010 Act. However, paragraph 6.28 of the Equality and Human Rights Commission's Employment Code gives examples of matters that a Tribunal might take into account. The Code stipulates that what is a reasonable step for an employer to take will depend on all the circumstances of each individual

case. The factors to have in mind include for example, the extent to which taking the step would prevent the effect in relation to which the duty was imposed, the practicality of such step, the costs that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking.

109. Paragraph 6.33 lists a number of adjustments that might be reasonable for an employer to make. These include allowing a disabled worker to be absent during working hours for rehabilitation, assessment or treatment and allowing a period of disability leave. A further example is the alteration of a disabled worker's hours of work which could include permitting part-time working or different working hours or a phased return to work with a gradual build up of hours.

110. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee would be placed at a substantial disadvantage by reason of the application to him or her of the PCP in question. The issue therefore is whether the employer knew or ought to have known both of the disability and the likelihood of the disability placing the employee at a disadvantage by reason of the application of the PCP. The latter concept is known as constructive knowledge.

111. The question therefore is what objectively the employer could reasonably have known following reasonable enquiry. There is however no remit for a requirement for employers to make every possible enquiry where there is little or no basis for so doing.

112. The 2010 Act does not require an employer to have actual or constructive knowledge of the precise diagnosis of the disability in question. Rather, it requires actual or constructive knowledge of the facts constituting the disability; that is to say, that the individual is suffering from (in this case) a mental impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

113. The EHRC Code states that "An employer must do all it reasonably can be expected to do to find out whether a person has a disability." The Code suggests, at paragraph 5.14 that "employers should consider whether a worker has a disability even where one has not been formally disclosed as for example, not all workers who meet the definition of disability may think of themselves as a disabled person."

114. Paragraph 5.15 says that what is reasonable will depend on the circumstances. This is an objective assessment. An example is given in the Code of a disabled man with depression who in recent weeks had suffered a deterioration in performance and has evidently become upset at work for no apparent reason. The Code says that the change in behaviour should have alerted the employer to the possibility that the changes were

connected to a disability and it is likely to be reasonable to expect the employer to explore with the worker the reason for the changes in behaviour and whether the difficulties are because of something arising in consequence of a disability.

115. The concept of constructive dismissal is aimed at the mischief of employers benefiting from an approach of not making any enquiries or investigations into an employee's medical condition and then praying ignorance in aid as a defence to a claim. In acknowledging that the first respondent is a small employer, Mr Campion said that where a larger employer may make a referral to its own or an external occupational health service a small employer such as this one may be expected to enquire (with consent) of the employee's GP as to the reasons for the presenting symptoms.

116. We then turn to the compliant of discrimination for something arising in consequence of disability. This is a complaint that may be raised where an employer treats an employee unfavourably because of something arising in consequence of the employee's disability which the employer cannot show to be a proportionate means of achieving a legitimate aim. Again, an employer facing a complaint of discrimination arising from disability has a defence of lack of knowledge: that is to say, there will not be discrimination if the employer shows that the employer did not and could not reasonably have been expected to know that the employee had the disability.

117. In this case, the claimant's case is that she was unfavourably treated by being dismissed. Employment Judge Little summarised matters at paragraph 3.12 of the Case Management Summary (page 47 of the bundle). The *"something"* that arose in consequence of disability was the possibility that the disability would require the claimant to have time off work. It is not necessary for the employer to have (actual or constructive) knowledge that the *"something"* arises in consequence of an employee's disability in addition to knowledge of the disability itself. Again, the test is objective and if the employer treats the employee unfavourably because of the thing that arises in consequence of disability liability will be established. The knowledge defence therefore applies only to the issue of whether or not the employer knew or ought to have known that the employee was disabled within the meaning of the 2010 Act. If the employer does have actual or constructive knowledge of a disability then it does not matter whether or not the employer is aware that its reason for treating the employee as it does is something that arises in consequence of the disability or not.

