Case No: 2601185/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss D Morris	**-v-**	Taylors Transport International Limited

Heard at: Nottingham **On:** 11, 12 and 13 March 2019

Before: Employment Judge Evans and Mr J Akhtar

Representation
For the Claimant: Mr Donkersley (friend of the Claimant)
For the Respondent: Mr Khoshdel (Counsel)

JUDGMENT

1. The Respondent fairly dismissed the Claimant.

2. The Respondent did not unlawfully discriminate against the Claimant.

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

REASONS

Preamble

1. The Claimant was dismissed by the Respondent with effect from 14 March 2018. On 26 May 2018 she presented a Claim Form to the Employment Tribunal in which she brought complaints of disability discrimination, unfair dismissal and for unlawful deductions from wages. The claim of unlawful deductions from wages was dismissed following its withdrawal prior to the final hearing.

2. Those complaints came before the Employment Tribunal in Nottingham at a hearing held between 11 and 13 March 2019 ("the Hearing"). The parties were represented at that hearing as set out above. Before the hearing the parties had agreed a bundle of documents, the numbering of which ran to page 113. A page 93A1 was added to the bundle during the course of the hearing. All references to page numbers in these reasons are to the bundle page numbers unless otherwise stated.

3. The Claimant provided a witness statement for herself and gave oral evidence. The Respondent provided witness statements for the following individuals who also gave oral evidence: David Parnell (manager) and Alan Taylor (managing director).

4. Following submissions on 12 March 2019 the Tribunal reserved its judgment. It deliberated and reached a decision on 13 March 2019. The Tribunal's decision as set out in these reasons is unanimous.

The Claimant's strike out application

5. At the beginning of the Hearing the Claimant made an application that the Respondent's Response should be struck out on the basis that it had failed to comply with the case management orders in a timely fashion. It was argued that this had prejudiced the Claimant. The Respondent admitted some delays, argued that others had been agreed with the Claimant, but said that in any event the Claimant had not been prejudiced.

6. Before the Tribunal heard the Claimant's application it queried whether in the event that the Response was not struck out the Claimant would seek an adjournment to enable further preparation. Mr Donkersley said that the Claimant did not seek an adjournment. All the preparation that had to be done had been done. However the Claimant did feel strongly about the Respondent's failure to comply with the Tribunal's orders in a timely fashion.

7. The Tribunal concluded that the Respondent had failed to provide its list of documents or to prepare the hearing bundle in accordance with the Tribunal's orders with the result that the Claimant had not received the whole of the bundle until 4 March 2019. Equally, the Respondent had not been ready to exchange witness statements until that date. Further, the Claimant had sent the Respondent her witness statement on 13 February 2019. However the Tribunal accepted that the Respondent's representatives did not review the Claimant's statement until exchange on 4 March 2019 (at which point a revised version of the Claimant's statement was exchanged).

8. Overall, the Tribunal concluded that the Respondent's representatives had been incompetent in their preparation for the Hearing and had failed without good cause to comply with the Tribunal's orders. However the Tribunal also concluded that there was no real prejudice to the Claimant. The bundle was a small one and there was very little in it that the Claimant would not have already seen. The Respondent's witness statements were short. The lack of prejudice was also reflected in the fact that the Claimant did not seek an adjournment in the event that the strike out application was unsuccessful. Her representative accepted that the necessary preparation had been completed.

9. The Tribunal concluded that a fair hearing was possible and that it would be disproportionate to strike out the Respondent's Response. It therefore refused the Claimant's application for the Response to be struck out.

The indisposal of one of the lay members

10. The Tribunal originally comprised Employment Judge Evans, Mr Akhtar and another lay member. Sadly, on the morning of the second day of the Hearing, the second lay member received a phone call informing him that a close relative had died. The second lay member therefore needed to leave the Hearing immediately.

11. The Tribunal explained to the parties that in these circumstances section 4(1)(b) of the Employment Tribunals Act 1996 enabled the Hearing to continue without the second lay member if both parties consented. However, either party was free not to consent and in these circumstances the Hearing would be adjourned until the second lay

member was no longer indisposed. The Tribunal explained that the second lay member was drawn from the panel of employees' representatives and that the remaining lay member, Mr Akhtar, was drawn from the panel of employers' representatives.

12. The Tribunal explained that, if the parties did consent, then when the Tribunal made a decision, Employment Judge Evans would (if necessary) have a second or casting vote in accordance with Rule 49 of the Employment Tribunal rules. The Tribunal also explained that if the parties consented to the Hearing continuing then they would be waiving their right to object subsequently to the Claim having been decided by a two person Tribunal. Finally the Tribunal explained that, if the parties consented to the Hearing continuing, they would need to sign a document confirming their consent. There was then a 10 minute adjournment for the parties to decide what they wished to do.

13. After the adjournment both parties indicated that they wished to proceed rather than the Hearing to be adjourned and consequently consented in accordance with section 4(1)(b) of the Employment Tribunals Act 1996 to the proceedings before the Employment Tribunal being heard by Employment Judge Evans and Mr J Akhtar alone. The parties then signed a document which is on the Tribunal's file confirming that agreement.

The discussion at the beginning of the Hearing and the issues

14. The issues to be decided by the Tribunal had been agreed on 28 November 2018 at a closed Preliminary Hearing conducted by telephone. The list of issues agreed were recorded as set out below in the Case Management Summary sent to the parties on 1 December 2018.

15. The Tribunal and the parties reviewed the list of issues at the beginning of the Hearing and it was refined to a limited extent. Those refinements are set out in bold.

The issues

(1) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

(i) Were all of the Claimant's complaints of disability discrimination presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA"). Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and whether time should be extended on a "*just and equitable*" basis.

