Case Number: 1600022/2017

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Parry

Respondent: Gwynedd Council

Heard at: Caernarfon **On:** 4 – 8 December 2017

Before: Employment Judge T Vincent Ryan
Ms C O Peel
Mrs L V Owen

Representation
Claimant: Mr R Carter, Counsel
Respondent: Mr G Edwards, Solicitor

JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claimant's following claims are well-founded and succeed (but all other claims raised by her in table 1 of the Schedule appearing at pages 31 – 46 of the trial bundle fail and are dismissed) namely:

    (1) The claimant was unfairly dismissed by the respondent for a reason said to be a substantial reason on the 12 December 2016. (See incident numbered 1 in table 1 of the claimant's said schedule page 31).

    (2) The respondent discriminated against the claimant by treating her unfavourably because of something arising in consequence of her disabilities by dismissing her in circumstances that the respondent could not show to be a proportionate means of achieving a legitimate aim. (page 34 and 35).

    (3) The respondent discriminated against the claimant by her protracted suspension from work in that such prolonged suspension amounts to unfavourable treatment because of something arising in consequence of the claimant's disabilities which the respondent could not show was a proportionate means of achieving a legitimate aim. (See incident numbered 2 in the claimant's said schedule).

(4) The respondent harassed the claimant contrary to section 26 Equality Act 2010 on 6 January 2014 when the claimant's line manager pointed and ordered the claimant to leave the room during a supervision meeting. (See incident numbered 9 page 40 of the claimant's said schedule)

(5) The respondent discriminated against the claimant by treating her unfavourably because of something arising in consequence of her disability which the respondent could not show to be a proportionate means of achieving a legitimate aim when on 2 July 2013 her line manager indicated to his line manager that he was running out of patience with her, was seething, and he indicated that he wished to deal with her. (See incident number 6 page 38 of the claimant's said schedule).

(6) On or around 15 November 2011 the respondent failed in its statutory duty to the claimant to make a reasonable adjustment by allowing her full and unrestricted access to a laptop computer with specialist software loaded upon it suitable for use notwithstanding the claimant's disabilities whilst she attended work at the Pwllheli office; this failure was a continuing act of discrimination from November 2011 until the claimant's dismissal notwithstanding a brief period when limited permission was granted to her during the week of her suspension from employment on 13 January 2014 (the prolonged suspension referred to in paragraph 3 above and continuing up to the date of dismissal). (See incident number 4 in the claimant's said schedule pages 36 and 37 and incident number 9, pages 40 - 41).

(7) The respondent breached the claimant's contract of employment and specifically the implied term of trust and confidence by its failure to investigate the claimant's grievances, albeit the claimant did not accept the breach and resign on account of it but neither did she waive the breach.

(8) The Tribunal's findings at paragraphs 2 – 6 above constitute a continuing course of conduct from 2011 to the date of the claimant's dismissal; the events are inextricably linked; the claimant presented her claims of discrimination within the prescribed time limit but even if there was a break in the series of acts by virtue, for example, of the respondent's granting permission to the claimant to take her laptop to Pwllheli then it would be just and equitable to extend time to allow the Tribunal's jurisdiction.

REASONS

1. Introduction

1.1 The claimant, who is a disabled person, was employed by the respondent as a Social Worker until her dismissal for what the respondent considered to be a substantial reason other than capability, conduct, redundancy or a legal requirement. The claimant had requested some reasonable adjustments to working provisions, criteria or practices (PCPs) over a protracted period and felt aggrieved both at what she considered to be the respondent's persistent failure to comply with its statutory duty with regard to such adjustments and what she also perceived to be bullying behaviour by her line manager and harassment by some of her colleagues. The respondent had concerns over the claimant's performance. After the respondent suspended the claimant for investigation in relation to her capability by reference to skill and aptitude the claimant raised a grievance which she subsequently expanded upon. The claimant remained suspended from work from 13 January 2014 until her dismissal with notice on 12 December 2016, the decision to dismiss her being made on or about 18 October 2016; during that time neither the grievance nor the capability (or indeed any conduct) procedures had been completed and investigations were outstanding in respect of all such matters. The respondent however, unilaterally considered that both the capability and grievance procedures had come to an end. The respondent dismissed the claimant because it concluded that the employment relationship had deteriorated to the point that it said it could not justify continuing with the relationship; the respondent described this as "a breach of trust and confidence". The respondent said that the relationship had "broken and it is not reasonable or realistic to expect it to be restored".

1.2 The claimant presented a claim to the Employment Tribunal which, following case management, resulted in a two-part schedule of claims (at pages 31 – 57 of the trial bundle to which further page references refer unless otherwise stated). It has been agreed between the parties that the claims in table 1 of the said schedule being claims numbered 1 – 16 at pages 31 – 46 are to be adjudicated upon at this hearing. The twenty claims listed in table 2 of the schedule at pages 46 – 57 have been "parked" in the meantime. That said, the parties agreed that it was relevant to the opinion of the respondent's Head of Children and Family Support Department (Marian Parry-Hughes – "MPH") whether she was aware of the claimant's complaints in table 2 at the time that she had "serious doubts about whether it would be possible to repair the trust and confidence that is required from both sides of this employment relationship" (page 590). The claimant's evidence was that she did not consider the relationship to be at an end, that she wanted the grievance to be concluded and for the capability issue to be dealt with rather than have it hanging over her, so that she could continue in employment. We made no findings of fact or law regarding the

"parked" table 2 allegations at pages 46 – 57 save as to MPH's knowledge of the claimant's complaints at the relevant time in that she was aware of some of them.

1.3 Having received and heard evidence and submissions over three and a half days (4th December – lunchtime 7th December 2017) the Employment Tribunal considered its Judgment in Chambers on the afternoon of 7th and on the morning of 8th December 2017. It announced Judgment on the afternoon of the final day being 8th December 2017. The oral Judgment was long and detailed. After it the claimant queried whether the Tribunal had decided on the breach of contract claim and the respondent queried whether the Tribunal had considered its submission that some claims were presented out of time. I confirmed, with reassurance from the Non-Legal Members on the panel, that we had found (I thought I had stated) facts and findings that made clear without specific reference (for which I apologise) that the breach of contract claim succeeded and that there was a continuing act of discrimination from 2011 until the claimant's dismissal in 2016 such that all claims were in time but that in any event in respect of our findings in favour of the claimant it would have been just and equitable to extend time for those claims. Out of an abundance of caution and respect for the respective advocates, following the hearing the panel reviewed the submissions and our respective notes including our notes of the Judgment we had reached. On such self-reflection, the panel unanimously confirmed that it is satisfied with the findings in full as set out below, including as regards the claim of breach of contract and the respondent's time point. Once again, I apologise that my delivery of Judgment in the circumstances left either party in any doubt; that must be my fault. The respondent requested Reasons. I hope that these Reasons provide the required clarity.

1.4 Because of the number, nature and chronology of the claimant's claims set out in table 1 of the schedule at pages 31 – 46 we made discrete provisional findings in respect of each allegation and went on to consider whether, taken as a whole or with some individual findings considered together, there were facts from which we could decide, in the absence of any other explanation, that the respondent had discriminated against the claimant as alleged. We considered whether inferences ought to be drawn. In setting out our findings of fact and law, claim by claim, we confirm that our conclusions shown in respect of each claim is the conclusion reached having carried out that exercise, looking at each claim and putting each claim in context considering all the facts and whether inferences ought to be drawn from them.

2. The Issues

2.1 Mr Edwards for the respondent kindly produced a revised written list of issues for our reference, the matter having been discussed from the outset of the hearing, and they were endorsed by Mr Carter although he set out issues in his separate written submissions. The agreed issues were:

2.2.1 Unfair dismissal

Can the respondent establish some other substantial reason which would justify its dismissal of the claimant?

If so, was the respondent's decision to dismiss for some other substantial reason reasonable in all the circumstances?

2.2.2 Breach of contract

Did the respondent's failure to complete its investigation into the claimant's grievance amount to breach of contract?

2.2.3 Disability discrimination (disability arising from disability)

In respect of allegations 1, 2, 3, 6, 8, 11 and 14 in table 1 of the claimant's schedule:

What was the something that arose in consequence of the claimant's disabilities?

What was the unfavourable treatment?

Was that treatment arising from the claimant's disabilities?

Was there an objective justification for the treatment?

2.2.4 Failure to make reasonable adjustments

In respect of allegations 1, 2, 4, 5, 7, 9, 12, 13 and 16 in table 1 of the claimant's schedule:

What was the PCP?

What put the claimant at a substantial disadvantage and what was that disadvantage?

What would be a reasonable adjustment to remove the said disadvantage?

Was the reasonable adjustment contended for done?

2.2.5 Harassment

In respect of allegations 1, 7, 8, 9, 10, 13, 14 and 15 in table 1 of the claimant's schedule:

Did the respondent's employee engage in unwanted conduct related to the claimant's disability?

If so, did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.2.6 Victimisation

In respect of allegation 1 and 2 in table 1 of the claimant's said schedule:

What was the protected act?

What was the unfavourable treatment?

3. The Law

3.1 Unfair Dismissal

By virtue of section 94 Employment Rights Act 1996 (ERA) an employee has a right not to be unfairly dismissed by his or her employer.