118. Upon a consideration of unfavourable treatment, there is no need to compare a disabled person's treatment with that of another person. Unfavourable treatment means in this context putting the employee at a disadvantage. The consequences of the disability which give rise to that disadvantage includes anything which is the result, effect or outcome of a disabled person's disability.

119. The respondents have not pleaded any form of objective justification defence. That said, the EHRC Code refers to the objective justification test

at paragraphs 4.25 – 4.32 and paragraph 5.11. The legitimate aim in question must be legal and should not be discriminatory in itself. It must also represent a real objective consideration. Where an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified. Even where an employer has complied with the duty to make reasonable adjustments in relation to the disabled person, the employer may still subject a disabled person to unlawful discrimination arising from disability. This can arise where the adjustment is unrelated to the particular treatment complained of. An example is given in the Code to illustrate this point. Where a disabled person is dismissed for sickness absence in circumstances where there has been a reasonable adjustment to that workers working hours then plainly a sickness absence dismissal may be unrelated to the adjustment.

120. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements.

121. We now turn to the indirect disability discrimination complaint. There is no knowledge requirement in respect of indirect disability discrimination. The relevant PCP is the same as for the compliant of failure to make reasonable adjustments. It is the claimant's case that the application to her of the relevant PCP created a group disadvantage and an individual disadvantage. The group disadvantage applies, on the claimant's case, because the PCP of requiring a certain level of attendance in order not to be subjected to dismissal was applied by the respondent to persons with whom the claimant did not share the particular disability and puts or would put persons with whom she shared the particular disability at a particular disadvantage when compared with persons with whom she did not share the particular disability. As with the complaint of disability discrimination, for something arising in consequence of disability an employer has a justification defence if the employer can show that the application of the PCP is a proportionate means of achieving a legitimate aim. Similar principles apply to those as described above at paragraphs 119 and 120.

122. Finally, we consider the law as it relates to the complaint of direct disability discrimination. This occurs where a person treats another less favourably than they treat or would treat other persons because of a protected characteristic. A comparison mist be made with how the employer has treated other workers or would have treated them in similar circumstances. The circumstances relating to a case include a person's abilities where the protected characteristic is disability.

123. In all discrimination cases, the crucial question is why the claimant received less favourable treatment should such have been established. Was it upon the grounds of disability (or whatever protected characteristic is question) or was it for some other reasons? The focus primarily must be on why the

claimant was treated as she was. Was it on the proscribed ground or was it for some other reason?

124. We now turn to our conclusions. We shall start with the question of actual or constructive knowledge. Mr Campion contends (at paragraph 30 of his submissions) that the respondent knew or ought to have known of the claimant's disability because:

1) The claimant suffered the loss of her mother on 21 May 2017.

2) The claimant submitted a sick note around that time stating *"bereavement".*

3) Mr Hellewell was aware from Ann Stott that the claimant was trying to obtain bereavement counselling.

4) The claimant was sent home from work by Mrs Housley on 6 September 2017 and advised to attend her GP to discuss medication.

5) The claimant told Mrs Housley that she had been on medication for some years but felt it was not working following the passing of her mother, that the claimant was visibly upset that day, and made reference to attending her GP and sorting her tablets out in her text messages that day.

125. We find that the respondents did not have actual or constructive knowledge of the claimant's disability on or before 5 September 2017. There was nothing (in our judgment) to put the respondents upon notice that the claimant was disabled simply by reason of the passing of her mother and the bereavement diagnosis. The Tribunal is not in any way seeking to diminish the undoubted distress which the claimant was suffering at this time. However, in our judgment, this was a life event (albeit doubtless a deeply distressing one for the claimant) and not one which the respondents knew or ought to have known would have a substantial and long-term adverse effect upon the claimant's ability to carry out normal day-to-day activities. Certain it is that the impact of the bereavement upon the claimant was substantial (in the sense of being more than minor or trivial which is the statutory test). It would also impact upon her ability to carry out normal day-to-day activities. However, bereavement being a life event there was nothing to put the respondents on actual or constructive notice that the claimant's condition at that stage was long-term (as defined in the 2010 Act).