Pre-termination negotiation

(ii) Was there a pre-termination negotiation between the parties pursuant to section 111A of the Employment Rights Act 1996 ("the ERA") and, if so, was anything said or done during those negotiations which was improper in accordance with section 111A(4) of the ERA?

(iii) To what extent, if at all, is evidence of the pre-termination negotiation admissible at the final hearing?

There was discussion at the beginning of the Hearing in relation to whether this should be dealt with as discrete preliminary issue. The parties' view was that it should not. The Tribunal agreed for the following reasons:

a. There was also a disability discrimination claim. The parties both agreed that without prejudice privilege was waived in relation to the pre-termination negotiation for the purposes of the disability discrimination claim;

b. When asked how the pre-termination negotiation was relevant to the unfair dismissal claim, the Claimant's representative said that it was not. Nevertheless, given that the Claimant was not professionally represented, the Tribunal decided that the issue should be dealt with.

Unfair dismissal

(iv) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the ERA? The Respondent asserts that it was a reason related to the Claimant's capability.

(v) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'? The Claimant asserts that the dismissal was unfair because, amongst other things, the Respondent failed to support the Claimant to return to work for example by working from home or reducing her hours.

Remedy for unfair dismissal

(vi) The Claimant is not seeking reinstatement or re-engagement.

(vii) If the Claimant was unfairly dismissed and the remedy is compensation

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway?

b. would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

(viii) Was the Claimant a disabled person in accordance with the EQA at all relevant times because of anxiety and / or depression? **The Respondent had conceded by the date of the hearing that the Claimant was a person with a disability at all relevant times.**

(ix) Was the Respondent aware or ought it to have been aware, at all relevant times, that the Claimant was a disabled person?

EQA, section 13: direct discrimination because of disability

(x) Has the Respondent subjected the Claimant to the following treatment:

a. On or around 3 March 2017 sending the Claimant a letter from Mike Smith informing her that she did not need to send in any more sick notes, the consequence being that she would not receive any more sick pay;

b. Jean-Gill Abatte not speaking to the Claimant at Gill Waters' wedding on 13 May 201**7**.

(xi) Was that treatment "*less favourable treatment*", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?. The Claimant relies upon "work colleagues" as comparators.

(xii) If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

EQA, section 15: discrimination arising from disability

(xiii) Did the following things arise in consequence of the Claimant's disability:

a. The Claimant's mental state on 6 February 2017 which meant she was unable to have a lengthy telephone meeting with the Respondent;

b. The Claimant's heightened emotional responses, anxiety and inability to focus on 30 March 2018.

(xiv) Did the Respondent treat the Claimant unfavourably as follows:

a. Jean-Gill Abatte calling the Claimant at her father's bedside on 6 February 201**7** and insisting on a telephone meeting to discuss her pipeline;

b. Trevor Symonds being aggressive towards the Claimant at a meeting on 30 March 2018 at the West Retford Hotel.

(xv) **Did the Respondent treat the Claimant as set out in (xiv) (a) and (b) because of the things set out in (xiii) (a) and (b)?**

(xvi) If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

(xvii) Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

(xviii) Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

(xix) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

a. A requirement that the Claimant work in the office and make a 100+ mile round trip to do so;

b. A requirement to drive a significant amount of further miles per year;

c. Overt aggression, shouting and swearing in the office;

d. Pressure to achieve targets which the Claimant alleges were unrealistic;

e. A requirement that the Claimant return to work on a full time basis after a lengthy period of sickness absence.?

(xx) Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

(xxi) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

(xxii) If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

a. Adjusting working arrangements to allow some home working;

b. Allocating some of the Claimant's duties to another person;

c. Limiting the time the Claimant spent in head office;

d. Changing the office culture;

e. Allowing the Claimant to work part time;

f. A phased or gradual return to work.

(xxiii) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

The Tribunal asked the Claimant when the reasonable adjustments that she contended for should have been made. She said that the PCP to which she made reference had been applied from 2014 and so, given that she was at that "disabled" for the purposes of the EQA, the reasonable adjustments should have been made from 2014. The only exception to this was in respect of PCP "e" and reasonable adjustment "f": that PCP was only applied following her absence from work beginning in February 2017.

Remedy for discrimination.

(xxiv) If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

The Law

Pre-termination negotiations

16. Section 111A of the ERA provides that evidence of pre-termination negotiations is inadmissible in any proceedings on an unfair dismissal claim subject to certain exceptions. Those exceptions include where anything said or done was in the Tribunal's opinion improper or was connected with improper behaviour. In those circumstances, the pre-termination negotiations are only inadmissible to the extent that the Tribunal considers just.

17. ACAS has produced a "Code of Practice (no 4) on Settlement Agreements" ("the ACAS Code") which gives guidance on what is likely to constitute improper behaviour. The ACAS Code gives as an example of improper behaviour:

Putting undue pressure on a party. For instance:

(i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code.

18. Paragraph 12 provides:

> *Parties should be given a reasonable period of time to consider the proposed settlement agreement. What constitutes a reasonable period of time will depend on the circumstances of the case. As a general rule, a minimum period of ten calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.*

Unfair dismissal

19. Section 94 of the ERA gives an employee the right not to be unfairly dismissed.

20. Section 98(1) of the ERA provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2) of the ERA. The burden of proof to show the reason and that it was a potentially fair reason is on the employer.

21. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause it to dismiss the employee.

22. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the ERA. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.

23. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

24. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted. A claim will not succeed just because the Tribunal takes the view that the decision to dismiss was harsh if it nonetheless fell within the range of reasonable responses.