Section 95 ERA describes circumstances in which an employee is dismissed as including where the contract under which he or she is employed is terminated by the employer whether with or without notice.

Section 98 ERA specifies potentially fair reasons as being those relating to capability (by reference to health or qualifications), conduct, redundancy or legal requirement. In addition to those potentially fair reasons section 98(1)(b) also permits of dismissal (subject to the provisions below) for "Some Other Substantial Reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" ("SOSR"). Section 98(4) ERA provides that where an employer has proven that the dismissal was for a potentially fair reason including the possibility of it being an SOSR then the determination of whether the dismissal is fair or unfair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee.

Such questions shall be determined by the Tribunal in accordance with equity and the substantial merits of the case. A Tribunal is to consider the reasons shown by the employer and the size and administrative resources of the employer's undertaking.

The respondent to a claim must establish the reason for the dismissal and it is for the Tribunal to determine the actual reason and whether the dismissal was fair and reasonable.

3.2 Breach of contract

In circumstances where there is an employment relationship and contract the employer ought to provide the employee with a written statement of the principal terms and conditions within eight weeks of the commencement of

employment. Terms of the contract can be written or oral express or implied.

Where such terms exist and unless there is also an agreement as to their unilateral variation, which would be somewhat unusual, the contractual terms cannot be waived, varied or revoked without agreement.

Underlying expressed terms whether written or oral there are also implied terms and principally the implied term of trust and confidence. By virtue of the implied term neither party to the relationship ought to conduct itself in a manner designed to or with the effect of seriously damaging or destroying the relationship (acting to all intents and purposes as if there was no such contractual relationship).

Parties to a contract may "accept" a breach of contract by which is meant that they object to the conduct of the other party and they hold that party to its breach, in other words they are accepting that the conduct is contrary to the contract.

If a contracting party does not object to the other party's conduct that is contrary to the terms of the relationship it may waive the breach. If a breach of an employment contract is accepted the party accepting the other's breach may treat the contract as having been ended and in the case of an employee may allege that there has been a constructive unfair dismissal.

For there to be a constructive unfair dismissal there must be a fundamental breach of contract which was causative of the resignation and an employee must not delay so long before accepting the breach and resigning that he or she can be said to have waived the breach. The latter provision is not one of mere chronology but of whether there has been a substantive waiver in all the circumstances.

3.3 Disability discrimination

Section 39 of the Equality Act 2010 (EA) provides than an employer must not discriminate against an employee and neither must an employer victimise an employee. What amounts to discrimination is defined in other sections of that Act.

3.3.1 Arising

Discrimination arising from disability section 15 EA:

This provides that a person discriminates against a disabled person by treating that disabled person unfavourably because of something arising in consequence of their disability where the treatment is not shown to be a proportionate means of achieving a legitimate aim. This provision does not apply if the alleged discriminator did not know and could not reasonably have been expected to know of the disability.

3.3.2 Reasonable Adjustments

Section 20 EA:

This provides amongst other things that where a provision, criterion or practice (PCP) of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Failure to comply with the duty amounts to unlawful discrimination.

3.3.3 Harassment

Section 26 EA:

Harassment arises where a party engages in unwanted conduct related to a relevant protected characteristic (in this case disability) and the conduct has the purpose or effect of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person (all of which taken together would be referred to throughout as having "the harassing effect").

In deciding whether conduct has the effect referred to above the Tribunal must consider the perception of the person making the allegation, the other circumstances of the case and whether it is reasonable for the conduct to have the harassing effect alleged.

3.3.4 Victimisation

Section 27 EA:

A person victimises another if it subjects the other to a detriment because the other person has done a protected act or is believed to have done so or may do so.

For these purposes, a protected act includes alleging that, for example, an employer has contravened the EA, or by doing any other "thing for the purposes of or in connection with" the EA.

3.3.5 Burden of Proof

Section 136 EA:

If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person has contravened a provision of the EA, then the Tribunal must hold that the contravention occurred. This provision and the authorities concerning burden of proof were recently clarified by the Court of Appeal in Aoyodele v City Link [2017] EWCA Civ 1913. The claimant must prove facts from which a Tribunal could find discrimination and if so, the burden then shifts to the respondent to prove that there was

no such alleged discrimination. The Tribunal must consider all evidence from whatever source at the first stage of that process.

3.4 In his submissions Mr Carter for the claimant drew our attention to the remarks of Mr Justice Underhill, then President of the EAT, in McFarlane v Relate Avon Ltd where Underhill J commented that referring to trust and confidence in this context was "unhelpful" such that focus ought to have been on specific conduct rather than resorting to general language. He also referred us to Leach v Ofcom in which both the EAT and the Court of Appeal were critical of employer respondents relying on alleged losses of trust and confidence as if it were an "automatic solvent of obligations; it is not". More is required than the attaching of that label even though that may not necessarily be gross misconduct. A Tribunal must examine all relevant circumstances in deciding the reason for dismissal and whether it is substantial and sufficient to justify that dismissal. As an example of the EAT and Court of Appeal's approach Mr Carter further cited The Governing Body of Tubbenden Primarily School v Sylvester UKEAT/0527/11

3..5 Mr Edwards for the respondent referred in his submissions to Phoenix House Ltd v Stockman and Another UKEAT/0264/15 and specifically that when an SOSR dismissal is contemplated the employer should fairly consider whether the relationship has deteriorated to such an extent the employee cannot be reincorporated into the workforce without undue disruption. In citing Hutchinson v Calvert UKEAT/0205/06 Mr Edwards emphasised that a respondent was required to prove that it genuinely believed that trust and confidence had broken down and that the reason was not "whimsical or capricious"

3.6 The respondent referred the Tribunal to Basildon and Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14 in respect of the discrimination arising claim, in which Langstaff J held there were two distinct steps to the test to be applied firstly whether the claimant's disability caused or was the consequence of or resulted in "Something" and secondly, whether the employer treated the claimant unfavourably and did so because of that "Something". In this context the Tribunal was referred to Pnaiser v NHS England and Another [2016] IRLR 170 setting out the approach to be adopted by a Tribunal in identifying whether the claimant was treated unfavourably and by whom, determining the cause of that treatment focussing on the reason in the mind of the alleged discriminator, determining whether the reason arose in consequence of the claimant's disability, which was an objective question not depending on the thought processes of the alleged discriminator. The respondent must know of the disability even if it does not know that the "Something" leading to the unfavourable treatment was a consequence of the disability.

3.7 The Trustees of Swansea University Pension and Insurance Scheme and Another v Williams UKEAT/0415/14 clarified that unfavourable treatment must be treatment measured against an objective sense of that which is adverse as compared to that which is beneficial and has the sense of "placing a hurdle in front of or creating a particular difficulty for or disadvantaging a person"; an employee such as the claimant in this case would need to show that she was not in as good a position as others generally would be.

3.8 Certain claims such as unfair dismissal and breach of contract are to be brought to the Tribunal within three months of the event/s in respect of which a claimant claims, albeit an extension of time may be permitted at the discretion of the Tribunal if it concludes that it was not reasonably practicable for the claimant to present the Tribunal within the prescribed time. Initially a three-month time limit also stands in respect of discrimination claims, but the Tribunal has a wider discretion regarding the extension of time and can extend time in circumstances where it would be just and equitable to do so; reasonable practicability does not come into the test in respect of claims of discrimination. Time starts to run from the date of the event or matter complained of or from the date of the last of a series of such acts.

4. Facts of a General Introductory Nature

4.1 The respondent is the local authority for the County of Gwynedd and is a large employer with significant resources.

4.2 The claimant was employed by the respondent as a social worker in the respondent's Child and Family Support Department from 2008 until her dismissal with notice on 12 December 2016; she was dismissed for "some other substantial reason" that is a reason other than related to capability, conduct, redundancy or legal obligation. The claimant is a disabled person because of several disabling conditions listed by her in table 1 of her Schedule of Claims. The respondent accepts that the claimant is disabled as alleged. Bearing in mind that this Judgment will be published I do not see the need to list the many and varied disabling conditions with which the claimant lives. If specific reference is required at any stages of this Judgment to a particular disabling condition then I will refer to it.

4.3 The claimant's principal place of business was the respondent's Dolgellau office where there were six social workers, including the claimant, and two administrative staff. She was managed by Mr Panther at the relevant time (MP). MP was also the line manager for the respondent's Dwyfor Team based at Pwllheli where the complement of staff was the same as at Dolgellau.

4.4 At all material times MP was line managed by Sharron Williams-Carter (SCW) who was in turn line managed by Marian Parry-Hughes (MPH).

5. Claim Specific Facts and Findings (by chronological reference to the claimant's schedule):

5.1 Incident number 10 in the claimant's schedule (pages 41 – 42) regarding the email on 9 April 2010 MP to SWC concerning the claimant's performance which the claimant says amounted to harassment:

5.1.1 **Facts**: On 9 April 2010 MP, in his capacity as the claimant's line manager, sent an email to SWC in her capacity as his line manager which email appears at pages 157A and 157B. In his email MP conscientiously raised concerns about his perception of the claimant's professional practice in language that was reasoned and reasonable. He was constructively critical. He did not use insulting or demeaning language or make personal remarks that fell outside his remit as line manager. Sometime later during a disclosure exercise in respect of the claimant's grievances she was sent a copy of the email. It was not the respondent's intention that it would come to her attention at the time or even subsequently had she not requested and been entitled to receive it. MP's reason for writing and its purpose was to alert SWC to genuine managerial concerns about the claimant's performance believed to be unrelated to the claimant's disability. He made mention of some requested adjustments but he did not complain about them and none of the critical remarks were disability related.