126. In our judgment, the respondents were fixed with constructive notice on and after 6 September. At that stage, the respondents through Mrs Housley (who passed the information onto Mr Hellewell) knew that the claimant was on long-term medication. The claimant had turned up for work that morning in no fit state so to do and in obvious distress. There was discussion about altering and increasing medication. The claimant had been diagnosed with a condition of stress and anxiety and had been certified as unfit for work as

a consequence and which was a condition for which no reasonable adjustments could be recommended at that stage. Mrs Housley was informed of that at 20:20 on 6 September (page 376). The presentation of the claimant that day was in contrast to the perception of her formed (reasonably) by Mr Hellewell and Mrs Housley prior to that date. Mr Hellewell had given unchallenged evidence that "the claimant had often been childlike in her behaviour skipping and whistling and giggling and swinging her legs on her chair". Mrs Housley had said that the claimant was generally well- liked in the office. There were times when the claimant had appeared upset particularly as her mother's condition deteriorated. On the whole, however, in our judgment, there was insufficient to put the respondents on notice prior to 6 September of mental impairment as opposed to a reaction to a serious life event.

127. The claimant's presentation on the morning of 6 September and the information imparted to Mrs Housley was however, a very different order. At that time, the respondents became aware that the claimant had been on long-term medication since the time of her grandmother's death. In our judgment, at that stage, the respondents ought to have been on notice that the claimant was presenting with a mental impairment which had a long-term adverse effect upon her and her ability to carry normal day-to-day activities. The tasks that she was assigned to do at work are of course not normal day-to-day activities. However, tasks such as operating the computer, answering the telephone and reading are day-to-day activities and Mrs Housley was on notice that day (and subsequently informed Mr Hellewell) that the claimant was simply unable to perform those tasks. Further, we accept that Mr McCord told Mr Hellewell upon meeting in the Costa Coffee car park that he was concerned about the claimant's ability to drive. Driving is of course a day-to-day activity.

128. The claimant was signed off as unfit for work for a period of two weeks from 6 September. There was therefore ample time for Mr Hellewell to have made reasonable and discreet enquiries of the claimant for consent to have approached her GP for a report. Had he done so, it is likely that he would have received something akin to the report that was provided to the claimant's solicitors at pages 55 and 56 of the bundle.

129. In the circumstances therefore, we conclude that the respondents had constructive knowledge in that upon making reasonable but not intrusive or elaborate enquiries, the claimant's condition could have been properly ascertained. There was sufficient on 6 September to put the respondents on notice that the claimant may be disabled and cause them to make enquiries.

130. We find that the respondents did not have actual knowledge of the claimant's disability. A limited amount of information could be passed from the claimant to Mrs Housley during the three minute conversation which took place in the workplace kitchen on 6 September. That information coupled with Mr McCord's comments about concerns over the claimant driving are in our judgment insufficient to fix the respondents with actual notice. There was no medical evidence akin to the GP's report of 19 February 2018 at pages 55 and 56 of the bundle. The sick note referred to

anxiety and stress as opposed to depression. Further, the claimant eschewed the opportunity when presented to her by Mr Hellewell of furnishing him with information about the disability when she failed to prosecute her appeal.

131. We accept entirely that a microbusiness such as the first respondent cannot be expected to make the same level of enquiry as a large local authority or NHS Trust or private employer. However, Mr Hellewell made no enquiries about the claimant's health at all after 6 September. He was clearly nervous at the meeting at Costa Coffee. He wanted to get the matter over and done with. Had he followed his own procedures in the employment handbook and carried out what is (unfortunately) termed a disciplinary hearing (but which in reality would be a performance hearing) he could have made enquiries and the claimant would have had the opportunity of telling him about her condition. The reality is, as Mr Hellewell candidly accepted, that he did not pay any heed to his handbook at all. He acted very much in haste but in circumstances where there were enough red flags to put him on notice that the claimant was presenting as a disabled person and which gives rise to legal obligations upon employers of all size.