25. If the Tribunal concludes that the dismissal is unfair, section 123 of the ERA provides for a compensatory award to be made. Section 123(1) provides:

> *(1) "Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

26. It is therefore necessary for the Tribunal to consider whether the compensation awarded should be reduced to reflect the chance that the Claimant might have been dismissed fairly at a later date in any event or if a fair procedure had been used.

27. In addition, section 123(6) of the ERA requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the Claimant caused or contributed to their dismissal. In addition, section122(2) of the ERA requires the Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the conduct of the Claimant prior to dismissal.

Time limits for disability discrimination claim

28. Section 123 of the EQA provides that complaints may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

29. However conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when they do an act inconsistent with doing it, or if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

Disability discrimination

30. Section 39(2) of the EQA provides that an employer must not discriminate against an employee by subjecting her to a detriment.

31. Section 13 of the EQA provides that an employer discriminates against an employee if it treats her less favourably than it treats or would treat others because of a protected characteristic. Section 4 of the EQA provides that disability is a protected characteristic.

32. Section 15 of the EQA provides that an employer discriminates against a disabled person if it treats her less favourably because of something arising in consequence of her disability and it cannot show that the treatment is a proportionate means of achieving a legitimate aim.

33. Section 20 of the EQA imposes a duty on employers to make reasonable adjustments to premises or working practices to help disabled job applicants and employees. A

failure to comply with this duty to make reasonable adjustments is a form of discrimination (section 21).

34. The duty can arise in three circumstances, the first of which is relevant in this case: where a PCP puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3)).

35. Section 20 is supplemented by Schedule 8 to the EQA. Paragraph 20 of Schedule 8 now provides that the duty to make reasonable adjustments only arises where the employer knows or ought reasonably to know of the disabled person's disability and of the substantial disadvantage at which the person is placed.

36. Pursuant to section 136 of the EQA, it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. If the Claimant does not prove such facts, she will fail.

37. Where the Claimant has proved such facts then the burden of proof moves to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

Findings of Fact

38. We are bound to be selective in our references to the evidence when explaining the reasons for our findings. However, we wish to emphasise that we considered all the evidence in the round when reaching our conclusions.

General findings of fact

39. The Claimant was employed by the Respondent as its sales manager from 1 March 2005 to 14 March 2018.

40. On Friday 3 February 2017 the Claimant asked Mr Taylor if she could take unpaid leave because her father was gravely ill. It seemed possible that he would die in the very near future and he had been put on an end-of-life pathway. The Claimant explained to the Tribunal in her oral evidence that she had told Mr Taylor that she did not expect him to pay her whilst she was absent. Mr Taylor immediately agreed that the Claimant could take unpaid leave. He was, in the words of the Claimant, “very decent about it at that time”. The Claimant left work in a hurry. She did not have time to carry out a handover of her work before leaving.

41. On Monday 6 February 2017 Mr Abatte telephoned the Claimant to seek handover information from her. The Claimant was at her father’s bedside. She understandably felt unable to speak with Mr Abatte. She did not therefore provide him with the information requested. Mr Taylor subsequently sent the Claimant a text message asking her to get in touch when she could in relation to the necessary handover.

42. Within a week to 10 days of the Claimant’s unpaid leave beginning, she obtained a fit note from her GP indicating that she was not fit for work as a result of stress and anxiety. The Claimant did not send an explanatory letter with the fit note: for example, she did not state that she wished to change the nature of her absence from unpaid leave to sick leave.

43. It is clear that from shortly after the beginning of her unpaid leave until the date of the Hearing, the Claimant has endured a very difficult period. Her father has defied medical prognosis and is still alive despite being put on an end-of-life pathway three times. During the whole of this period the Appellant has been her father's carer. She provides him with care for 12 hours a day, from 8 a.m. to 8 p.m. five days a week. She also provides him with care for 24-hours a day for one 48-hour period each week.

44. Mr Smith of the Respondent wrote to the Claimant on 3 March 2017 (page 62A) noting that Mr Taylor had agreed to Claimant taking a period of unpaid leave to care for her father and stating "as Alan has agreed to your absence from work you do not need to send in any more sick notes to cover your absence."

45. Mr Donkersley wrote to the Respondent by email on behalf of the Claimant on 7 March 2017 indicating that the Claimant had submitted sick notes so that she would receive statutory sick pay. He received no reply and sent a further email on 30 March 2017 (page 62E). Again no reply was received and the Claimant herself emailed Mr Taylor on 6 April 2017 (page 63 A). Mr Parnell then replied on behalf of the Respondent on 6 April 2017. He said:

> *Unfortunately, there had been a misunderstanding regarding the status of your absence and this will be rectified in the next payroll run. You will be paid up to 3 February 2017 and thereafter you will receive SSP in accordance with the statutory rules.*
>
> *We believe that, as per your request to Alan Taylor, you were taking unpaid time off to care for dependents, namely your father. We are sorry to hear that he is so unwell and that this is detrimentally affecting your health also.*

46. The Claimant did then indeed receive SSP as promised.

47. The Respondent invited the Claimant to a welfare meeting on 3 May 2017 but on 29 April 2017 she indicated that she had been signed off work sick until 26 May 2017 and so would be unable to attend. On 3 August 2017 (page 66) the Respondent asked the Claimant to attend a medical examination on 14 August 2017. That resulted ultimately in a brief medical report from Dr Ahmed dated 13 October 2017 (page 71). In that letter Dr Ahmed noted that the Claimant had a history of anxiety and depression. It noted that her symptoms were exacerbated in February 2017. It concluded:

> *… due to the nature of her father's illness and variation in his day-to-day health, it is difficult for me to suggest a possible date of returning to work at this stage.*

48. The Respondent then obtained further medical report from Dr Bassi following an interview he had held with the Claimant on 8 December 2017 (page 73). He explained that he had had two interviews with the Claimant. He described the trigger for her mental health problems and the nature of them. He then concluded:

> *Mrs Morris feels there is no definite end to her problems at present and cannot envisage returning to work for at least six months. It may indeed be longer than that.*
>
> *On balance, it is my opinion that she is unlikely to return to work in her current role at B Taylor and Sons Transport Ltd, owing to Health Reasons.*

49. On 18 December 2017 the Respondent wrote to the Claimant inviting her to a meeting on 3 January 2018 to discuss the report of Dr Bassi "and to make a decision as to what steps, if any, to take in relation to your ongoing absence from work". The letter continued that the Respondent would take a decision about what steps to take in any event if the Claimant did not attend the meeting.