5.1.2 The Tribunal's **finding**: The words used by MP to SWC and his criticism of the claimant was unwanted by the claimant. It was not relevant to the claimant's protected characteristic of disability. The purpose of the unwanted conduct was not to violate the claimant's dignity or create a harassing effect. Some years later when the claimant saw the email it had that effect upon her. The claimant's perception at the time was that many managers had taken against her, were critical of her and she was self-conscious and sensitive to criticism. There is no evidence before the Tribunal to suggest that the criticism was inaccurate, malicious or capricious and we find that MP reasonably and genuinely believed his comments to accurately reflect a genuine and conscientious concern. In the light of the wording used, MP's role, his purpose in writing and the fact that the addressee was his own line manager the Tribunal concluded that in any event it was not reasonable for the conduct of which the claimant complains to have the effect upon her which she claims it had. For these reasons, this claim fails and is dismissed.

5.2 Incident number 3 in the claimant's schedule at pages 35 and 36 an allegation that MP stated on 28th June 2011 within the claimant's hearing that "she will have to go" and "she is a liability" in reference to her which the claimant says amounts to discrimination arising from disability:

5.2.1 **Facts**: Whilst using a toilet in a corridor adjoining or near MP's office the claimant overheard MP speaking on the telephone. MP has no recollection of the conversation and denies being of the view or ever saying at the material time that the claimant either had to go (implying she ought to leave her employment) or that she was a liability. The claimant believes that she heard both phrases used and has assumed they were used

about her. She believed this at the time and immediately coming out of the toilet approached MP and said that she had overheard him. We find that the claimant overheard a conversation in the circumstances she has described in which MP used the words "liability" and used the words "she will have to go". Although we cannot go so far as to say that the latter comment was about anyone having to leave their employment. On being challenged MP said to the claimant that if he had been talking about her and had concluded that she would have to leave her employment he would have made this very clear to her and she would know about it. He denied at the time that the comments were about her or meant what the claimant believed them to mean. We find this based on the claimant's evidence of the conversation. We find further that the claimant was sensitive at this time because a short time before the said conversation her work laptop which had specialised software downloaded on it specifically to assist the claimant in view of her disabilities had been left by her in her family car and was subsequently thrown away by her husband; it was never retrieved. The loss of the laptop was a matter of considerable concern to the respondent. Future reference to this laptop will be as laptop number 1. It was replaced by laptop number 2 later.

5.2.2 **Findings**: The claimant overheard snippets of a conversation and odd words out of context and assumed that she was the subject of the comments made. This assumption lacked reasonable basis and a clear and unequivocal and contemporaneous denial was made by MP when she challenged him about it. The claimant has not proved and there are no facts from which we can find directly or by inference that the snippets of conversation quoted above amount to unfavourable treatment of the claimant or were about the claimant or that either comment made by MP was made because of something arising in consequence of the claimant's disability. The claimant's allegation is that what arose from her disability was taking time off for appointments and that the comments made displayed a negative attitude by MP which amounted to unfavourable treatment. We have not made findings of fact that would substantiate any of the limbs of section 15 EA discrimination arising from disability. This claim fails and is dismissed.

5.3 Incident number 11 in table 1 of the claimant's schedule page 42, an allegation that MP put the claimant under pressure to cancel a sick note on or around 22 July 2011 and that she should return to work which the claimant says is discrimination arising from disability:

5.3.1 **Facts:** At about the time in question the claimant telephoned her office to report that she was sick. The team rule enforced by MP was that any social workers phoning in sick must speak to him. The claimant spoke to a colleague named Medwyn, one of the administrative staff. The claimant told Medwyn that

she was going to see her doctor. On hearing of this MP sent an email to the respondent's Senior Health and Safety Welfare Advisor about this absence. MP explained in the email that he had no problem or issue with the claimant if she was ill but he indicated that he would have an issue with her if what she was trying to do was to avoid dealing with the issues arising from the loss of laptop number 1. In those circumstances MP's stated preference was for the claimant to attend work to resolve any outstanding issues and the sooner the better. This reflected MP's managerial approach namely to accept genuine ill-health absence but to encourage attendance at work if in so doing he could encourage and support resolution of any outstanding issues in circumstances where there was no ill-health. There is no evidence before the Tribunal either directly or by inference which would suggest that MP's stated approach to the Senior Health and Safety Welfare Advisor was related to the claimant's disability or that he would adopt a different approach to a non-disabled employee. In the event the claimant, of her own volition, chose to speak to her doctor and the consequence of that was that she received a fit note indicating that she was fit to return to work; she did so.

5.3.2 **Finding**: MP's email of 22 July 2011 referred to above was not related to the claimant's disability and did not amount to unfavourable treatment. It was a statement of opinion as to how best to deal with outstanding managerial problems leaving aside issues of ill health which would take priority, if indeed the claimant was ill. The email was a proportionate means of achieving the respondent's legitimate aim of resolving outstanding staff issues, ensuring adequate attendance of staff and the provision of service to the public. Whilst it might have been disproportionate for MP to insist on a sick employee ignoring or seeking revocation of a fit note saying that the employee was not able to attend work, that was not the situation in respect of the 22 July 2011 email. That email contains what the Tribunal finds to be a genuine and sincere statement that MP had no problem with the claimant's absence if she was ill. This claim fails and is dismissed.

5.4 Incident number 4 in table 1 of the claimant's schedule page 36 – 37 that on or around 15 November 2011 MP failed to put in place reasonable adjustments regarding the provision of auxiliary aids and that this amounted to a failure to provide reasonable adjustments.

Facts:

5.4.1 The claimant had several Occupational Health referrals and assessments under the Access to Work Scheme including on 10 August 2010 by Shirley Jones (pages 161 – 172. On 20 August 2010 by Gillian Lawrence (pages 163 – 171). On 24 August 2010 by Shirley Jones (pages 173 – 174). On 24 August 2010 by Clive Newton (pages 177 – 193). On 6 October 2010 by Richard Todd (pages 194 – 202). The claimant underwent a further Occupational Health referral

which resulted in a letter from Shirley Jones dated 6 December 2011 (page 279). The reports and letters referred to above indicated the claimant's need for reasonable adjustments to her working environment and the provision of auxiliary aids. Albeit some of the auxiliary aids took some time to be supplied they were supplied in accordance with the Occupational health and Access to Work reports. The claimant as we have said was based in Dolgellau where she was provided with the use of a quiet room and she was issued with laptops (latterly laptop number 2 with replacement software). The software provided was directly as recommended or was so similar as to be appropriate. She was not allowed to work from home because that was contrary to the respondent's policy that social workers should work in a team environment with the necessary support, guidance and assistance and the shared experience that this allowed. In limited circumstances (see below) the claimant was permitted to work in the Pwllheli office which was nearer to her home so that she could write up reports and deal with work in the border area between the jurisdictions of the teams. On occasion, she was asked to do other duties relevant to the Pwllheli office if that is where she was basing herself. The respondent provided for the claimant in early 2010 a specialist chair and in November 2010 a document holder and trolley. In December 2010, the respondent provided for the claimant's use a laptop, headphones, and appropriate software. In January 2011, the claimant was provided with a digital recorder and digital software.

5.4.2 In 2011 the respondent provided the claimant with a Bluetooth headset and then in March 2011 a replacement chair. Between May and July 2012, she was provided with training. Laptop number 1 was lost or discarded in June 2011 and this resulted in the respondent issuing the claimant with a final written warning which expired some eighteen months later. In the meantime, she was provided with laptop number 2 with replacement software that took some months to arrive.

5.4.3 In the light of the loss of laptop number 1 the respondent provided the claimant with a set of rules for the use of laptop number 2 and these are set out at page 277 in an email dated 16 November 2011. Laptop number 2 was to be kept at the Dolgellau office and was not to be transported out of the office without MP's specific permission. That permission had to be sought by the claimant and authorised by email (albeit in MP's absence such authorisation could come from his line manager SWC). She was required to take reasonable steps to protect the equipment from damage storing it in the boot of a car if she was transporting it and she was never to leave it in the car overnight. On the "rare occasions" when she was permitted to transport the laptop from the Dolgellau office having obtained prior authorisation, she was to ensure that any journey undertaken was uninterrupted; it was not to be taken with her when visiting clients. In fact, from the date of the provision of

laptop number 2 to a day or two before the claimant's suspension from work owing to concerns over her professional practice on 13 January 2014, she was never allowed to take laptop number 2 from the Dolgellau office. Indeed, the facility of being able to work from Pwllheli as a reasonable adjustment was only permitted if it was considered by MP on a case by case day by day by day basis as being "logistically sensible", that is that it suited the respondent. The Pwllheli office was quieter than the Dolgellau office; it was closer to the claimant's home which had the benefit of her not being as fatigued by driving long distances on a difficult road especially after a busy day as these carry with them the substantial disadvantage of exacerbating her disabling conditions. The claimant was put at a substantial disadvantage regarding the symptoms of her disabling conditions by having to work late in the evening, by driving in the dark, and driving long distances after work. The respondent accepted all that hence the agreement in principle to her having the facility of working from the Pwllheli office sometimes as it was nearer to her home.

5.4.4 The claimant however, had a significant issue with the respondent over not being freely allowed to use, and transport, laptop number 2 with its adjusted software anywhere other than at Dolgellau, namely at the Pwllheli office or when visiting clients. This would have assisted her in being better able to prepare her reports. The claimant's disabling conditions made the preparation of reports without a bespoke laptop with customised software very difficult and slow. That affected the prompt efficient and accurate preparation of reports. When the claimant worked from Pwllheli (save other than for a day or so before her suspension on 13 January 2014) she could only use MP's laptop at the Pwllheli office and that laptop was not bespoke and did not have customised accessories or software to suit the claimant's requirement for reasonable adjustments as substantiated by the various Occupational Health documentation and the assessments done by the Access to Work Team.

5.4.5 **Findings**: The claimant was subject to a PCP whereby she could work from either Dolgellau or Pwllheli offices but that she could only utilise her adjusted laptop at Dolgellau. This PCP applied throughout the period from 15 November 2011 until her dismissal except when she was granted short-term one-off permission immediately before suspension in January 2014. This had the substantial disadvantage for the claimant that whilst she was working from the Pwllheli office or at a client's home, she did not have access to software on the computer that she required to prepare reports and records and this exacerbated her symptoms and affected the quality of her work giving rise to criticism by the respondent. It would have been a reasonable adjustment to allow the claimant access and use of her bespoke laptop and adjusted software whilst working at the Pwllheli office. Such an adjustment was reasonable and

manageable even subject to instruction, monitoring and supervision by the respondent. This would have been a proportionate step given the claimant's history of having failed to take proper care of laptop number 1. It was disproportionate having provided the claimant with bespoke equipment by way of a reasonable adjustment to then place such limitations on its use. Greater access to laptop number 2 with adjustments including whilst the claimant was working in clients' houses or at Pwllheli would have removed the substantial disadvantage facing her. This substantial disadvantage was recognised by the respondent with regard to her working at Dolgellau but nowhere else. This remained a source of grievance and an issue between the claimant and the respondent from November 2011 until the claimant's subsequent dismissal. The claimant's grievances about this adjustment and request for the adjustment were never properly investigated or concluded by the respondent. This claim (incident number 4) is well founded and succeeds.

5.5 Allegation number 12 in table 1 of the claimant's schedule (page 43) - an allegation that in 2012 MP said to the claimant that she could "forget" the idea of her working remotely and flexibly because it would not be allowed and in so doing that the respondent failed to provide reasonable adjustments.

Facts:

5.5.1 The claimant alleges that she was not allowed flexible working or working from home. We find in accordance with the claimant's evidence that she did not wish to move her principal place of work permanently from Dolgellau to Pwllheli. She wanted the facility to work from the Pwllheli office to write up reports, and for the provision of flexibility in her diary to permit for this, with no late call outs or requirement to work late in or around the Dolgellau area necessitating a long-distance drive home late at night and in the dark. Those working conditions had an adverse effect on the claimant because of her disabling conditions and working in such conditions was therefore a substantial disadvantage as acknowledged by the respondent. The claimant was however able to work somewhat later at the Pwllheli office where there were colleagues that remained with her in the office after normal office hours and because she had a shorter drive home which suited her conditions better, not least because there was less late evening or early night-time driving in the dark.

5.5.2 On 19 March 2012 SWC sent an email to the claimant (page 322) enquiring constructively and considerately what it was that the claimant meant by asking for flexible working. She made this enquiry in her capacity as MP's line manager. The respondent was prepared at this stage to consider flexible arrangements for the claimant and those arrangements would include occasional working from the Pwllheli office when it was logistically or strategically convenient to the respondent. MP

was not however prepared for the claimant to work from home. MP's view was in line with the respondent's general policy which was a legitimate policy for the sensible and proportionate reason that social workers required support, assistance and supervision that was best provided within a team environment.

5.5.3 **Finding**: The requirement that social workers worked from the respondent's office premises was a PCP. The requirement that the claimant would work from one of the team's offices either Dolgellau or Pwllheli did not put the claimant at a substantial disadvantage. As the claimant had the facility of working from Pwllheli she was not put at a substantial disadvantage by the PCP preventing her from working at home either permanently or flexibly at her sole discretion. Whilst allowing home working would provide a potential adjustment, it would not have been a reasonable adjustment in all the circumstances. The policy was clear, known and for a legitimate, proportionate reason to ensure adequate security and support. The security of equipment and the issues over the claimant's capacity to fully perform her role alone were genuine practical concerns to the respondent that would not have been met by lone working from home. Against that background it would not have been a reasonable adjustment for the respondent to be obliged to permit permanent home working or complete discretion for the claimant to work flexibly from home as much as she wanted. This claim fails and is dismissed.

5.6 Incident number 6 in the claimant's schedule in table 1 (pages 45 and 46) - allegation that MP required the use in the office of fan heaters that disadvantaged the claimant because the noise affected her concentration and MP's approach was a failure to provide reasonable adjustments.

Facts:

5.6.1 The Dolgellau office was in a cold building. In addition to central heating MP also ensured that fan heaters were available to supplement the heating. He did this for the benefit of his teams. He would arrive early in work and switch on the fan heaters so that the offices were warm upon the arrival of his colleagues. He would stow the fan heaters if there was an inspection such as an inspection of electrical equipment or other fire inspection and he did this to preserve the fan heaters for future reasonable use as and when the office was cold. Team members were at liberty to regulate the heat and could turn on and off the fan heaters as they required. There was no evidence before us that the claimant was put at a substantial disadvantage by the noise of the fan heaters or that there was any requirement for the fan heaters to be kept on. The claimant could turn the fan heaters off if she wished; she could leave the room or rooms in which the fan heaters were placed and take herself to the quiet room where she could regulate the heat herself.

5.6.2 **Findings**: Fan heaters were provided as an additional source of heat for the benefit of staff for use as and when they wished and that included the claimant. There was no provision or criterion regarding the use of fan heaters. There was a practice that was extremely flexible and exercised at the will of the staff members including the claimant. There was no evidence before the Tribunal to support the claimant's assertion that this practice caused her a substantial, or any, disadvantage. She may on occasions have been inconvenienced by the noise of the fan heater and that may have temporarily or to some extent distracted her or somehow impaired her concentration. In the absence of a proven PCP causing a substantial disadvantage there was no duty on the respondent to make a reasonable adjustment. This claim fails and is dismissed.

5.7 Incident number 15 in table 1 of the claimant's schedule (page 45) - an allegation of harassment specifically referring to the conduct of a colleague JW who is said to have given the claimant an offensive book and made offensive comments about smells in the toilet.

Facts:

5.7.1 Each Christmas team members, including the claimant, would exchange gifts by way of a designated secret Santa distribution. Each employee was allocated another employee for whom to buy presents but the recipients would not know the name of the benefactor.

5.7.2 In December 2013 through the secret Santa gift-giving the claimant received a book entitled "How to poo at work". She does not know who gave it to her and JW denied it was her. The claimant stated in evidence that she could only assume it was JW because of JW's reaction when the claimant unwrapped it. JW's evidence was credible. It was clear from JW and the claimant that a few of the team reacted when the book was unwrapped by the claimant. At about this time, before and after, comments may have been made about smells in the toilet but the claimant has not proved and there are no facts from which we could infer either that any comments about unpleasant smells from the toilet were specifically made to or about the claimant, were in relation to her having IBS or any other disabling condition, or indeed that any of her colleagues were aware that the claimant's disabling conditions included IBS. We accept JW's evidence that she was unaware of this and she was not the donor.

5.7.3 **Findings**: Receipt of the said book and overhearing the said comments was unwanted by the claimant but the Tribunal does not find that either the book or comments related to the claimant's protected characteristic of disability. There is no evidence to support the contention that the purpose of the book giving or comments if they were made was to violate the

claimant's dignity or to create a harassing effect. The claimant was however, upset and it was reasonable for her to be sensitive at such books and comments if they were made, bearing in mind her perception and her personal circumstances. It was not reasonable of the claimant to conclude however that JW had engaged in the conduct of which the claimant complains or that any of JW's conduct was related to her disability particularly as she was unaware of the relevant disability. This claim fails and is dismissed.

5.8 Incident number 6 in table 1 of the claimant's schedule (page 38) - an allegation of discrimination arising from disability where on 2 July 2013 MP stated in an email to a colleague that he was running out of patience with "the sickness thing".

Facts:

5.8.1 On 22 July 2013 in an email to SWC MP set out various matters related to the claimant with his comments and observations including that he was "running out of patience with the sickness thing" and "seething" about some of the claimants' absence. The email is specifically and exclusively about the claimant. The Tribunal did not believe MP's evidence that in an email that only refers to the claimant by name and where each of the comments appears entirely and exclusively applicable to the claimant's case, he was in fact referring to sickness absences throughout the team. His oral explanation in evidence was contrary to the natural, logical reading of the email itself and he gave his evidence in an unconvincing way which was not credible in the circumstances. The Tribunal finds that the comments displayed MP's growing frustration and negative attitude about the claimant's attendance record. Because of this he wished to discuss the claimant with his line manager. The purpose of that discussion can only have been to decide what if any action to take at very least to alert SWC of what MP considered to be unacceptable absence. This amounted to treatment of the claimant by MP. That treatment was at very least recording dissatisfaction and drawing that to the attention of SWC in her official capacity and may have been as much as the commencement of a plan of action. The reason for MP's stated concern and annoyance was that the claimant had not attended work following a camera procedure. The claimant has said she needed some time off to recover from it. The camera procedure referred to by MP was because one of the claimant's disabling conditions and it was therefore disability related. The need for the camera procedure arose in consequence of the claimant's disabilities.

5.8.2 MP's reaction and his desire to raise this with his line manager, perhaps with a view to planning how to manage the claimant, was unfavourable, not least because of MP's anger and negative attitude. MP's aim was to secure the full attendance at work of his team thus supporting provision of the services to the public; that was a legitimate aim.

5.8.3 **Findings**: MP's reaction and actions as displayed by the email of 2 July 2013 was a disproportionate way of addressing the fact of the claimant's absence following a camera procedure. A proportionate way of dealing with the matter would have been for him to enquire of the claimant as to why she needed time off after the camera procedure asking for more detail about the procedure itself so that he could fully understand the effects of the treatment before proceeding with any complaint. MP did not take this step. The complaint, which may have included the commencement of a managerial plan to address absence, was unfavourable treatment taken because of the absence at the time for the camera procedure which arose in consequence of the claimant's disability. The respondent has failed to show that the treatment in question was a proportionate means of achieving a legitimate aim. This claim succeeds.

5.9 Incident number 7 in the claimant's schedule in table 1 - an allegation that between July 2013 and January 2014 MP increased the claimant's caseload which amounts to harassment and a failure to provide reasonable adjustments.

Facts:

5.9.1 Because of the claimant's disabilities it was accepted by the respondent that she required adjustments. In respect of workload the respondent was happy to adjust her workload because it had concerns about her capability. The respondent ensured that the claimant was not required to work on the most complex social work cases such as those requiring court reports. The respondent had reservations about her ability and it was conscious of limitations caused by her ill health. That said, the claimant was a conscientious and keen worker and MP appreciated that when she was at work she would arrive early and leave late and that she was very committed.

5.9.2 The fact of her reduced workload however, created some additional burden on her colleagues. There was no evidence before the Tribunal, either produced directly or that it could infer from all the facts and the circumstances of the case, that MP ever increased the claimant's case allocation. Having heard evidence from MP and MPH, which we find was given clearly credibly and cogently, and in the light of some of the claimant's other evidence, we conclude that if anything her caseload was reduced in terms of complexity and number of cases.

5.9.3 **Findings**: Reducing the claimant's workload was not unwanted conduct on the part of the respondent but was appreciated at the time by the claimant. She was however keen to do her work and to do more of it if it had been possible. What the claimant really appears to be complaining about is the way in which she was required to undertake the work and the lack of

access to her bespoke laptop (number 2) and equipment whilst availing herself of the facilities at Pwllheli. The claimant has not established and we were not able to infer that the respondent's purpose or indeed that the effect of the allocation of the claimant's workload violated her dignity or created an intimidating, hostile or degrading working environment. Taking the claimant's perception and all circumstances of the case into account we concluded it would not be reasonable for the provision of the workload in question to have a harassing effect. The workload which the claimant voluntarily undertook did not create for her a substantial disadvantage but in fact it was a lighter caseload than she had previously enjoyed and that in itself was a reasonable adjustment. There was no PCP to the effect that the claimant's case allocation would increase or was increasing. Her case allocation was dictated by reasonable adjustments. There was no failure to make any further reasonable adjustment to the caseload. The claims of harassment and breach of statutory duty fail and are dismissed.

5.10 Incident number 5 in table 1 of the claimant's schedule (page 37) - that the respondent failed to provide reasonable adjustments on 4 March 2013 when she was refused a transfer to Pwllheli or to allow her to work from home as the claimant feared she would fall asleep at the wheel of her car driving from Dolgellau:

5.10.1 **Facts**: In 2013, the claimant reported that she had fallen asleep at the wheel when driving from Dolgellau to her home in Pwllheli (or perhaps it was on the other leg of the journey). This concerned her. Her tiredness and lack of concentration were side effects of her disabling conditions. She also found because of an eye condition that driving in the dark was difficult. Notwithstanding the terms of the claimant's claimed incident at number 5 of her schedule she stated clearly in evidence that she did not want to have a transfer to Pwllheli and had not requested it on a permanent basis. The Tribunal has already made findings in respect of incident number 12 with regard to use of the Pwllheli office and the prohibition on social workers working from home. The parties are referred to the Tribunal's earlier findings without us having to repeat them.

5.10.2 **Findings**: The PCP of the claimant having to work full-time out of the Dolgellau office put her at a substantial disadvantage because of the symptoms and side effect of her disabling conditions affecting her health, causing her pain, loss of concentration and drowsiness. The respondent put in place a reasonable adjustment in that regard by permitting her to work from the Pwllheli office on occasions. That was agreed with the claimant. The claimant did not want a permanent transfer to Pwllheli. It would not have been a reasonable adjustment for all the reasons previously stated to permit the claimant to work from home when she needed the support of teamwork that was better provided by the PCP imposed by the

respondent that social workers must work from the respondent's offices. These claims fail and are dismissed.

5.11 Incident number 13 of table 1 in the claimant's schedule (page 43 and 44) - allegations of harassment and failure to provide reasonable adjustments. On 5 August 2013 MP was said to have berated the claimant at a team meeting.

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5.11.1 **Facts**: The claimant conceded in cross examination that there possibly was no team meeting on 5 August 2013. The Tribunal is satisfied with MP's evidence and contemporaneous emails that there was no such team meeting. During the team meeting immediately prior to 5 August 2013 there was a discussion concerning various aspects of the claimant's work and the use by her of a dongle which could have bespoke software downloaded. MP's contemporaneous email giving details of the team meeting in question does not mention any issue or concern or source of irritation with the claimant. The claimant's courteous and friendly reply does not disclose any evidence to support her contention set out in incident 13. The Tribunal had no evidence before it or from which it could draw an inference that MP had berated the claimant at any team meeting and there was none on 5 August 2013 in any event.

5.11.2 Findings: The claimant has failed to prove and the Tribunal cannot find from all the circumstances and facts found that MP engaged in unwanted conduct with the purpose or having the effect of violating the claimant's dignity or creating a harassing effect at any team meeting in July or August 2013. In the circumstances, if because of her perception and any other circumstances the claimant felt a harassing effect then it was not reasonable for the conduct in question to have that effect. There was absolutely nothing untoward in MP's handling of matters as illustrated by his emails concerning team meetings in July and August 2013.

5.12 Incident numbers 8 and 14 in table 1 of the claimant's schedule (pages 39 – 40 and 44 – 45 which the Tribunal has taken together as they overlap). These are allegations that MP was over zealous in his monitoring of the claimant's attendance or absence from work with unnecessary referrals for Occupational Health advice specifically with a requirement for psychological assessment.

Facts:

5.12.1 MP applied the provision and practice within his teams that social workers absent through ill health would contact him directly on the first day of absence. This was so that he could ascertain the reason for absence and as far as possible discuss the potential duration of absence so that appropriate alternative working arrangements could be made if necessary; he needed to ascertain pertinent information to arrange cover during an employee's absence. The respondent in accordance

with established employment relations practice required proof of ill health when employees were absent from work. MP requested fit notes to support the claimant's absences and she had a considerable number of absences in the time leading up to her suspension from work on 13 January 2014 (for reasons related to concerns over her capability). MP would refer the claimant to the respondent's Occupational Health advisors in the light of absences from work; this was an established practice in respect of sick or disabled colleagues who were absent from work. MP referred the claimant to Occupational Health on several occasions. The claimant consented to every referral. The reports and letters that resulted from the various referrals (as indicated previously) identified the need for adjustments at work and made recommendations that were beneficial to the claimant. The claimant was also assessed independently by the Access to Work Scheme; reports by Mr Newton and Mr Todd regarding Access to Work made further recommendations that were supportive of the claimant. In one such report Mr Todd recommended that the claimant undergo a "psychological assessment". In a subsequent report Mr Newton recommended "psychological assessment for dyslexia and dyspraxia". The claimant takes exception to what she perceived as a requirement for her to undergo psychological assessment which she says was pursued by the respondent specifically MP with a view to proving that she had a mental illness as opposed to the respondent's being prepared to address her physical impairments with a view to making reasonable adjustments. The claimant's suspicion is that the respondent wanted a psychological assessment to prove that she was unfit to work and to give an opportunity for dismissal based on incapability by reference to health.

5.12.2 SWC, on behalf of the respondent, felt that Mr Todd's recommendation that the claimant should undergo psychological assessment was unusual and potentially inappropriate. SWC queried the recommendation on 30 November 2011 at page 279 with an Occupational Health advisor. The respondent had reservations about undertaking a psychological assessment of the claimant and did not see it was relevant, appropriate or beneficial. The respondent's decision was to defer obtaining such an assessment. to obtain the second Occupational Health opinion from a Dr Baron as to the appropriateness or otherwise of such an assessment. No psychological assessment was undertaken.

5.12.3 Throughout the period of the claimant's absences through ill health MP's monitoring and referrals to Occupational Health were both supportive and appropriate. This was favourable treatment. The claimant specifically refers to MP's emails at pages 285 and 290 as evidence to support her suspicions outlined above. The Tribunal finds that the emails were appropriate managerial emails written in measured appropriate and relevant language, displaying proper managerial oversight

and support. The Tribunal's interpretation of the emails is completely at odds with that of the claimant and we find that her interpretations were not reasonably sustainable.

5.12.4 **Findings**: The respondent's support monitoring and its referral of the claimant to Occupational Health were supportive and amounted to favourable treatment because of something that arose in consequence of the claimant's disability namely her absences from work. The respondent had the aim to support its staff safeguarding their health to ensure full attendance at work if possible and the provision of a service to the public. MP's monitoring of the claimant's health and referrals to Occupational Health was a proportionate means of achieving that legitimate aim. It was unreasonable for the claimant to consider that these actions had a harassing effect or violated her dignity in all the circumstances. Even though the references to psychological assessment was unwanted conduct, the purpose of the reference to psychological assessment was to explore why Mrs Todd and Mr Newton had recommended psychological assessment and in the event, although enquiries were made, it was not pursued. The enquiries were entirely appropriate in the circumstances not least SWC's reservations about the appropriateness of such an assessment. The purpose of the monitoring and referrals was not to violate the claimant's dignity or create a harassing effect, the claimant was genuinely upset but it was not reasonable for the conduct to have that effect. These claims fail and are dismissed.

5.13 Incident number 9 in table 1 of the claimant's schedule (page 40 – 41) allegations of harassment and failure to provide reasonable adjustments in respect of a supervision meeting on 6 January 2014.

5.13.1 . **Facts**:

5.13.1.1 The claimant was issued with a written warning in 2013 in respect of her having left a case file containing confidential information at a school where she had paid a visit. This warning was issued after the expiry of the final written warning in relation to laptop number 1. The terms of the written warning expired towards the end of December 2013. The claimant says, and the Tribunal is prepared to accept, that she was somewhat wary of pushing issues relating to her request for reasonable adjustments which she felt were outstanding and her concerns at the treatment she was receiving from management during the currency of either of these disciplinary warnings; in those circumstances, she refrained from pressing issues to a great extent or formally. That said as evidenced above she was not "backwards in coming forward" and was prepared to challenge MP in respect of individual events and occasions (such as when she overheard him on the telephone and assumed he was talking

about her – see above). She frequently and in fact regularly raised matters concerning working at Pwllheli with MP but she did not present any formal grievance.

5.13.1.2 The claimant told the Tribunal that she informed one of her colleagues towards the end of December or early in January that she was going to formalise matters and take them up with senior management particularly allegations of bullying against MP. We heard no corroborative evidence but the Tribunal accepts at some point it was likely the claimant would lodge a formal grievance if and when she felt it best suited her purpose.

5.13.1.3 Whilst that was the background, nevertheless the claimant attended a routine supervisory meeting with MP on 6 January 2014. The claimant's discontent was not formally on the agenda for discussion at this meeting. At the meeting MP raised with the claimant his concerns about her performance following an audit of files that he had carried out. The claimant reacted defensively and in a challenging manner to MP, who felt he in turn had to defend his position; he felt somewhat vulnerable because of the claimant's reaction. The claimant raised her requirement, if she was being required to improve her performance, to be allowed to work more from Pwllheli and to work there with the use of her bespoke laptop number 2. The fact that the claimant raised this point is corroborated by her email to MP following that meeting that appears at page 382. She believed that at that meeting MP agreed that she could spend time in Pwllheli with laptop 2 and that there was a discussion about storage arrangements. The claimant was satisfied that she had achieved her objective.

5.13.1.4 In response to the claimant's email following the meeting, Mr Parry agreed only that the claimant could work from Pwllheli when it was "logistically sensible" such as when she was visiting the northern part of the Meirionnydd team's jurisdictional area when it made no sense for her to return to the office at Dolgellau before going home for the evening as she would be nearer her home. He was also prepared to allow her to work from Pwllheli if health issues arose. He did not feel that this constituted any change in the arrangements that had been in place for some time and he told the claimant that this was his understanding; he disagreed with her interpretation of the meeting and its outcome.

5.13.1.5 This version of what MP said was discussed and agreed is corroborated by his email of 7 January 2014 that appears at page 383.

5.13.1.6 The parties to the supervisory meeting were talking at cross purposes. MP became frustrated and the Tribunal is prepared to accept that during the conversation and in his frustration, he either put his pen down forcibly on the desk or tossed it onto the desk. Contrary to the claimant's allegation the Tribunal finds that he did not throw it violently. Whilst addressing the claimant, MP pointed at the door of his office and ordered her to leave the room before the meeting would normally have concluded. To his mind MP had heard enough from her.

5.13.1.7 That said there is no suggestion in the claimant's email that followed the meeting (page 382) that she was upset by this conduct as she makes absolutely no reference to it or how she was made to feel. In fact, the email in question is friendly in tone confirming that she had secured what she wanted namely flexibility about working in Pwllheli and access to laptop 2 whilst there.

5.13.1.8 Prior to the meeting MP had been in email correspondence with SWC (page 381) alerting her to his concerns following the audit of the claimant's case files and this corroborates the priority he placed upon the matters he raised at the supervisory meeting on 6 January. He reported to SWC that he could see no alternative than to remove certain cases from the claimant's caseload and to reallocate them because he considered that the level of her record keeping was "abysmal". This is what he intended to raise with the claimant on 6 January 2014 and he did so. That is what caused his frustration when the claimant steered the conversation around to the adjustments she felt were required and why MP became frustrated further when he attempted to confirm to her that there was to be no change in existing working arrangements which were to remain as he summarised at page 383.

5.13.1.9 Following that meeting and MP's receipt of the claimant's email at page 382 he wrote to SWC by email which appears at page 384; he confirmed that he had had a long "chat" with the claimant, that he would update SWC "in due course" but stated that he felt the need to share all communications that he received from the claimant with his line manager SWC. The Tribunal finds that this accurately reflects MP's view that there was no urgency about reporting back to SWC in detail about what the claimant had said at the meeting but that he would wish to keep her in the loop about such matters as the file audit and the claimant's request for changes to the working regime.

5.13.1.10 The claimant did not, at the supervisory meeting of 6 January, accuse the respondent or specifically MP of disability discrimination. There was no protected act. To the claimant's mind she had in fact achieved her objective regarding Pwllheli and access to laptop 2.

5.13.2 **Findings**;

5.13.2.1 Allegation of harassment: In mid supervision, in the light of his frustration MP pointed the claimant in the direction of the door in a peremptory manner and ordered her to leave the room before the conversation had ended properly. This was unwanted conduct and it was related to the claimant's protected characteristic of disability because his frustration was not regarding his part of the conversation regarding the audit but the claimant's input about her insistent request for reasonable adjustments. He had agreed a method of working that he was prepared to confirm and he wanted to concentrate on the audit and the claimant's performance; the claimant was going over the working arrangements. MP's conduct had the effect, but not the purpose, of violating the claimant's dignity and creating a harassing effect. MP's purpose was merely to end the meeting as he was so frustrated at the claimant's repeated reference to reasonable adjustments, which he understood had been settled, when he wished to deal with her performance and capability issues as he saw them. In making this finding we have considered all the circumstances, the claimant's perception and whether it was reasonable for the conduct to have that effect. The frustration expressed by MP was directly related to MP's references to adjustments related to her disability and as such his conduct was more than just in the context of disability but was related to it. This claim succeeds.

5.13.2.2 Failure to provide reasonable adjustments. The claimant reported that her understanding of the outcome of the meeting of 6 January was that she could work from Pwllheli as she wished with laptop 2. MP confirmed that she could only do so if it was logistically sensible or health matters required it but he confirmed that the arrangements remained as before. He thereby confirmed that the claimant was not to have ready, free, access to laptop 2 and she did not have absolute flexibility as to when she worked from Pwllheli. This was a continuing refusal of the reasonable adjustments regarding flexibility to work at Pwllheli and access to laptop 2 whilst in Pwllheli which had been the case since November 2011. It is not a

stand alone separate failure to make reasonable adjustments but is a further continuation of the status quo. There was a continuing failure.

5.14 Allegations numbered 1 and 2 in table 1 of the claimant's schedule (page 31 – 35) being allegations of harassment, failure to provide reasonable adjustments, discrimination arising from disability, victimisation with regard to suspension on 13 January 2014 and her subsequent dismissal.

5.14.1 **Facts** regarding the decision to suspend the claimant:

5.14.1.1 As detailed above MP carried out an audit of the claimant's files and found that her record keeping was "abysmal". He alerted his line manager SWC to these concerns and he raised them with the claimant at the supervisory meeting on 6 January 2014. There was a partial investigation of those allegations and that was conducted by Heidi Rylance whose report is at page 548. This report corroborates in part MP's concern and shows that there were indeed potential grounds for those concerns and there was something that required investigation. We made no findings as to the merits of MP's audit or HR's provisional investigation save to say that it corroborates the view that suspension for the reasons stated in the respondent's letter to the claimant of 13 January 2014 at pages 387 – 388 was not malicious or capricious. The claimant was suspended from work on full pay with effect from 13 January 2014 following the decision of MPH because the report she had received about the claimant's practice as a social worker gave rise to "grave concerns about the standard and quality of your practice and to whether it is of the standards as laid out in the Care Council for Wales Code of Conduct for Social Workers".

5.14.1.2 The purpose of the suspension was to enable the respondent to investigate the concerns that had been raised. There was to be an investigation meeting with the claimant and she was reminded that suspension was not a disciplinary action. She was given information regarding the respondent's Counselling services.

5.14.1.3 Whilst MPH made the decision to suspend the claimant based on information she received from MP (and possibly also SWC) the decision was given to the claimant by MP in his role as line manager in the absence of MPH.

5.14.2 **Findings** in respect of the decision to suspend:

5.14.2.1 The reason for the claimant's suspension was related to her performance and issues of capability by reference to aptitude that came to light prior to and justified by MP's audit. The audit confirmed grounds for concern. MPH's decision to suspend the claimant was based on those concerns and that audit. The suspension was conduct unwanted by the claimant but it was not related to her disability. The purpose was not to violate her dignity or create a harassing effect. In the circumstances, the claimant would have to reluctantly accept the situation as a professional subject to professional standards and the risk of an unsatisfactory audit. In those circumstances whilst her upset is understandable the Tribunal finds it was not reasonable for the suspension to have the harassing effect claimed considering all the other circumstances including the claimant's perception. The harassment claim fails.

5.14.2.2 Reasonable Adjustments: The practice, criterion or provision that was relevant was adherence to the Care Councill for Wales Standards and good professional practice notwithstanding that the claimant's record keeping may have been partially impaired because of the issues over working from Pwllheli with laptop 2, nevertheless they went far beyond that. The PCP did not put the claimant at a substantial disadvantage compared to a non-disabled colleague as her disabilities could not be used to justify falling short of the required professional standards. It would not have been a reasonable adjustment to allow the claimant to work to a lower standard as a professional social worker than that set out in the Care Council for Wales Code. This claim fails.

5.14.2.3 Discrimination Arising: Suspension on full pay in circumstances such as these, pending investigation, was not unfavourable treatment arising from the claimant's disability but was treatment that arose from concerns over her performance. This claim fails.

5.14.2.4 Victimisation: The decision to suspend the claimant was not in any sense related to a grievance or any other protected act as the claimant had not performed a protected act by this stage. She may have voiced her concerns to colleagues, or at least one colleague, (Bethan), regarding what she considered to be discriminatory treatment but she had not made this known to the respondent's management and specifically did not make it known on 6 January 2014 when she alleges that she did. On 6 January 2014, at the supervisory meeting, she felt that she had secured the adjustments that she sought and that there was no

breach of the statutory duty; she did not allege one. As found above she did not on 6 January 2014 or any time prior to 13 January 2014 suspension, bring proceedings under the Equality Act or do any other thing for the purpose of, or in connection with, EA or make an allegation whether express or not that the respondent or any of its management had contravened the EA.

5.14.3 **Facts** regarding the duration of the suspension from 13 January 2014 until dismissal on 12 December 2016 and the decision to dismiss:

5.14.3.1 Following the claimant's suspension, the respondent attempted to investigate the claimant's performance and Heidi Rylance carried out a partial investigation, reporting at page 548 on the 12 October 2014. That report is critical of the claimant and of management of the claimant with a lack of guidance and support. Save in respect of that partial investigation the capability issue was "parked" because the claimant raised a grievance in the meantime. The respondent decided to take no further action in respect of the capability investigation pending resolution of the claimant's grievance (see below).

5.14.3.2 On 27 February 2014 (page 395) the claimant raised a formal grievance alleging bullying by MP and others, victimisation, disability discrimination, a failure to make reasonable adjustments and conduct generally that in her view seriously undermined trust and confidence. No details were provided. The respondent requested details of those allegations. On 21 May 2014, the claimant provided further and better particulars of her grievances in a lengthy document that appears at pages 401 – 415. She entitled this "Points of Grievance". She gave considerable detail about the allegations numbered 1 – 5 in her formal grievance of February. The respondent requested further detail. The claimant was slow to provide this further detail. The respondent issued reminders and set a deadline for further detail to be provided. In response to the respondent's repeated request the claimant provided a document which she entitled a chronology covering the period 2008 – 2014. This document was submitted to the respondent on 19 September 2014 (the respondent's deadline) and appeared at pages 452 – 538, another very lengthy document. The claimant followed that up with an additional document of substantial size which appears at pages 539 – 543 which she sent to the respondent on 20 September 2014 entitled "Complaint in respect of Breach of the Employer's Code of Practice by [MP and SWC]". For

the sake of completeness, we confirm that on 21 January 2015 the claimant submitted a further document that could be classed as a grievance and that appears at page 568. The claimant's grievance throughout all those documents remained that she had been bullied by MP and SWC who had refused her reasonable adjustments specifically timely provision of auxiliary aids and software to support her personalised laptop and freedom of movement with laptop number 2 to work at Pwllheli to suit her purposes. She considered that she would benefit from those adjustments because of her disabilities and difficulties that she encountered working at Dolgellau. She would have liked to work from home but the Tribunal has already found that that would not have been a reasonable adjustment in the circumstances. Whilst the focus of the claimant's substantial documentation set out in the five documents detailed above remained in respect of conduct by MP and SWC she also raised by way of complaint, and cross-referenced approximately thirty other managers or colleagues and thereby by implication MPH the head of the department. By virtue of the claimant's detailed documentation her complaints of bullying and refusal of reasonable adjustments became inextricably linked with concerns raised by the respondent regarding the claimant's professional practice. The whole situation was complex and the task in hand for the respondent was sizeable. MPH considered that she was too closely involved to lead any investigation into the claimant's grievances for fear of being accused of having a conflict of interest. She sought to involve an independent investigator. She received feedback from a Ms S Maskell who reported on the difficulty due to complexity that would be encountered in undertaking an investigation into a grievance which was being seen as one against the entire department in which the clamant worked, up to and including MPH herself. We accept MPH's evidence that whilst Ms Maskell's written notes indicated that there were concerns regarding management as well as regard to the claimant she effectively reported to MPH that the task was too difficult to handle and that she would not do so. MPH then approached another independent consultant Ms B Allen who reported back that she would have to interview more than thirty-one individuals, that there was extensive documentation and that she did not have the time and resources to dedicate to the task. She refused the commission.

5.14.3.3 Throughout all this time MPH took legal advice, and advice from her HR department. As time passed it became more difficult for the respondent to consider a

solution to the issues facing it, namely a substantial grievance, a request for reasonable adjustments, and capability issues. This was compounded by the claimant being out of practice throughout the time and for up to two and a half years. Her absence from practice meant that her registration was in doubt and would have to be renewed which would require training and a probationary period. The respondent had qualms about the claimant's continued employment even at the time of her suspension but as the period of suspension dragged on it concluded it did not want to have her back. The respondent's management was not sure how to bring matters to a head and rather than grasp the nettle, or nip matters in the bud, they left it be for two and a half years whilst considering various options.

5.14.3.4 Matters moved on within the department and the teams within that department; work was reallocated and some of the claimant's colleagues reported to their line managers an element of reluctance to see the claimant return to work. If the claimant was ever to return to work the respondent would have to deal with the outstanding capability procedure but as stated above that was being held in abeyance pending the outcome of the claimant's grievance. For the claimant's part, she wanted her grievance to be dealt with and she wanted to return to work as soon as practicably possible with the benefit of the reasonable adjustments she felt she needed in accordance with Occupational Health advice and Access to Work recommendations which the respondent had already received. The claimant was prepared to mediate with the respondent and she was prepared for the grievance and capability procedures to take their natural course.

5.14.3.5 On 24 November 2015 based on legal advice received, and having canvassed the claimant's Union representative, MPH wrote to the claimant (page 583) suggesting a "without prejudice" meeting. The purpose of the meeting was to discuss "how your employment with Gwynedd Council could be brought to an end in what would be an acceptable manner to both you and us". That was the respondent's agenda. MPH considered that the parties had reached an "impasse" and she was clear that the employment relationship had been "irreparably damaged". MPH accepted and appreciated that the claimant may not be of the same view. MPH felt that regardless of the claimant's view it would be impossible to maintain a reasonable working relationship again. The claimant did not wish for her employment to end and was not prepared to meet with

MPH based on MPH's agenda. In these circumstances, the respondent commenced proceedings under its "policy and procedure for possible dismissal on grounds of Some Other Substantial Reason (SOSR) or Statutory Illegality (SI)" which appears at pages 569 – 577.

5.14.3.6 MPH wrote to the claimant (at pages 589 – 590) on 4 May 2016 stating that the respondent had tried to the best of its ability to address the claimant's grievance but that its efforts had proved in vein. In view of the fact that over two years had elapsed, as the claimant was suspended regarding capability issues, MPH decided that the respondent would not pursue the capability issue. MPH concluded that both the claimant's grievances and the capability procedure were at an end. She was not however prepared to lift the suspension and she notified the claimant of the SOSR proceedings. MPH's mind was made up that the claimant's employment would end without ever having fully and properly investigated the capability issue or the grievance. She had had enough and saw no future for the claimant in her employment.

5.14.3.7 The SOSR agenda was investigated by Haf Ingman Jones and Stephen Wood and went to an SOSR hearing on 13 and 18 October 2016 before a panel comprising Aled Davis and E. Jones and A. Owen. The Tribunal heard evidence from Mr Aled Davies. The panel was provided with a statement from MPH which appears at pages 625 – 627 in which MPH stated at paragraph 4 "the working relationship has broken down to an extent that termination of employment is the only feasible way forward"; she felt the claimant had made clear to her that the claimant would not discuss matters with MPH. This latter observation in MPH's statement is a misattribution as it relates only to the claimant's refusal to meet on a "without prejudice" basis to negotiate terms for termination of employment. The claimant remained ready, able, and willing to deal first with her grievances and then with a capability issue and to return to work if possible and if it was not immediately so possible she was prepared to enter mediation. Throughout the SOSR primary hearing and appeal hearing the respondent's view that termination was the only feasible way forward did not alter; on that basis, it was clear that MPH was not prepared to enter the mediation suggested by the claimant. Throughout the SOSR procedure including up to appeal the claimant requested only reasonable adjustments in accordance with Occupational Health advice and the Access to Work recommendations. Subject to the respondent

complying with professional recommendations it had received, she was prepared to mediate on all else with a view to returning to work as soon as practicably possible.

5.14.3.8 The SOSR primary panel concluded that dismissal was appropriate in view of MPH's unwillingness to mediate and what it considered to be the claimant's pre-condition that she would succeed with regard to her grievances including with regards to allegations that she was bullied. The Tribunal finds that the claimant did not insist on the respondent's management upholding her grievance on all counts including bullying but she did wish, through the course of the mediation and or grievance procedure, for those complaints to be aired; she did not feel it was appropriate for the respondent to declare that her grievance was at an end when it had never been addressed. The claimant's only requirement was the respondent's adherence to Occupational Health and Access to Work recommendations in accordance with its statutory duty. Up to the date of termination of employment the claimant's approach remained consistent indicating her belief and understanding that the relationship was surviving and could survive provided the respondent fulfilled its managerial responsibilities.

5.14.3.9 The reasons for the protracted suspension and dismissal were similar in that the claimant was a disabled employee who required reasonable adjustments including variations in the usual working practices as to the place of work and she required trust in her with regard to safeguarding laptop number 2 and the auxiliary aids related to it; the claimant countered concerns raised with her over her performance by reference to a failure on the respondent's part to allow those reasonable adjustments; she also alleged that in all of that context she had been bullied. This situation proved difficult for the respondent to manage and the respondent was not prepared to manage it in the light of its concerns about the claimant's capability. The respondent ran out of patience and willingness to address the issues in a structured way and accepted at face value the difficulties highlighted by Ms Maskell and Ms Allen without attempting to deal with the complexity which if anything, only showed that there was a required investment of time and effort and expense in resolving the matters in hand.

5.14.4 **Findings** in respect of the prolonged suspension:

5.14.4.1 In consequence of the claimant's disabilities she requested reasonable adjustments and raised a grievance about her perception that the respondent had failed to put reasonable adjustments in place in a timely and effective manner (and that this lead to her being bullied). This failure on the part of the respondent impacted on the claimant's performance to an extent, and it was deleterious to her health and so amounts to unfavourable treatment. The respondent wished to ensure full employment and the provision of an efficient and professional service to the public which was a legitimate aim. Failing to address the claimant's grievances for so long or at all, and thereby to deny consideration and provision of the reasonable adjustments requested, was not a proportionate means of achieving that legitimate aim. In these circumstances, the claimant's claim, that the prolonged suspension amounted to discrimination arising from disability succeeds.

5.14.4.2 The claimant says there was a failure to make reasonable adjustments and we have already found that to be the case and that it was a continuing act up to and including the date of dismissal.

5.14.4.3 The circumstances of the grievance and capability issues leading to a protracted period of suspension became complex and was mismanaged but the claimant was not suspended because she had raised a grievance and the suspension was not prolonged because of the fact of her having complained and grieved about the respondent's management. The claimant's specific claim of failure to make reasonable adjustments regarding the prolonged suspension and of victimisation fail and are dismissed.

5.15 **Findings** in respect of the claim of Unfair Dismissal

The decision to dismiss the claimant was unfair because the respondent chose to use SOSR to break what it considered an impasse instead of availing of the appropriate procedures regarding grievances, capability and/or disciplinary matters in circumstances when the claimant did not consider that the relationship had broken down. She sought to avail herself of the contractually available grievance procedure. She was prepared to be dealt with under the respondent's capability procedure. Had the respondent acted reasonably via timely application of the disciplinary and/or capability procedure and/or dealing with the grievance the effluxion of time would not have been an aggravating feature. The respondent could have dealt with the bullying aspects of the grievance apart from the grievance in respect of the provision of reasonable adjustments; it could have dealt with the grievance in the context of the capability issues insofar as there was an overlap and they became linked by

the claimant's defence to the allegation about her record keeping. The claimant's defence was her record keeping would have been better had she been allowed the reasonable adjustments and therefore there was a circularity in the argument. Rather than either break up the sets of proceedings into manageable portions and dealing with them appropriately, or dealing with it in the round, the respondent failed to assume managerial responsibility but too easily accepted the view of the two independent consultants that the grievance was difficult. That was an easy way out; it did not reflect the contract and the respondent's policies and procedures. Because of the manner of the respondent's management of the whole situation it was only getting worse, likely to be more time consuming and more expensive, but it was not intractable. It would just take an investment of time and effort with goodwill. It was unreasonable of the respondent to allege a breach of trust and confidence and thus rely on the SOSR cop-out by saying that the relationship had broken down when it had allowed the risk of breakdown to materialise by prolonging the suspension for over two and a half years; it did not deal properly, effectively or in a timely manner, with any of the strands of concern. It would be too easy for an employer to sit on its hands and let time pass without dealing with legitimate grievances and legitimate performance concerns until it reached a point where life had moved on and an employee would be deemed surplus to requirement and not worth the investment of time and effort to resolve legitimate outstanding matters. This cannot be a fair basis for the termination of employment. In all the circumstances, and considering the respondent's size and resources it did not act fairly in considering that that there was a breach of trust and confidence and some substantial reason for dismissing the claimant. Dismissal was outside the range of reasonable responses of a reasonable employer. We are not to, and have not, substituted our judgment for that of the respondent. A reasonable employer would follow its standard procedures in a timely fashion. The respondent did not do that.

5.16 Allegation of harassment in respect of the decision to dismiss the claimant:

Finding:
Dismissal was unwanted conduct as far as the claimant was concerned. It was in part related to disability in that the claimant's request for reasonable adjustments and grievances were inextricably linked to her disabilities and her defence to the capability issue refer to those matters. It was not the respondent's purpose to create a harassing effect but obviously the claimant was very upset by it. The claimant, however, was no longer in a working environment because of the dismissal and therefore, it cannot be said that the respondent had created a harassing effect in the working environment. The claimant was not at work, and had not been so, for a considerable length of time. She was not going to be returning to work and therefore this claim fails.

5.17 Reasonable Adjustments and Victimisation in respect of the claimant's dismissal:

Finding:

The respondent's failure to make adjustments regarding working venue, practices, and the access to laptop number 2 has been covered already and is a continuing breach and there is no separate finding of a failure to make reasonable adjustments regarding the dismissal decision. The fact of the grievance did not cause the respondent to dismiss the claimant but rather the complexity of the situation and the respondent's failure to manage it efficiently; therefore, the decision to dismiss was not an act of victimisation and that claim fails albeit the claimant had performed a protected act and dismissal was a detriment.

6 Discrimination Arising in the context of the claimant's dismissal:

Finding:
The respondent's decision to dismiss the claimant arose in consequence of the claimant's request for reasonable adjustments and the complexity of the claimant's grievances regarding alleged disability-related bullying; the dismissal was unfavourable treatment. The request for adjustments and the grievance arose from the claimant's disability. The situation relating to the claimant's disability had been mismanaged, or was not managed by the respondent. It failed to address the request and grievance. That was unfavourable treatment of the claimant because of her disability. The respondent had a legitimate aim of maintaining staffing levels, to provide an efficient service to the public. The respondent's failure to take effective action in respect of the matters facing the claimant and raised by her, was not a proportionate means of achieving that aim. It would have been proportionate to follow applicable procedures and to follow recommendations made by OH and others; the respondent did not. The decision to dismiss the claimant in these circumstances was discrimination arising from disability.

Employment Judge T Vincent Ryan

Date: 16.02.18

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....09/03/2018.....

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FOR THE TRIBUNAL OFFICE