132. We then turn to the several complaints starting with that of the failure to make reasonable adjustments. There being no dispute that the respondents applied to the claimant a disadvantaging PCP (as those without her disability would more easily have been able to comply with the level of attendance required) a duty to make reasonable adjustments arises. In our judgment, not only did the respondents have constructive knowledge of disability but also that the disability placed the claimant at a substantial disadvantage by reason of the application of the PCP. The respondents knew (or ought to have known) that by reason of her condition the claimant was unable to maintain the levels of attendance required. The respondents were on actual notice of that when the claimant presented the sick note at page 375. Again, reasonable and discreet enquiries would have informed the respondents that the claimants difficulties in complying with the PCP arose from disability.

133. In our judgment, there was a prospect of the substantial disadvantage being alleviated by the making of reasonable adjustments. Those contended for are allowing a period of time for the claimant to recover and to return to work upon a phased return to work basis. The claimant was, in the event, able to return to work (elsewhere) upon a part-time basis on 13 November 2017. In our judgment, looking at matters objectively, it would have been reasonable in the circumstances to allow the claimant a period of time of about this length to recover to such an extent as to be able to attend work. There was no evidence that the engagement of a temporary worker to cover the claimant's absence would have been unaffordable for the first respondent. In fact, the evidence was to the contrary. While it was accepted by the respondents that the claimant's absence had a significant impact upon the business, the busiest period was over with by early September. In short, the first respondent could have withstood the claimant's absence for a short period of around two months. We do not suggest that a microbusiness such as the first respondent could have sustained a period of absence measured in terms of months or even years.

However, upon the facts of this case the period of absence in question was modest and sustainable. We can see from the payslips in the bundle that the claimant has managed to sustain part-time work since her return to work in mid November 2017. Therefore, an adjustment of allowing her a period of time and to come back to work and to do so upon a phased return to work bass would plainly bring with it a prospect of alleviating the substantial disadvantage. In the circumstances, therefore, the reasonable adjustments complaint succeeds.

134. We now turn to the complaint of discrimination for something arising in consequence of disability. There can be little doubt that the claimant was unfavourably treated by being dismissed. She was dismissed for something arising in consequence of disability. The something arising was the absence from work caused by the disability and which caused her to be unable or less able to comply with the requirement to attend work. It was that consideration which materially influenced Mr Hellewell to dismiss her when he did. As there were reasonable adjustments which had a prospect of alleviating the substantial disadvantage it was not proportionate for the respondents to dismiss the claimant when they did. The respondents have advanced no case as to why it was proportionate so to do. The Tribunal accepts that the respondents had a legitimate aim being the smooth running of the business in order to serve the respondents' clients. However, in circumstances where that legitimate aim could have been pursued during the period of the claimant's absence, by the engagement of temporary staff, it was not proportionate to dismiss the claimant as the need so to do did not correspond to a real need upon the part of the first respondent at that stage. In contrast, the impact upon the claimant was significant as she lost her job.

135. We find, upon the direct discrimination complaint, that the reason for the claimant's treatment was Mr Hellewell's awareness (or more accurately constructive awareness) of the claimant's disability. However, no evidence was presented to the Tribunal to show that a non-disabled comparator with a similar attendance record to that of the claimant was or would have bene treated more favourably. The correct comparator is a non-disabled person with an attendance record (actual or prospective) similar to that of the claimant. In our judgment, and given Mr Hellewell's approach, he would have dismissed a non-disabled comparator in similar circumstances. We also vested the hypothetical comparator with the performance issues which arose during the course of the claimant's employment. As we have said, we are satisfied that Mr Hellewell acted from mixed motives (albeit the deciding factor was the presentation by the claimant of the sick note and is constructive awareness of her disability). As we say, there is no evidence that a non-disabled comparator who had performed as did the claimant and with a similar attendance record was or would have been treated better and therefore that complaint is dismissed, the claimant not having established a *prima facie* case.