50. The Claimant and Respondent exchanged a considerable number of emails in relation to the meeting which was finally arranged for 16 February 2018. The Respondent's notes of the meeting are at page 79.

51. The Tribunal finds that at that meeting the Claimant told the Respondent that she was unable to give a date when she would be able to return to work. This was because she was not prepared to place her father in residential care and intended to continue to be his carer until he died. However, she did not know when he would die. The Tribunal finds that at that meeting the Claimant told the Respondent that in light of her caring responsibilities it was not practicable for her to have a phased return to work, to work part part-time or to perform some work from home. The Tribunal finds that the Claimant did, however, say that at some point following her father's death she would return to work and indeed she confirmed this by email dated 21 January 2018 (page 81). She also indicated that a "phased return incorporating working from home" would be acceptable *once she was able* to return to work following her father's death.

52. Following the meeting on 16 February 2018 there were settlement discussions as set out below. Those did not result in the Claimant's employment ending on agreed terms. Consequently, on 14 March 2018 Mr Parnell of the Respondent wrote to the Claimant (page 101). In his letter he stated that the Respondent had decided to terminate the Claimant's employment with immediate effect, making a payment in lieu of notice. The letter referred to the meeting on 16 February 2018 and stated "you said that you were unlikely to return to work for us in the foreseeable future and, on this basis, I have decided to end your employment".

53. The Claimant appealed her dismissal by letter dated 19 March 2018 (page 103). Her grounds of appeal may reasonably be summarised as follows:

    53.1. the Respondent had not "followed procedure in attempting to find ways to enable my return to work, which makes the dismissal unfair";

    53.2. "you have not explored, or discussed with me any options regarding flexible working, working from home or part-time working; all of which would resolve the main issue of the 3 to 4 hour commute each day";

    53.3. The Respondent appeared "to also have not considered how you are going to deal with my disability under the 2010 Equality Act".

54. The Claimant's appeal was heard on 30 March 2018. The Tribunal finds that during the course of that appeal meeting the Claimant accepted (notwithstanding her grounds of appeal) that as at the date of the appeal she was unable to carry out any work for the Respondent (whether following a phased return to work, part-time or at home). The Tribunal also finds that at that meeting the Claimant indicated that she would not be fit to return to work immediately following the death of her father due to the depression from which she was suffering. The Tribunal finds that the Claimant did say, however, that she would like to return to work at some point in the future.

55. Following the meeting on 4 April 2018 Mr Taylor wrote to the Claimant (page 106) upholding the decision to dismiss her. He stated:

    The primary reason for my decision is that you have been off work for 15 months and, by your own admission, you do not know when you will be well enough to return to work. We cannot keep your job open indefinitely. This should not discourage you from applying to as in the future should a suitable vacancy arise.

56. The Tribunal finds that the reason for Mr Parnell taking the decision to dismiss the Claimant and for Mr Taylor rejecting her appeal against that decision was (1) the length of her absence from work to the date of her dismissal; and (2) the fact that no timescale could be placed on her possible return to work.

How the Respondent covered for the Claimant during her sickness absence

57. The Tribunal finds that prior to the Claimant's ill-health absence she had worked as the sales manager for the Respondent and another employee, Lisa Sutcliffe, had worked as sales manager for the associated business of B Taylor & Sons Transport Limited. The Claimant worked mainly with international sales and Ms Sutcliffe with domestic sales, but their roles overlapped.

58. After the Claimant's sickness absence began, the Respondent transferred another employee, Ms Snodden to cover her role. As at the date of the Hearing, Ms Snodden was performing that role on a permanent basis.

The Pre-termination negotiation issue

59. The Respondent intimated that it would make a settlement offer to bring about the termination of the Claimant's employment on agreed terms at the meeting which took place on 16 February 2018. The Respondent then sent Claimant a draft settlement offer on 22 February 2018 (page 83).

60. The Claimant raised a query in relation to the draft settlement agreement by an email dated 27 February 2018 (page 97). Mr Parnell of the Respondent replied on 1 March 2018 (page 95). The Claimant raised a further query by an email dated 2 March 2018 (page 94). Mr Parnell replied on 5 March 2018 (page 93 A). The Claimant replied on 6 March 2018 saying that she would need further time to consider the offer and seek advice. She then wrote again to Mr Parnell on 11 March 2018 (page 93 A1) stating that she did not accept the offer made and that she believed she should receive an ex-gratia payment of £10,000, 12 weeks' notice and an amount in respect of accrued holiday pay. Mr Parnell responded on 12 March 2018 stating that "it seems from your email that we are too far apart to agree terms and so the Settlement Agreement is now withdrawn".

61. The sticking point in the negotiation was, in effect, the meaning of clauses 1.1, 1.2 and 2.1 of the draft settlement agreement (page 84). The Claimant's position in the negotiations was that these required the Respondent to pay her 12 weeks' notice and her accrued holiday pay (clause 1.2) and, in addition, an ex-gratia payment of £10,000 (clause 2.1). The Respondent's position was that these required it to pay the Claimant her normal remuneration until 28 February 2018, her accrued holiday pay and an ex-gratia payment of £10,000.