136. We also dismiss the complaint of indirect disability discrimination. Again, the claimant has shown *no prima facie* case of group disadvantage. There is no evidence that those with the claimant's disability as a group are disadvantaged by the PCP when compared to those without a disability or those with a different disability. We cannot accept as Mr Campion urged upon us the taking of judicial notice that those with depression within any given comparison pool are particularly disadvantaged in this way compared

to others in the chosen pool. No evidence has been presented of group disadvantage pertaining to those with anxiety and depression and therefore the indirect discrimination complaint fails and stands dismissed as no *prima facia* case has been shown by the claimant..

137. We now turn to the issue of remedy. The Tribunal's powers upon remedy are set out in Section 124 of the 2010 Act. That provision says that the Tribunal may make a declaration as to the rights of the claimant and respondent in relation to the matters to which the proceedings relate, may make appropriate recommendation and order the respondent to pay compensation to the claimant.

138. The amount of compensation that may be awarded corresponds to the amount which could be awarded by the County Court under Section 119 of the 2010 Act. This section provides that the County Court has power to grant any remedy which could be granted by the High Court in proceedings in tort and that any award of damages may include compensation for injury to feelings (whether or not it includes compensation on any other basis).

139. The overarching principle in assessing and awarding compensation is that, so far as possible, complainants should be placed in the same position as they would have been in but for the unlawful acts. The Tribunal's task is thus to put the employee, so far as money can, into the position that she would have been in had there been no discrimination. The Tribunal has jurisdiction to award compensation by way of damages for personal injury (extending to psychiatric injury) caused by the statutory tort of unlawful discrimination. A successful complainant is entitled to be compensated for the loss which arises naturally and direct from the wrong.

140. The relevant principles for assessing injury to feelings can be summarised as follows:

1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to affect the award.

2) Awards should not be too low as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained as excessive awards could be seen as the way to untaxed riches.

3) Awards should bear a broad similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of awards rather than to any particular type of award.

4) In exercising their discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in

mind. This may be done by reference to purchasing power or by reference to earnings.

5) Tribunals should bear in mind the need for public respect for the level of awards made.

141. In *Vento v Chief Constable of West Yorkshire Police (No: 2)* [2003] IRLR 102 CA three broad bands of compensation for injury to feelings (as opposed to compensation for psychiatric or similar personal injury) were identified. An award within the range of the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

142. In respect of claims presented on or after 11 September 2017 (such as the instant case) Presidential Guidance about the appropriate award to make in the respective bands was published by the Presidents of the Employment Tribunals in England & Wales and Scotland. The lower band is £800 – £8,400. The middle band is £8,400 - £25,200. The top band is £25,200 – £42,000.

143. The award for injury to feelings is to compensate for subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression and emotions of that kind. Translating hurt feelings into hard currency is bound to be an artificial exercise. Tribunals must do the best that they can upon the available material to make a sensible assessment. Quantification of injury to feelings is more a broad brush exercise of estimation than of calculation, comparison with precedent or cold logic.

144. Mr Campion submitted that a Tribunal may make an award for personal injury without expert medical evidence. He submitted that it would have been disproportionate given the modest amount claimed by way of psychiatric injury for the claimant to commission a report from a psychiatric expert.

145. We shall start our assessment of remedy with a consideration of the monetary loss. Although helpful, the letter from the GP of 19 February 2018 (and which is in reality the closest that we have to a medico-legal report in this case) does not help the Tribunal to address the question as to whether, but for the respondents' discriminatory conduct, the claimant would have been able to work full-time, return to work earlier or return to work doing more hours than she is currently able to do. While taking Mr Campion's point about the proportionality of commissioning medico-legal reports given the modest personal injury claim, the Tribunal is in some difficulties without such evidence.

146. It is plainly the case that the claimant has been significantly affected by the passing of her grandmother and her mother. Further, there are issues around the claimant's inability to conceive a child. Her GP says that she was left feeling mentally and physically exhausted when seen on 7 September (prior to Mr Hellewell's dismissal of her). In short, there is simply no or no sufficient evidence to satisfy us that the claimant's position would have been any different had the discriminatory conduct not occurred.