Reasons for delay in presenting claims

62. The Claimant's claim that the Respondent has discriminated against her goes back as far as 2014: that is when she says the PCPs giving rise to the need to make reasonable adjustments were applied to her. The Tribunal makes the following findings in relation to the reasons for her delay.

63. In her evidence to the Tribunal the Claimant said that she had not raised her dissatisfaction internally (for example by raising a grievance) because it was "not that kind of company". When the Tribunal asked her when she had become aware of the possibility of bringing a claim in relation to a failure to make reasonable adjustments, she said that this was not until early 2018 when she had sought the advice of a solicitor in relation to the draft settlement agreement. When asked why she had not sought advice at an earlier stage, she had said "I am not a trade union type of person, I had never belonged to a trade union, I am not militant in anyway at all. I hoped it would be resolved in a civilised way".

64. The Tribunal finds that the Claimant was aware of the factual matters which she contends give rise to a claim for a failure to make reasonable adjustments in 2014

(with the exception of PCP "e" and reasonable adjustment "f"). The Tribunal finds that the Claimant decided not to pursue them formally at that stage or seek legal advice in relation to them because she did not wish to be perceived as someone who insisted on her rights and, also, because at the time the issue was not as important to her as it was following her dismissal. In addition, following the beginning of her sick leave in February 2017, her ability to focus on such matters was undoubtedly affected by her illness and her caring responsibilities.

Conclusions

Issue (i): Time limit issues

65. The Claimant's Early Conciliation period ran from 16 April 2018 to 16 May 2018 and she presented her claim to the Tribunal on 26 May 2018. Consequently, any cause of action arising on or before 16 January 2018 is in principle out of time. The consequence of that is that the Tribunal has no jurisdiction to hear any of the Claimant's discrimination claims except those relating to the meeting on 30 March 2018, unless the Tribunal finds that it would be just and equitable to extend time.

66. The Tribunal has concluded that it would not be just and equitable to extend time in relation to the Claimant for reasonable adjustments in respect of PCPs (a) to (d) and reasonable adjustments (a) to (e) for the following reasons:

    66.1. The length of the delay: a failure to make reasonable adjustments is for the purposes of section 123 of the EQA treated as an omission. Section 123(3) of the EQA provides that in circumstances such as these a failure to make a reasonable adjustment is treated as being done when the employer decides not to make it. Further, section 123(4) provides that in the absence of evidence to the contrary a person shall be taken to have decided upon a failure when they do an act inconsistent with doing it or when the period expires within which they might reasonably be expected to have done that act.

    66.2. The Claimant's evidence in relation to PCPs (a) to (d) and reasonable adjustments (a) to (e) was at best vague. However the Tribunal concludes that given the Claimant contended that the PCPs had applied to and disadvantaged her from some time in 2014, then the application of the above test means that they should be treated as having been done by the Respondent by no later than mid-2015. As such the claims were presented approximately two and a half years out of time. That is a very substantial delay indeed.

    66.3. As stated above, the Claimant's evidence in relation PCPs (a) to (d) and reasonable adjustments (a) to (e) was at best vague and so too was the Respondent's. The Tribunal concludes, therefore, that the cogency of the evidence in relation to the reasonable adjustments claim was very substantially affected by the delay.

    66.4. The reasons for the delay – the Claimant not wishing to be perceived as someone who insisted on her rights and the fact that at the time the matters now complained of did not assume as much importance in the mind of the Claimant as they did following the termination of her employment – are not a reasonable or sufficient explanation for the first 18 months of the delay.

    66.5. The Claimant was aware of the facts giving rise to the cause of action in 2014 but chose not to take legal advice in relation to them until 2018. That is a very long delay indeed in seeking legal advice.

67. The causes of action of the Claimant's remaining discrimination claims all arise during the period of the Claimant's absence from work which began in February 2017. The delay is much shorter. The cogency of the evidence has not, the Tribunal concludes,

been substantially affected by the delay. The Tribunal has decided that it is just and equitable to extend time so that these claims can be heard because for the whole of the delay the Claimant was absent from work with stress and anxiety and burdened by her caring responsibilities for her father. These are matters which will have affected her ability to focus on her legal rights and the possibility of pursuing a claim.

Issues (ii) to (iii): The Pre-termination negotiation issue

68. The Claimant argued that the Respondent had been guilty of improper conduct in relation to the draft settlement agreement in two ways. First, it had placed undue pressure on her to sign it: on 5 March the Respondent had asked to have the settlement agreement back by 8 March. Secondly, it had behaved improperly in the way that it had interpreted the draft settlement agreement.

69. The Tribunal concludes that the Respondent was not guilty of improper conduct in relation to the draft settlement agreement and consequently evidence of negotiations relating to it are inadmissible in the Claimant's unfair dismissal claim. This is for the following reasons:

    69.1. The draft settlement agreement was first sent to the Claimant on 22 February 2018. There were then fairly routine back-and-forth communications in relation to its contents until the Claimant indicated that she would not accept the offer made in an email dated 11 March 2018. That is to say the period between the offer being made and the Claimant's refusal was two weeks and three days. The Tribunal concludes that in principle the time allowed by the Respondent for the Claimant to decide whether to accept the offer was reasonable.

    69.2. Turning to the Claimant's specific point that the conduct of the Respondent was improper because on 5 March 2018 the Respondent requested a reply by 8 March 2018, the context for this request was that by 5 March 2018 the Claimant had had the draft settlement agreement for one week and four days. She was in effect being given three days to reach a view on whether she wished to accept this in light of the Respondent's response to her query of 2 March 2018. The Tribunal concludes that this was a reasonable period of time. Further, when the Claimant requested additional time, she was given it. Taking into account the provisions of the ACAS Code of Practice, the Tribunal concludes that the Respondent did not behave improperly: it did not put undue pressure on her by not giving her reasonable time considering the contents of the draft settlement agreement.

    69.3. The Claimant's second point was that the Respondent acted improperly in construing the draft settlement agreement as it did and so adopting the position that she was not entitled to both 12 weeks' notice and also an ex gratia payment of £10,000. The Tribunal is not at all convinced that adopting a particular position in relation to the drafting of a particular clause in a draft settlement agreement is capable of being improper conduct. However, the Tribunal can conclude without hesitation that the Respondent did not act improperly in this case: its construction of the draft settlement agreement was plainly right. Under its clause 1.1, the Claimant agreed that her employment would terminate on 28 February 2018. The effect of clause 1.2 was that she would only be entitled to her normal remuneration until that date. The effect of clause 1.1 and 1.2 is to remove the Claimant's right to notice of the termination of her employment by agreeing a date on which her employment would end. Consequently, properly construed, the draft settlement agreement entitled the Claimant to receive her normal remuneration until 28 February 2018, accrued holiday pay and an ex gratia payment of £10,000.

70. The Tribunal notes that in fact the admissibility of the pre-termination negotiations was in fact of academic interest only, given the waiver by both parties of without prejudice privilege in relation to the disability discrimination claim, and the fact that the Claimant

did not put forward any argument that the way in which the pre-termination negotiations were conducted made her dismissal unfair.

Issues (iv) to (vii): The unfair dismissal claim

The principal reason for dismissal

71. In light of its findings of fact above, the Tribunal concludes that the principal reason for the Claimant's dismissal was that (1) by the date her appeal was rejected the Claimant had been absent from work for 14 months as a result of ill-health (for all but the first few days of such absence when she was on unpaid leave); and (2) she was unable to provide any estimate whatsoever of when she would be well enough to return to work.

72. The episode of mental ill-health which was responsible for her absence began shortly after she had taken unpaid leave in early February 2017. Exactly when it began is unclear, but the Claimant's evidence which the Tribunal accepted as true was that she had provided her first "fit note" in either the week commencing 6 February 2017 or the week commencing 13 February 2017, so her ill-health began very shortly after she had taken unpaid leave.

73. It is clear that her ill-health was caused or at the very least contributed to by her highly commendable decision to provide care to her father personally until his death. However she and the Respondent regarded her absence as being due to her ill-health, and this is reflected in the fact that she anticipated that her ill-health (and absence) would continue for at least some time after her father's death.

Whether the reason for dismissal was a potentially fair one

74. The factual reason for dismissal arose from the Claimant's ill-health and was as such a potentially fair reason because it related to her capability.

Whether the dismissal was fair or unfair in accordance with section 98(4) of the ERA

75. In the list of issues agreed before the Hearing the Claimant contended that the dismissal was unfair because the Respondent "failed to support the Claimant to return to work for example by working from home or reducing her hours". In light of its findings of fact above, the Tribunal concludes that the Respondent was most certainly not guilty of any such failures. It is clear that the Respondent discussed the possibility of the Claimant doing some work from home or working reduced hours at the meeting in February 2018 and, also, at the appeal meeting. However on both occasions the Claimant said that she was not able either to work from home or to work reduced hours.

76. In deciding whether the dismissal was fair, the Tribunal has taken account of the following:

    76.1. **The Respondent acted on an up to date medical report:** The Respondent sought a medical report in December 2017 before reaching any decision whether to dismiss. As set out above, Dr Bassi was unable to identify a date when the Claimant would be able to return to work and, indeed, stated that it was his opinion that she was unlikely to ever be able to return to work in her current role. As such, as at the date of dismissal, the up-to-date medical evidence was unable to identify a date when the Claimant would be able (or would be likely to be able) to return to work.

    76.2. **The Respondent consulted with the Claimant about the medical report and sought her views on it:** The Respondent discussed the medical report with the Claimant at the meeting in February 2018. The Claimant did not really

disagree with its conclusions except that she believed she would be able to return to work at *some point* in the future, although she was quite unable to identify when. In short, her ill-health would not dissipate until her father died and she did not know when that would be. Further, she indicated that it was likely that her mental health would not recover for a further period following her father's death.

76.3. **There was no identifiable timescale for the Claimant's return to work:** By the time of the Claimant's dismissal she had been absent from work for 14 months and no date could be identified by her, her doctor or the Respondent by when she would be likely to return.

76.4. **There were no adjustments which could be made to enable the Claimant to carry out some work**: The Respondent discussed with the Claimant at the meeting in February and at the appeal meeting whether there was some work she could perform notwithstanding her ill-health, whether that be part-time or at home. The Claimant's position was that there was not.

77. The Claimant's argument as presented in her closing submissions at the Hearing was, in effect, that her dismissal was unfair because she would be able to return to work at some point in the future and there was no reason for the employer not to simply wait until she could do so. They had managed 14 months without her performing the sales manager role and could wait for longer, much longer if necessary.