147. To her credit, the claimant has managed to return to work upon a part-time basis with effect from mid-November 2017. She appears to have managed to sustain that level of attendance. It is our judgment (in view of the contents of the GP's report referred to at paragraph 146) that but for the discriminatory conduct the claimant's mental condition in early September 2017 would have precluded her from working anyway until mid-November even had the statutory tort not happened . Therefore, in our judgment, the appropriate measure of compensation to put her in a position that she would have been in but for the discriminatory conduct is to award an amount equivalent to the statutory sick pay that she would have received had she not been dismissed between 14 September and 15 November 2017. This is what she would have received had she remained employed by the first respondent.

148. In the absence of any evidence that the claimant would, but for the discriminatory conduct, have been better able to resume full time work earlier than she did then we make no award for any loss of earnings after mid- November. In our judgment, the claimant would only have been fit to work part-time anyway. She is doing so and would therefore be in no better financial position had the discriminatory conduct not occurred and she had remained employed by the first respondent. Had that conduct not occurred she would, in our judgment, have returned to work for the first respondent in or around mid November 2017, upon a part-time phased return to work basis pursuant to the respondents' duties to make reasonable adjustments.

149. We now turn to the non-monetary claims. In the absence of a medico – legal report in our judgment it is not appropriate to make any award for personal injury. While taking Mr Campion's point, the plain fact of the matter is that the Tribunal is in no position to assess what difference the discriminatory conduct caused to the claimant's pre-existing conditions (for which the respondents' have no responsibility) or the extent of the injury caused to her by reason of that conduct.

150. In our judgment, the appropriate award for injury to feelings is to be found in the middle *Vento* band. We accept this to be a one-off act by reason of Mr Hellewell's dismissal of the claimant. However, we accept that this one-off act had profound implications for the claimant and resulted in her suffering the subjective feelings of upset, frustration and hurt as eloquently described by her and Mr McCord. The claimant had no prior warning of the possibility of dismissal when she met Mr Hellewell at Costa Coffee on 14 September. He had given her no prior warning that that was a possibility. The dismissal of her took place in a public arena in a busy café on the edge of town. Given the constructive knowledge which Mr Hellewell had of the claimant's

disability and given his actual knowledge of her presentation on 6 September, coupled with his awareness that the claimant had lost her mother several months prior, his treatment of her that day in a public place was insensitive. It is our judgment that this case falls outside the lower band as a consequence. That it was a one-off act puts the appropriate award towards the bottom end of the middle band. An award of £10,000 is therefore the correct award in our judgment.

151. Interest is awarded upon the injury to feelings award at the rate of 8% *per annum* which is the prescribed rate. This runs from the date of the discriminatory conduct to the date of calculation of the compensation (being 8 August 2018 when the Tribunal met in Chambers). Interest upon the loss of statutory sick pay is assessed bearing the same rate of interest but from the mid-point of the loss (again as at the date of calculation).

152. Finally, there is the issue of the uplift on the award pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. This provides that in proceedings listed within that section (which includes claims brought pursuant to the 2010 Act) a Tribunal may if it considers it just and equitable in the circumstances increase any award by no more than 25% by reason of non-compliance by an employer with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

153. Contrariwise, a Tribunal may reduce an award in the event of failure by an employee to so comply. As we have determined that Mr Hellewell had mixed motives to dismiss the claimant (extending to performance issues) than the Code is applicable in the circumstances of the case. Plainly, the respondents failed to comply with it.

154. Taking into account the size of the first respondent but that it has an employee handbook it is our judgment that an appropriate uplift for failure to comply with ACAS Code is 15%. That is the amount we consider to be just and equitable in the circumstances of the case. However, that uplift shall be reduced by one half to reflect the claimant's failure to engage with the appeal process. Had she done so, that would have given Mr Hellewell an opportunity to reflect upon his conduct of the matter. Therefore, it is in our judgment just and equitable to increase the amounts awarded by 7.5% to reflect each party's culpability in the matter.

Employment Judge Brain

Date 4th September 2018