78. Having heard the evidence of Mr Parnell and Mr Taylor, the Tribunal concludes that as of April 2018 there was no *immediate* pressing reason to dismiss the Claimant: her role was being performed by Ms Snodden and the ongoing costs of keeping the Claimant "on the books" were limited. However, the Tribunal also concludes that the Respondent reasonably took the view that it was unsatisfactory for its business to have a situation where a sales managers was *indefinitely* absent: Mr Taylor noted that the customer base was a "moving object" and that an employee performing the role of sales manager who was absent for a prolonged period of time would over time lose contact with the Respondent's clients – some clients would leave, new ones would arrive etc. What Mr Taylor was in effect saying was that the role of sales manager involves maintaining relationships with the Respondent's clients on a day to day basis and that those relationships could not be properly tended to if a sales manager was indefinitely absent but might at some uncertain point in the future return: their "cover" would have built up their own relationships with clients, including new clients that the Claimant had never dealt with, and the value of the cover's relationships with clients would inevitably increase with time. It was therefore to the disadvantage of the business for the absent sales manager then to return after a very lengthy period of absence. They would not have the relationships built up by their "cover" and the value of their own relationships with the Respondent's clients would have diminished over time.

79. Taking matters in the round, the Tribunal concludes that the dismissal was fair by reference to section 98(4) of the ERA. Before dismissing the Claimant Respondent obtained up-to-date medical evidence and that evidence was quite unable to predict when the Claimant would be able to return to work (and suggested that in fact she would not be able to return to her current role at all). The Respondent then consulted with the Claimant. Whilst she did not agree that she would not be able to return to work at all, she was also unable to provide any indication of when she actually would be able to return. The Respondent considered with the Claimant whether notwithstanding her ill-health absence there was any work that she could do for it, but the Claimant's view was that there was not. Having reached the decision to dismiss, the Respondent gave the Claimant the opportunity to appeal. At the appeal hearing the Claimant was still unable to give the Respondent any idea of when she would be able to return to work and there is no suggestion that the underlying medical position had changed. The Respondent had a clear business need (for the reasons set out in the previous paragraph) to draw a line under the Claimant's employment if she was unable to

identify when she would be able to return to work. Given these matters it was quite clearly within the band of reasonable responses for the Respondent to decide to dismiss the Claimant.

80. In reaching this conclusion the Tribunal has taken into account the lengthy service of the Claimant and, also, that the Respondent is a business of significant size.

81. The Claimant did not at the Hearing present any real argument that the dismissal had been procedurally unfair (although she criticised the location of the appeal meeting and the way in which Mr Simmons spoke to her at it). The Tribunal concludes that the procedure followed was fair: in particular medical evidence was obtained, and a meeting was held to give the Claimant the opportunity to comment on it prior to the decision to dismiss being taken.

82. The Tribunal therefore concludes that the Claimant was fairly dismissed.

83. **Polkey**: if the Tribunal had concluded that the dismissal was unfair (and it has not so concluded) because the Respondent had acted prematurely (i.e. it should have given the Claimant further time to return to work), the Tribunal would have also concluded that the Respondent would certainly have dismissed the Claimant fairly by virtue of her ongoing ill-health absence by the end of 2018. It would have so concluded because as at the date of the hearing in March 2019 the Claimant's ill-health subsisted, her father was still alive, and she was still not well enough to return to work. It should be noted that in these circumstances the compensatory award of the Claimant would have been very limited indeed because she had by the date of her dismissal exhausted her statutory sick pay and so would not have received wages for the rest of 2018 if she had not been dismissed.

84. **Blameworthy or culpable conduct**: If the Tribunal had found the Claimant's dismissal to be unfair (which it has not), the Tribunal would not have concluded that the Claimant was guilty of blameworthy conduct. Consequently, it would not have reduced her basic award or her compensatory award on the basis set out in issue (vii) (b) or (c).

Issue (viii) and ix): Disability

85. The Respondent has conceded that the Claimant was at all relevant times a disabled person. The Tribunal also concludes that the Respondent was aware or ought to have been aware of this fact at all relevant times because it accepts as true her evidence that she told Mr Bates, her then manager, when she was first diagnosed with anxiety and depression in 2010.

EQA, section 13 direct discrimination because of disability

86. The Tribunal concludes that the Claimant was sent a letter on 3 March 2017 by Mike Smith as set out in issue (x)(a) and also that Mr Abatte did not speak to her at Gill Water's wedding on 13 May 2017 as set out in issue (x)(b).

87. So far as the letter is concerned, the Tribunal concludes that the reason it was sent was that Mr Smith understood that the Claimant was on unpaid leave, not sick leave. Consequently he was of the view that there was no need for the Claimant to submit sick notes to justify her absence. The Tribunal so concludes because this was the explanation of Mr Parnell for what happened and it is obviously consistent with the letter which he sent to the Claimant on 6 April 2017 in which he explained the misunderstanding and said that statutory sick pay would be paid. Further, the Tribunal had found that the Claimant had not expressly said to the Respondent that she wished to change the status of her absence from unpaid leave to sick leave. She had just sent in the fit note. There was as such obviously room for a misunderstanding.

88. The Claimant could not identify an actual comparator, i.e. someone who had been paid statutory sick pay after initially going on unpaid leave (or in otherwise comparable circumstances). Her argument was, in reality, that the Respondent treated employees who were absent due to physical ill-health better than those who were absent due to mental ill-health and so a hypothetical employee who had taken unpaid leave and then gone on sick leave as a result of physical ill-health would have been paid statutory sick pay on submitting a fit note.

89. The Tribunal concludes that this is not the case. It so concludes because it is able to make a positive finding that the reason that the Claimant was not initially paid statutory sick pay when she submitted a fit note was that the Respondent had quite understandably taken the view that she was on unpaid leave (because that is what she had expressly agreed with Mr Taylor) and not on sick leave. As such the Claimant was not treated less favourably than the hypothetical comparator identified in the previous paragraph. The Tribunal is satisfied that such a comparator would not initially have received statutory sick pay either if the Respondent had believed that the reason for their absence was that they had agreed with Mr Taylor that they would take unpaid leave.

90. So far as Mr Abatte not speaking to the Claimant at the wedding is concerned, the Claimant stated in her further particulars (page 43) that he had spoken to a number of other employees of the Respondent but not to her. The comparators she named were Ms Stevenson, Mr Moore, Ms Price and Mr Bates. The Claimant remarked in her further particulars "surely if there were no issues, any decent human being and indeed my line manager would have spoken to me…" The Tribunal concludes that there was a material difference between the circumstances of the Claimant and those other employees: namely that the Claimant was off work on sickness absence and had made very clear to Mr Abatte when he had spoken to her on 6 February 2017 that she did not wish to speak to him about work. As a result, there was an awkwardness between them. As such, the comparators are not appropriate comparators.

91. The Tribunal concludes that an appropriate hypothetical comparator would be another employee who had been off work for a similar period of time (whether as a result of physical ill-health or some other reason) and with whom Mr Abatte had similarly previously had a conversation in which the comparator had made clear that they did not wish to speak about work.

92. The Tribunal concludes that the Claimant has failed to prove that such a comparator would have been treated differently to her. This is in particular because she has failed to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that Mr Abatte treated her as he did because she was absent from work due to mental ill-health. A far more obvious explanation is that Mr Abatte did not speak to her because he was uncertain how best to approach her in light of her absence from work and their conversation on 6 February 2017. The Tribunal is reinforced in this conclusion by the fact that the only other person that the Claimant identified as not having been spoken to Mr Abatte was someone whom Mr Abatte had personal reasons not to speak to.

93. The Claimant's claim that she was subjected to direct disability discrimination therefore fails and is dismissed.

Issues (xiii) to (xvii):EQA, section 15: discrimination arising from disability

94. The Tribunal finds that:

    94.1. The Claimant's mental state on 6 February 2017 meant she was unable to have a lengthy telephone meeting with the Respondent. However the Tribunal does not find that this arose in consequence of her disability. Rather it arose because she believed at the time that she was at her father's deathbed.

94.2. The Tribunal also finds that at the appeal meeting on 30 March 2018 the Claimant did suffer from heightened emotional responses, anxiety and inability to focus. The Tribunal finds on the balance of probabilities that these things arose in consequence of the Claimant's disability.

95. The Tribunal finds that the Claimant did treat the Claimant unfavourably as follows;

95.1. By Mr Abatte calling the Claimant when she was at her father's bedside on 6 February 2017 in order to discuss her "pipeline" (i.e. prospective work of the Respondent for which she was responsible).

95.2. By Mr Symonds' behaviour towards the Claimant at the meeting on 30 September 2018. In relation to Mr Symonds' behaviour at the meeting, however, having heard the evidence of Mr Taylor and the Claimant in relation to the meeting, the Tribunal concludes that Mr Symonds did not behave "aggressively" at that meeting. Rather, the Tribunal finds that Mr Symonds behaved in what might reasonably have been regarded as an insensitive way in light of the Claimant's circumstances (caring for her terminally ill father) by pushing her hard in relation to when she might be able to return to work and pointing out that the logic of her having decided to care for her father until he died meant that it was impossible to foresee when the Claimant would be both able and fit to return to work. In so finding, the Tribunal has preferred neither the evidence of Mr Taylor nor that of the Claimant. Rather it has found that what occurred was somewhere in between what each suggested, having regard to the contents of the note of the meeting at page 110 and, in particular, the fact that it records that after the Claimant got upset Mr Symonds asked if the Claimant was abandoning her appeal. This suggests insensitivity on his part but not aggression.

96. Because the Claimant's mental state on 6 February 2017 did not arise in consequence of her disability, it is not necessary to consider whether the unfavourable treatment set out in paragraph 95.1 was because of it. However if it had been necessary for the Tribunal to decide this question, it would have concluded that it was not. The reason for the unfavourable treatment was Mr Abatte's wish to know about the prospective work of the Respondent.

97. The Tribunal concludes that the unfavourable treatment set out in paragraph 95.2 was not because of heightened emotional responses, anxiety and inability to focus. Rather it was because Mr Symonds, as the Respondent's lawyer, was robustly looking after the Respondent's interests by trying to point out the logical consequences of the Claimant having decided to care for her father until his death.

98. In light of these conclusions, issues (xvi) and (xvii) do not arise. The Claimant's claim that she was discriminated against contrary to section 15 of the EQA fail and are dismissed.

Issues (xviii) to (xxiii): reasonable adjustments

99. In light of the Tribunal's decision above in relation to limitation issues, the only reasonable adjustment claim which needs to be determined is that based on the alleged PCP said to be a "requirement that the Claimant return to work on a full time basis after a lengthy period of sickness absence".

100. This claim fails at the first hurdle: it is quite clear that no such PCP was applied by the Respondent during the Claimant's period of sickness absence beginning in February 2017. The Respondent was willing for the Claimant to have a phased return to work (or to do some work from home, or to work part time) and this was made plain to her both at the meeting in February 2018 and in the meeting on 30 March 2018.

101. Further, even if such a PCP had been applied (and it was not), the proposed reasonable adjustment of a "phased or gradual return to work" would not have assisted her, and as such would not have avoided any disadvantage caused to the Claimant. This is because it was the position of the Claimant up to and including the date of her dismissal that she was unable to perform any work whatsoever by virtue of her caring responsibilities.

102. The Claimant's claim that the Respondent failed to make reasonable adjustments therefore fails and is dismissed.

103. It is not necessary for the Tribunal to determine issue (xxiv) because none of the Claimant's claims have succeeded.

104. Finally the Tribunal finishes by observing that the Claimant deserves great respect for her decision to care personally for her father until he dies.

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Employment Judge Evans

Date: 17 April 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS