EMPLOYMENT TRIBUNALS

Claimant: Ms K Allen

Respondent: 1. Fertile Frog Limited
2. Darren Heywood

HELD AT: Manchester **ON:** 25 & 26 February
4 & 5 March
11 & 12 March
24 & 25 June 2019
(In Chambers)

BEFORE: Employment Judge Howard
Mrs A L Booth
Mr W Haydock

REPRESENTATION:

Claimant: In person
Respondent: Mr R Anderson, Consultant

JUDGMENT

The claimant's claims of sex harassment pursuant to Section 26 of the Equality Act 2010 of disability discrimination and harassment pursuant to Sections 15, 21 and 26 of the Equality Act 2010 fail and are dismissed against both respondents.

The claimant's claims of unfair dismissal and breach of contract, being unpaid notice of termination of employment, succeed against the first respondent.

The claimant's claims for unpaid wages and holiday are dismissed upon withdrawal.

A hearing to determine remedy will be listed and directions are given at paragraph 115 below.

REASONS

1. Ms Allen has Charcot-Marie-Tooth disease type 1A (CMT). The condition causes muscle wastage and affects nerve conduction, resulting in pain and fatigue. To accommodate the effects of her condition, the hearing proceeded on two days

over three consecutive weeks. Ms Allen's condition means that she is particularly sensitive to cold and draughts and during the hearing the ventilation was kept to a minimum and room temperature raised to a level that the parties and the Tribunal could tolerate.

2. The issues to be determined had been identified at a Preliminary Hearing on 31 May 2018 by Employment Judge Tom Ryan. At the outset of this hearing Ms Allen asked to amend her claim of failure to make adjustments, which was dealt with by consent except for one element; the provision of a foot swing. The Tribunal decided to allow this amendment because it caused no hardship to the respondents as Mr Heywood could deal with this issue in his evidence.

3. The respondents conceded that Ms Allen was a disabled person because of CMT.

4. Ms Allen withdrew her claim for unpaid holiday and wages which was dismissed upon withdrawal.

5. At the outset and during the hearing, both parties produced additional documents which were incorporated in a supplemental bundle by consent and all witnesses had the opportunity to comment upon them as appropriate.

6. Ms Allen applied for an Anonymity Order pursuant to Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations because personal details of her condition might be revealed. However, as the respondents had conceded disability, medical evidence containing personal details was no longer required and the Tribunal refused the application on the grounds that it was not necessary or proportionate.

7. During the hearing the respondents applied to submit evidence of Ms Allen's communications on a dating website. This application was refused on grounds of relevance.

8. Ms Allen was accompanied by her sister, Ms Doolan who took notes for her throughout. At one stage Ms Allen asked if she could record the proceedings by way of an adjustment because her sister had a medical appointment. We offered to rise early or start late to accommodate that appointment and so recording would not be necessary.

The Issues

9. The issues to be determined were as follows.

8.1 Can Ms Allen establish that she had sufficient continuity of service so that the Tribunal has jurisdiction to determine the claim of unfair dismissal?

8.2 Between 1 October 2015 and 30 June 2016 was Ms Allen an employee as defined in Section 230 of the Employment Rights Act 1996.

The respondents conceded that during this time she was an 'employee' under the Equality Act 2010 but argued that she was a self-employed freelance

'worker' and not an employee under the ERA until 1 July 2016. Thereafter it was agreed that she was employed by the first respondent until her dismissal on 28th December 2017.

Unfair Dismissal

8.2 Was the contract of employment void for illegality?

8.3 It is admitted that Ms Allen was dismissed by the first respondent.

8.4 What was the reason for the dismissal? The first respondent states that it was 'conduct'; a potentially fair reason falling within Section 98(2) of the Employment Rights Act 1996.

8.5 Did the first respondent have a genuine belief in the misconduct and was this a reason for dismissal?

8.6 Did the respondent have reasonable grounds for that belief?

8.7 Did the respondent hold that belief having carried out a reasonable investigation?

8.8 Was the decision to dismiss within the reasonable range of reasonable responses for a reasonable employer, applying S98(4) ERA 1996?

Contributory Fault/Polkey

8.9 No findings will be made on these matters which would be determined at a remedy hearing, if appropriate.

The discrimination claims

The first respondent accepted liability for any unlawful acts of Mr Heywood.

Harassment related to sex, Section 26 Equality Act 2010

8.10 Did Mr Heywood engage in unwanted conduct in the respects set out in paragraph 95 to 103, 106 to 107, 109 to 112 of the claim and additionally paragraphs 8 and 63 of the particulars of claim?

8.11 Was the conduct related to Ms Allen's protected characteristic of sex?

8.12 Did the conduct have the purpose of violating Ms Allen's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

8.13 If not, did the conduct have the effect of violating her dignity or creating such an environment for her, having regard to her perception, in the circumstances of the case and whether it is reasonable for the conduct to have that effect?

Disability

8.14 Disability was conceded.

Section 26 harassment related to disability

8.15 Did the Mr Heywood engage in unwanted conduct in respect set out in paragraph 50 (laughing when Ms Allen raised the issue of an emergency evacuation and saying he would throw her over his shoulder), 63, 90 and 92 of the particulars of the claim?

8.16 Was the conduct related to Ms Allen's protected characteristic of disability?

8.17 Did the conduct have the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

8.18 If not, did the conduct have the effect of violating her dignity or creating such an environment for her having regard to her perception, the circumstances of the case and whether it is reasonable for the conduct to have that effect?

Section 15 Discrimination arising from disability

8.19 Did the respondents treat Ms Allen unfavourably because of something arising in consequence of the disability? Ms Allen's case is that her impairment caused mobility issues and the lack of sensation in her hands could pose a risk in certain circumstances.

8.20 Ms Allen's case is that she was required to refill a hot water Urn and access the rear yard at the Chorley office to empty the bins which was slippery from being uncleaned and that being required to do these things was unfavourable treatment because of the effects of her disability.

8.21 Additionally, Ms Allen relies on the matters set out in paragraphs 89 and 92 of the particulars of claims as unfavourable treatment arising in consequence of her disability.

8.23 If so, can the respondents show that the treatment was a proportionate means of achieving a legitimate aim? No legitimate aim was advanced by the respondents.

8.24 The S15 allegations all arise after February 2017 from which point the respondents accept they were aware of Ms Allen's disability and so knowledge is not an issue.

Reasonable Adjustments, Sections 20 and 21

8.25 Did the respondents apply the following provision, criteria and/or practice: to work in its premises using normal equipment?

8.26 Did the application of that provision put Ms Allen at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that

(a) she was not provided with an adapted chair,

(b) she was not provided with a mouse designed to relieve RSI,

(c) she was not able to be seated at a position away from an opening window to avoid cold aggravating pain and mobility of her hands.

(d) The window by which she was seated was not fitted with blinds to avoid direct light hurting her eyes.

(e) She was not provided with parking adjacent to her place of work.

(f) She was not provided with a foot swing.

(g) She was not provided with appropriate wrist support.

8.27 Did the respondents take such steps as were reasonable to avoid the disadvantage?

8.28 In the period before February 2017, did the respondents not know, or could the respondents not be reasonably expected to know that Ms Allen had a disability or was likely to be placed at the disadvantage set out above.

Time Limitation Issues

8.27 The claim form was presented on 17 February 2018, bearing in mind the effects of ACAS early conciliation any act or omission which took place before the 18 November 2017 is potentially out of time so that the Tribunal may not have jurisdiction.

8.28 If so, can Ms Allen prove that there was conduct extending over a period which is to be treated as done at the end of the period is such conduct accordingly in time.

8.29 If not, can Ms Allen show that it would be just and equitable for time to be extended, so that the Tribunal may find that it has jurisdiction.

Breach of Contract

8.30 It is not in dispute that the first respondent dismissed Ms Allen with one week's pay in lieu of notice. Ms Allen states that she is entitled to two weeks, because she had been employed by the first respondent for two years.

8.31 As Ms Allen was dismissed for serious, not gross misconduct, this issue rests upon her length of continuous employment.

The witnesses

10. We heard evidence from Ms Allen and from her witness, Wayne Taylor. For the respondents, we heard evidence from Mr Heywood, Mrs Heywood, Matt Kenyon and Katie Morris.

The Findings of fact relevant to issues

The Employment Relationship

11. Mr Heywood is Director of Fertile Frog Limited which is a web design and marketing company. The company builds web sites and provides graphic designs, print and internet marketing. Mr Heywood had been a Substance Misuse Officer and a Team Leader for the Princes Trust and continued in this role for the first few years after setting up Fertile Frog, however by October 2015 he had decided to commit full time to his business and was looking for a Web Developer to share the workload.

12. Ms Allen is an experienced Web Designer who had been out of the work place for around five years before commencing work with Fertile Frog. Mr Heywood had met Ms Allen's sister, Sandy who had attended a 12-week Youth Development Programme led by him a few years previously and he met Ms Allen at the final award ceremony. They had become Facebook friends and Mr Heywood contacted Ms Allen and the two met to discuss possible working arrangements.

13. Mr Heywood said that Ms Allen had agreed to be a contractor and to accept web design assignments from him on an ad-hoc basis. Ms Allen said that she was offered the job as an employee. Both recalled that flexibility around medical appointments were discussed and agreed. Mr Heywood said that Ms Allen had told him that she was going through a divorce and so could only work on a part-time basis as full time work would impact on her divorce settlement and that she did not want to be on Fertile Frog's books until after that. Mr Heywood pointed to a text exchange between them from February 2016 in which Ms Allen confirmed the final date of her divorce as 30 March 2016 and in response to his question; 'and then we still have to wait I guess before you can jump on the books', replied 'not sure I'm guessing a few weeks at least'. Ms Allen did not recall specifically mentioning the impact of her divorce however, given the subsequent text exchanges, we accepted Mr Heywood's recollection as accurate and that, whilst committing herself to work for Mr Heywood, she did not want her earnings to disadvantage any divorce settlement. In addition, as Ms Allen explained, she was in receipt of Employment Support Allowance which meant that she could work up to a maximum of 16 hours a week only, and we accepted her evidence that she explained this to Mr Heywood.

14. Ms Allen started work with Mr Heywood on 1 October 2015 as a Senior Web Designer. Mr Heywood had converted the spare bedroom in the home that he shared with his fiancé, now wife, Jennifer Heywood and Ms Allen worked mainly from this home office. The terms of their working arrangement were not put in writing and so we had to decide what the nature of their contractual agreement was from their respective accounts in evidence and the contemporaneous documentary records such as emails and texts.

15. Ms Allen worked under the control and direction of Mr Heywood. There was no evidence that she had any right to substitute her labour and she did not seek to do so. Mr Heywood had agreed to pay her a salary consistent with his text, dated 29 October 2015; 'been doing some calculations and if we can do PSD to word press between us I'll certainly be in a position to pay you a salary … I want you to be as proactive as you can with retention and upselling'. From the end of October onwards, Mr Heywood paid the claimant between £400 and £500, sometimes giving her additional sums, but with no reference to any specific projects allocated or completed. Whilst her hours were variable and flexible and the sums paid to her varied, these payments were not in response to any specific projects and she did not, at any stage, invoice Mr Heywood or have any control over the amounts that he decided to give her and when these payments would be made. Both parties agreed that her annual earnings in 2015 and 2016 were below the tax and national insurance threshold.

16. Ms Allen explained that she was obliged to do any task that Mr Heywood asked her to undertake, although at the beginning he had checked whether a task was within her capabilities or not. If it was, she had to do it. That account was consistent with the various emails and text/What's App communications where Mr Heywood can be seen allocating tasks to her.

17. Ms Allen worked mainly from the home office, sometimes working from her own home by agreement. For example, in February 2016 she asked Mr Heywood if she could work from home because she needed the PC 'for this Magento install programme and it is on a two-week trial so I need to get it done before the trial runs out'. Mr Heywood also agreed that she could work from home on days when she had medical or physio appointments. She took annual leave by agreement with Mr Heywood.

18. By January 2016, Mr Heywood had guaranteed to pay Ms Allen £500 a month, confirming this by text on 14 January. Mr Heywood described Ms Allen as his 'employee', in communications with her, for example describing her as 'employee of the century' in February 2016 and as 'everything I've ever looked for in both a friend and employee and a colleague, thanks for helping us build a professional organisation', in May 2016. He also presented her as his employee to clients. We accepted the evidence of Mr Taylor, Director of 'Marvel at Everything' Limited, a web site and digital supplier. Mr Taylor contracted Fertile Frog to work on Marvel projects. The work was carried out on Marvel premises. Mr Taylor clearly recalled that Mr Heywood had introduced Ms Allen as his permanent employee and on that basis, Mr Taylor had allowed Ms Allen access to his premises and had liaised directly with her on various projects, as was evident from email exchanges between them. Had she been introduced to him as a self-employed contractor, Mr Taylor said that he would not have allowed her such access. We were informed that Mr Taylor and Mr Heywood are in litigation however we did not consider that this detracted from the accuracy of his account.

19. In addition to her work with Mr Taylor, Ms Allen was an integral part of Mr Heywood's business and he described them as a good team. Ms Allen received company perks in the form of Botox treatment on several occasions and Mr Heywood gave her full administrative control to run the business in his absence. When he got married and went on honeymoon over three weeks in May 2016, he

informed his clients that she was 'efficiently managing the business in my absence if you need anything', providing her email address as katy@fertilefrog.com.

20. Ms Allen's employment relationship was formalised from 1st July 2016 when she was given a written contract of employment, increased her hours and was paid a regular monthly salary. In every other respect her working relationship with Mr Heywood remained the same and she continued to work mainly from the home office and occasionally from home as agreed with Mr Heywood.

21. We found that all these factors pointed towards an employment relationship and a contract of service and there was no convincing evidence presented which undermined our assessment. Although Ms Allen's pay varied, she was paid regularly and the amounts were entirely within Mr Heywood's control, not linked to any invoicing or project completion but rather on Mr Heywood's cash flow. There was no evidence that Ms Allen had provided her services during this period to anyone else; she worked exclusively for Mr Heywood and on tasks allocated to her by him. As was clear from the flow of email and text exchanges between them, she reported progress on these tasks to Mr Heywood daily and Mr Heywood had oversight of her activities.

22. For all these reasons we found that Ms Allen was an employee as defined by Section 230 of the Employment Rights Act 1996 from 1 October 2015 to the termination of her employment. The respondents had conceded that she was an employee from the 1 July 2016.

Illegality

23. Whilst her husband was running his business from home, Jennifer Heywood would come back most lunchtimes and spend time with him and Ms Allen and the two women were friendly. Mrs Heywood supported Mr Heywood's recollection that Ms Allen did not want to work full time because she was concerned about the impact upon her pending divorce settlement. Ms Allen denied this. Our attention was brought to Ms Allen's statement of earnings, submitted as part of the divorce petition. She had not disclosed her employment on that form or declared any earnings. Ms Allen's explanation was that her earnings were so low that it would have made no difference to her ultimate divorce settlement and her husband had agreed to sign over the house to her, in any event. We accepted that Ms Allen did indicate to Mr Heywood and Mrs Heywood that she preferred an informal arrangement until her divorce was finalised. As Mr Heywood explained, by Spring 2016, he was ready to formalise her employment and he was happy to provide her with a written contract. Ms Allen texted Mr Heywood on 11 May 2016; 'bank just phoned they said I'll need my employer letter with my salary and contract type on for Friday will this be possible, I hate to ask while you so busy'. He sent them to her later that day. The initial contract was for a fixed twelve-month term however Ms Allen explained that she would need a permanent contract to secure her mortgage and Mr Heywood provided one dated 1 July 2016. From that date Ms Allen cancelled her benefits and was employed full time by Fertile Frog.

24. On behalf of the respondents, at the outset of the hearing, Mr Anderson had suggested that the employment contract was void for illegality because Ms Allen had defrauded the benefits Agency and/or avoided tax/NI contributions. During the

hearing, Mr Heywood agreed that Ms Allen's earnings fell well below the threshold and it was plain from their text exchange that Ms Allen had come off benefits in July 2016. The allegations about divorce documentation were directed at Ms Allen's credibility and honesty. There were no grounds to conclude that the contract was void for illegality and we did not think it was appropriate or fair to draw any inferences from Ms Allen's conduct in her divorce proceedings.

Sexual Harassment

25. It was abundantly clear from the evidence of Mr Heywood, Jennifer Heywood and the two employees who worked alongside Ms Allen, Matthew Kenyon from June 2016 and Katie Morris from December 2016, that Ms Allen actively engaged in light hearted discussions, which she described as 'banter', of a highly sexualised and often graphic nature. Mrs Heywood told us that Ms Allen regularly discussed her online dating activities, revealing highly personal details about the men she had dated and showing her graphic images on her phone. Mr Kenyon recalled Ms Allen regularly making jokes and references to various sexual practices, describing the sexual performance of her dates and making sexual and flirtatious remarks to various visitors. Miss Morris recalled that Ms Allen would openly discuss sexual encounters and her dating activities. She recalled an occasion when Ms Allen, inadvertently or otherwise, showed a graphic picture she had taken of herself. All of them confirmed that Ms Allen had graphic images on her phone and enjoyed discussing and joking about men and sex. Mr Heywood described Ms Allen as regularly initiating and readily participating in sexualised banter with him and with colleagues in the office and through text and email exchanges. Likewise, Mr Heywood readily instigated, reciprocated and engaged in such banter and communications with Ms Allen.

26. It was also apparent from the email and text exchanges between Ms Allen and Mr Heywood that they had a genuinely close and supportive friendship. For example, in June 2016, Mr Heywood gave Ms Allen a further £400. She texted 'why you given me another £400???', he replied 'because you deserve it', she responded 'you have a good heart so I am always conscious it doesn't take over and get you in any trouble. It's hard for me to say it but you have no idea how much you've saved me not just my home but my self-worth … you came at exactly the right moment, it makes me cry to think about being alone but I'll never be alone because I have angels. Thank you for saving me and not leaving me to rot on benefits'.

27. When Ms Allen was going through relationship difficulties Mr Heywood was supportive telling her 'there is nothing wrong with you, relationships are just hard … men are fickle sometimes sending hugs, for what's it worth you are my best friend' attaching an image of a hug.

28. Ms Allen's friendship with Mrs Heywood was demonstrated by the affectionate and supportive text exchanges; Mrs Heywood telling Ms Allen, 'you're beautiful shine bright like we know you are and love' and arranging Botox appointments for them both.

29. Ms Allen depicted her relationship with Mr Heywood as of him abusing his position of authority over her and pressuring her into sexualised behaviour with which she complied for fear of the consequences for her employment and her

mortgage. She pointed to text exchanges in December 2015 between them after an evening out when Mr Heywood and his fiancé had had a drunken falling out. In them Ms Allen expressed concern about where he would end up that night and Mr Heywood replied that he might knock on her door. The tone of the exchange between them was supportive rather than sexual; Mr Heywood did not come to Ms Allen's house and their friendly relationship was unaffected.

30. Mr Heywood's evidence was that the sexualised conversations and text messages were entirely consensual and reflected their good friendship. Ms Allen claimed that communications were always instigated by Mr Heywood and that she felt compelled to respond in similar vein for fear of losing her employment and mortgage offer which was consequent upon her having a permanent role. However the tenor of these discussions continued well beyond July 2016 when she secured a permanent contract and her mortgage. As we have described, the other witnesses all recalled her in engaging in sexualised discussions about her dating activities and personal life and there was ample evidence of her using sexual terms and innuendoes and occasions when she instigated communications. For example, sending a close-up photo of her buttocks in tight jeans to Mr Heywood, telling him about the hairy back and small penis of a date, telling him that whilst he was giving a presentation she could not take her eyes of the bulge in his trousers and so on and so forth. When asked to provide a photo for the company website, she sent him a glamorous photo of herself wearing a low-cut top and short skirt.

31. Ms Allen also alleged that Mr Heywood made unwanted physical contact with her by touching her hair, looking up her skirt when she walked up stairs and looking at her breasts. Mr Heywood adamantly denied this.

32. Ms Allen accepted that she had never challenged Mr Heywood about his conduct and had never raised it as a concern or issue until after her suspension. Her explanation was the fear of the consequences for her employment and mortgage. Whilst we accepted that Mr Heywood was in a position of power and authority over Ms Allen and that this could make it difficult for her to challenge unacceptable behaviour, her own conduct demonstrated a ready engagement and participation in the sexualised communications between them and generally with her colleagues which was at odds with her assertion that she was reluctant and unwilling to engage. Ms Allen plainly enjoyed this kind of banter and we do not accept her description of herself as vulnerable and obligated to respond in kind as accurate. Quite the reverse, she was a proactive participant and persisted in this conduct well beyond the formalisation of her contract.

33. We found Ms Allen's assertion of unwanted physical contact unconvincing and at odds with her own conduct towards him. We do not accept that there was any unwanted physical contact between Mr Heywood and Ms Allen. The sexualised comments were all consensual in the context of a close personal friendship between them which Ms Allen enjoyed and encouraged.

34. We accepted Mr Heywood's account of an incident that Ms Allen had relied on as an act of harassment. Following the incident described by Ms Morris when Ms Allen had revealed a graphic photo on her phone, he had gone online and found that she had posted that picture. Mr Heywood explained that he felt protective of Ms Allen and was concerned about what she was posting. He sent her a text; 'I found a

picture of your money box online', when she asked to see it he sent her a phone of a Kermit the Frog hand puppet revealing it's anus. Whilst this exchange may well be in bad taste, it was in the context of Ms Allen revealing an explicit image of herself.

35. Our conclusion that all the sexualised communications between Mr Heywood and Ms Allen were consensual was supported by Ms Allen's reaction in November 2016 when Mr Heywood raised a concern about some of the comments that she had been making in front of other employees; 'Hi KT, thought it easier to email whilst Matt's in, try your best not to say things like I'll set this up properly now … or it took Darren two days to do that … I know it's your personality and humour (something I don't want you to change one bit!). I want you to know that I'm not taking this personally at all and just thinking from the business perspective, the main reason I am bringing this up is I want to ensure Matt and soon to be Kathryn take me seriously as their employer, whilst the team is small and we are working from home it will be a little harder but as we grow together a level of authority/respect will be a key factor in the smooth running of the business for new employees. We all have our own skillset and as we always see as a team we are formidable so let's focus on our strengths … I know you are good at positive motivation for all".

36. Ms Allen's response was 'I'm a little confused why all of a sudden, I've got to watch everything I am saying as it feels like I am walking on glass, when it's ok for you to say as you please and make many sexual innuendo's pushing your penis into the sweet bag when asking me to put my hand in it etc, a little oversensitive in my personal opinion, where did the us just being ourselves go and a relaxed office atmosphere with banter go? If it's easy I will just stick to only speaking when it is business related and keep it more corporate and less friendly/banter, you can't have it both ways'.

37. Mr Heywood replied 'hey hey I haven't said you've done anything wrong so sorry if its come across that way I tried to mention this in my email and keep it positive, my focus is solely on your personal and professional development as a friend as well as employer. The last thing I want is for you to feel like you have done something wrong, I've always said I'd love you both of us towards managing elements of the business so I hope that our constructive conversation wouldn't be taken as slights on personality or digs. We both need to support each other to guide towards building up a better future for us both. Let's talk later, there is no ill feeling and shouldn't be on your behalf either, I know you never said anything in the negative way and I don't want any miscommunication breaking down our relationship and I most certainly don't want to curb the friendly banter just trying to keep the personal/professional boundaries in place for me too which I also said … which is always going to be hard when someone has been friends for so long, we can still have plenty of belly laughs in work though at the same time …'.

38. It was apparent from Ms Allen's response that she saw the sexualised banter between her and Mr Heywood as fun and she was angry at being asked to be less personal in their communications. This was an opportunity to raise any discomfort she felt at his behaviour however it was clear that she saw this as part of a relaxed office atmosphere with banter and did not wish it to cease.

39. Further, we noted that it was only following Ms Allen's suspension on allegations of misconduct pending a disciplinary hearing that she raised any

allegations of inappropriate behaviour and sexual harassment. This was consistent with Mr Heywood's belief that Ms Allen made up the allegations of physical contact and misrepresented the email, text and verbal exchanges to harm Mr Heywood's personal and professional interests.

40. During the proceedings Mr Heywood referred to the many personal images of Ms Allen naked and semi naked which he had discovered after her dismissal downloaded onto the Apple Mac which she used. Ms Allen insisted that Mr Heywood had - she surmised, by watching her log in via a security camera - hacked her iCloud and downloaded those images. Mr Heywood also referred to the claimant's purchase of sex toys using the respondent's email which Ms Allen acknowledged but explained had been inadvertent. We refused to view the images and we drew no inferences from that information or material as to whether Mr Heywood's conduct towards Ms Allen was unwanted.

41. In her particulars of claim and her evidence, Ms Allen also alleged that she had been singled out as a female and made to do cleaning tasks. In fact, we accepted Mrs Heywood's evidence that this was not true, Ms Allen was not expected to do cleaning and tidying and Mrs Heywood would clear up the kitchen when the company operated from the home office. When they moved to the new premises we accepted Mr Heywood's, Mr Kenyon's and Miss Morris's evidence that everyone 'mucked in' to keep the office and the kitchen areas tidy. We did not accept that Ms Allen was singled out in any way and made to do cleaning tasks because of her gender or otherwise.

The home office and knowledge of disability

42. Ms Allen stated that Mr Heywood was aware that she had CMT from the outset. She stated that Mr Heywood would have known when he was Sandy's team leader and that she told him during their initial meeting on 1 October 2015. She recalled informing him that she had CMT and so would need time off for medical appointments. Mr Heywood explained that he had no recollection of Sandy telling him about her sister's condition and at their initial meeting, Ms Allen had simply explained that she had medical appointments to attend and at no stage, either then or until February 2017, did she disclose her disability to him or to any of her colleagues.

43. During the hearing we were shown copious communications between Ms Allen and Mr Heywood, ranging personal and professional matters and there was no reference anywhere to Ms Allen having a disability or CMT. Given that the content of their discussions and communications were so exhaustively documented we found it surprising that, if Ms Allen had disclosed her condition to Mr Heywood, there was no reference to it anywhere. We do not believe that Ms Allen told Mr Heywood, Mrs Heywood or any of her colleagues that she had CMT until a discussion in February 2017 from which point it is accepted by the respondents that they had knowledge of her disability.

44. Ms Allen argued that it was obvious to Mr Heywood that she had a disability; she said that she would moan constantly about draughts, temperature and cold; that he was aware she had problems with her feet and had to attend medical and podiatry appointments.

45. Mr Heywood said that Ms Allen was clumsy on stairs and after Mrs Heywood had noticed splash stains from drinks she was carrying, he and Mr Kenyon would carry drinks upstairs for her. Ms Allen's colleagues all knew that she attended podiatry appointments and occasional medical appointments, but did not know what the medical appointments were in relation to. Mr Heywood knew that Ms Allen got cold easily as she kept her shoes on in the home office. Mr Kenyon said that Ms Allen had a slightly rounded posture and Mr Heywood recalled that she would slump in a chair on occasion. All her colleagues and Mrs Heywood recalled Ms Allen as being physically active and going for regular walks at lunch times as she liked to 'get her 10,000 steps in'. They knew that she engaged in physical activity outside of work such as walking her dog and hillwalking; they all witnessed her dancing at the Christmas party and knew from what she shared with them that she had an active social life.

46. We considered whether Ms Allen's posture, clumsiness, tendency to cold and podiatric issues either individually or when taken together was sufficient to suggest that Ms Allen had a disability and was placed at a disadvantage by any features of the home office compared to her non-disabled colleagues. The features that Ms Allen identified as disadvantaging her in the home office were the location of her desk and temperature/draughts.

47. By the end of 2016, there were four people working from the home office from four desks. Originally Ms Allen had been sitting facing a side wall. When Ms Morris and Mr Kenyon joined she was seated at a desk next to Mr Heywood facing a double-glazed window and with a radiator underneath the window and alongside the front of her desk. The adjustments which Ms Alan contended should have been made related to the position of her desk. She accepted that she could keep her shoes on and that the room was kept warm, but she complained that placing her desk by the window made it colder. However, it was evident from the floor plans that it was a small room and she had a radiator directly in front of her desk and a further heater was provided for the room generally.

48. Ms Allen led a physically active lifestyle which did not appear to Mr Heywood or her colleagues to be restricted by any physical limitations. Her relationship with Mr Heywood was sufficiently close and open, that her decision not to reveal her condition was clearly a deliberate one. Mr Heywood explained that he accepted Ms Allen's podiatry appointments at face value and he did not wish to intrude on her privacy by making enquiries about medical appointments. Ms Allen was never absent from work or unable to perform her duties because of her condition; there was nothing to alert Mr Heywood to the possibility that Allen had an underlying condition which caused the difficulty in her feet or made her clumsy. Whilst Ms Allen may have complained about draughts and cold, it was clear that she never explained to Mr Heywood that she was susceptible because of her CMT disease.

49. We found that, until Ms Allen disclosed her disability in February 2017, Mr Heywood and Fertile Frog Limited did not know and could not reasonably be expected to know that Ms Allen was disabled and that she was placed at a disadvantage by the features of the home office.

50. However, there was a particular piece of evidence which supported Ms Allen's insistence that Mr Heywood had been aware of her disability and we dealt with that evidence as follows:

51. In the written contract of employment of 1 July 2016, Ms Allen's place of work was recorded as 'working from home'. Ms Allen explained that she had simply not noticed that provision when she signed the contract and had continued to work from the home office and subsequently from the Chorley office and it was clear that, in fact, Ms Allen worked mainly from the home office and only at home by agreement. During a subsequent meeting to consider Ms Allen's appeal against her grievance outcome, Mr Heywood was recorded as saying 'the fact is that KT's employment contract is to work from home, this was done to give KT the option to do remote work which KT did and I was flexible on. I was conscious to support KT's disability and not exclude her from a normal working environment, so working from home was a reasonable measure to support her'.

52. When this was pointed out to him by Ms Allen during cross examination, his explanation was that he had become confused in that hearing and he insisted that when the contract was drafted in July 2016, he had been unaware of her condition. He said that his appeal hearing comments had been him attempting to provide a likely explanation, in hindsight. We accepted that Mr Heywood's statement at the grievance appeal had been inaccurate and that he had not known of Ms Allen's condition when he drafted the contract because it was consistent with the weight of the evidence which we have described above.

53. Since late 2016, Mr Heywood had wanted to move from the home office and was looking for alternative premises. In early February 2017 there was a discussion about getting new premises during which Ms Allen stated that she might be able to get a grant because of her CMT. Mr Heywood asked her to provide information in writing about how her disability affected her and on the 7 February 2017, she replied;

"Hi Darren you requested further information about how my disability affects me. The condition is called Charcott-Marie-Tooth Disease and it is a congenital neuropathy muscle wastage, bone deformity disease and I am registered disabled:

- Difficulty walking because of problems picking up the feet (foot drop) and high arches, painful callouses under my feet, muscle weakness in the legs, hands and forearms, circulation is very poor and I need to keep warm to prevent nerve damage, fatigue, curvature of the spine, balance problems.
- I live in a bungalow to make my mobility easier as stairs as a problem, car parking is also important to lessen the distance to walk from the car to the office".

54. Mr Heywood recalled saying that they should contact Access to Work to risk assess her but that Ms Allen refused, saying she didn't want them involved. Mr Heywood said that she had only disclosed her disability to help get a grant for new premises. His recollection was supported by Miss Morris who remembered the conversation and said that Ms Allen had said words to the effect of 'don't go all legal on me'. Mr Heywood's recollection was that she said, 'don't insult me and go all official on me'. Ms Allen denied this and said that Mr Heywood had told her not to contact Access to Work. However, we accepted Miss Morris and Mr Heywood's

account as the more likely. Whatever the precise words used by Ms Allen, we accepted that it was Ms Allen who had refused to contact Access to Work, at that stage. It was clear to us that Ms Allen had been concerned about the possible implications of Access to Work involvement if it became clear that first floor premises were not suitable for someone with her condition.

55. Mr Heywood contacted Chorley Council's Business Advisor, stating 'I currently run my business from my home address and have a large second floor office with four desks for my three employees and myself. One of my key employees has a registered disability which includes the following [a cut and paste of Ms Allen's description was included]. The company is confidently growing at a sustained rate, however financially we are not quite able to get premises and retain the security of everyone's employment for now. I was wondering if there was any help available to support this employee and/or support our business to achieve premises that are on the ground floor? Given the nature of our work a proportion can be done remotely from home but I am conscious of social exclusion and want to ensure I do the best I can for my staff'.

56. In fact, there was no support available but over the course of the next few months Mr Heywood found ground floor premises in Chorley and the company moved in August 2017.

The Chorley Office

57. The business moved into a ground floor office in August 2017, consisting of a main office, a small second office directly behind and a kitchen and toilet area. The new office had roadside parking, 300 to 350 feet away for all staff, however, as Mr Heywood explained, Ms Allen had not been willing to leave her vehicle on the roadside as she was worried about it getting scratched and she opted to park her car outside Mr Heywood's home and walk from there. We saw a text exchange where Mr Heywood offered Ms Allen a lift in to work and she replied that she preferred to get her steps in.

58. Once they had moved to the new premises, Ms Allen agreed to get Access to Work involved and she contacted them online. This was acknowledged by Caroline Morris, Access to Work Advisor on 31 August 2017 and an assessment was carried out on 7 September 2017. Ms Morris compiled a report which Ms Allen received on 26 October 2017. The recommendations were for an ergonomic chair, a Dyson fan and a portable stand foot swing. The fan and the foot swing were purchased straight away. Mr Heywood explained that Ms Allen ordered the chair but that the process took time as the chair had to be adapted and customised to her specific needs and this was out of his control. Ms Allen liaised with the company directly to provide her personal details and measurements. It was clear from the email thread that Ms Allen gave final approval for the chair on 16 November 2017. Ms Allen arranged for the chair to be delivered to her home address and it arrived whilst she was suspended.

59. We were satisfied that Mr Heywood took all reasonable steps to put the adjustments recommended by Access to Work into place as soon as possible and his supportive attitude was demonstrated by his response to a text from Ms Allen on 1 September 2017 when she stated, 'I was thinking with the Access to Work they review the grant every twelve months, it is possible in the future we could apply for a

grant towards a bigger office with a rest room just a thought …'. He replied, 'we can certainly try, meanwhile if we can help any more then please let us know your suggestions, also perhaps see if you can get support with your house move as I am conscious that is taking up a lot of your energy too, if we can help in any way just ask'. She replied, 'I appreciate your support thank you'.

60. Ms Allen complained that she had not been provided with a RSI mouse with wrist support. Mr Heywood recalled obtaining an Evoluent Vertical Mouse with wrist support in July 2016 and offering it to anyone in the office to use. Ms Allen had refused, saying that she would look stupid and so he put the mouse back in the drawer for anyone to take if they wanted. Mr Kenyon was present during the conversation and confirmed Mr Heywood's account. Mr Heywood made the mouse available again when they moved to the Chorley office. Mr Kenyon recalled Ms Allen saying that she was happy with her Apple wireless mouse.

61. We decided that if Ms Allen had needed an adapted mouse with wrist support there was one available to her or she could simply have ordered one and there was no evidence of her making such a request or doing so.

62. For the first few weeks of being in the Chorley office there were no blinds on the windows and Ms Allen complained about the glare. Blinds were ordered and fitted and we accepted Mr Kenyon's evidence that he offered to swap with her so she could move to the corner away from the glare but that Ms Allen refused. In any event, there was no evidence of exposure to glare exacerbating CMT and Ms Allen did not suggest any connection between the two. Even had there been one, a solution to the problem was offered and rejected.

63. Ms Allen argued that the seating arrangements in the Chorley office were not suited to her disability. We heard a considerable amount of evidence and had the benefit of detailed seating plans and layouts. It was entirely apparent that Ms Allen's wishes were accommodated. Initially she was seated in a corner with a 2000-watt heater by her desk. Mr Heywood then introduced two further desks and re-arranged the room so that Ms Allen was towards the rear of the room, directly alongside Mr Heywood and still with her heater by her desk. She objected to that lay out and so the room was rearranged with Ms Allen facing the wall again with her heater and a further Dyson heater placed behind her. Ms Allen then asked to switch with Mr Kenyon whose desk was adjacent to her, facing the front window and Mr Kenyon agreed. Mr Kenyon offered to swap back because of the glare but Ms Allen preferred to remain where she was. Mr Heywood explained that he did what he could to accommodate Ms Allen's seating preferences and this was confirmed by Mr Kenyon and Miss Morris, both of whom were prepared to adapt and swap seats with her as required. In any event, throughout, Ms Allen had a heater close by and a further Dyson heater heating up the space in the middle of the room. Ms Allen was also offered the use of the other room which had no window but she refused. From the photographs and plans, it was apparent that Ms Allen's desk was not particularly close to a door or window; to the extent it was, her seating position was entirely at her behest. Mr Heywood had done everything reasonably possible to accommodate her seating arrangements and keep her warm by providing heating.

Disability Harassment

64. Ms Allen alleged that Mr Heywood had harassed her by joking that he would throw her over his shoulder and carry her out if there had to be an evacuation. Mr Heywood strongly disputed making those comments. We had to weigh up the accounts of Ms Allen and of Mr Heywood and we found Mr Heywood more credible, not least because, if Mr Heywood had made that comment and Ms Allen had taken strong objection as she alleged, in the context of their relationship we would have expected to see some record of it. As we don't accept that that comment was made it could not amount to harassment.

65. Ms Allen relied upon two further incidents which took place in around August 2017 when Mr Heywood and his three employees were getting the office ready to be used. Ms Allen alleged that she had been instructed to assemble furniture which was humiliating because of her physical limitations. Miss Morris recalled that they had all been assembling Ikea furniture and that Ms Allen had offered to help. The two of them began putting the chairs together and when Mr Kenyon and Mr Heywood had finished assembling the desks they came and helped them. Mr Kenyon and Mr Heywood recollection was the same and we accepted their evidence that Ms Allen had not been required to assemble furniture but instead had happily joined in.

66. On another occasion Mr Heywood asked everyone to get involved in painting the office. Ms Alan described this as a humiliating experience which exposed her physical limitations and left her distressed and crying.

67. Mr Heywood said that Ms Allen hadn't wanted to get paint on her clothes so he got some overalls from the car for her. She joined in with the painting along with the other staff and visibly had a good laugh doing it. Miss Morris concurred with that, saying that Ms Allen had joined in happily and did not express any pain or discomfort while or about painting. Mr Kenyon confirmed that although she had complained about painting in her normal clothes, Ms Allen did not say that she was unable to paint because of her condition or that doing so would cause her any physical problems and that she had been laughing and joking. He took a video of Ms Allen in her overalls and posted a screen shot in the private Fertile Frog Facebook Messenger group chat. He said that Ms Allen had playfully slapped him for taking the image but that he had not seen her crying or distressed. We accepted Mr Kenyon's, Miss Morris's and Mr Heywood's account as the more accurate. We do not accept Ms Allen's evidence that she cried and got upset or asked to go home early. As Mr Heywood pointed out, if Ms Allen genuinely considered that she was being forced to paint, despite not wanting to, or felt that she was physically unable to do so, given their close relationship over the previous years, she would have told him and we accepted that she didn't.

Discrimination arising from disability

68. Ms Allen gave evidence that she was required to fill the Urn in the kitchen in the morning with hot water and make drinks from it and that because of her CMT making her clumsier, she burnt her hand on the metal side. All the respondents' witnesses disputed that she had to fill the hot water Urn although all accepted that she had burnt her hand on it once. As Mr Heywood explained there was no requirement for her to fill the hot water Urn. This was switched off at the end of every day and refilled in the morning by him; if Ms Allen ever filled it, she did so

entirely voluntarily. Ms Allen also alleged that she had to cross a slippery yard to empty the bins. Again, this was disputed by all the respondents' witnesses. In the first place all said that the back yard of the office was not slippery, and secondly, that Ms Allen was not required to empty bins.

69. Ms Allen also raised the assembling of office furniture and painting as acts of discrimination arising from her disability. However, we accepted that Ms Allen had voluntarily participated in these activities, that she raised no issue about her physical limitations, pain or discomfort and that had she done, so she would not have been required to continue.

Unfair Dismissal

70. In around October/November 2017 Ms Allen told Mr Heywood that she was engaged in paid website work on an independent basis. Ms Allen was adamant that Mr Heywood had actively encouraged her to develop her own work and sanctioned any external activity that she was involved in.

71. Mr Heywood instructed Peninsula's 'HR Face to Face' service to carry out an investigative and disciplinary process and to make recommendations. Ms Allen recalled that she contacted Mr Heywood on 24 November 2017 when she discovered that her computer access had been blocked and that Mr Heywood told her she was suspended. Ms Allen said that their conversation had been brief and that Mr Heywood did not explain any of the terms of her suspension and we accepted her evidence on that point. At 17:39 that day Mr Heywood confirmed the suspension by letter sent as an email attachment which stated:

'I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations that you have set up your own business which is in direct competition of our business. As your employer we have the duty to fully and properly investigate this matter …. The duration of the suspension will only be for as long as it takes to complete the investigation, during the suspension you remain our employee and continue to be bound by the terms and conditions of employment … you are instructed not to contact or to attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client of ours. I am duty bound to inform you that a failure to abide by this instruction will be treated as an act of misconduct …'.

72. The allegations initially put to Ms Allen were that she had pursued a separate business interest; made unauthorised use of company property being Fertile Frog software (theme); accessed third party subscription software, (Deposit Photos) and abused her position as a Senior Web Developer thereby.

73. In the meanwhile, however, Ms Allen had disclosed her suspension on a What's App Group set up for members of a business network (BNI) which Fertile Frog was a member of. It included clients, business partners and Mr Heywood. She had stated that she was 'fuming' over her suspension, had replied to a question 'was it conflict of interest or jealousy' with 'what do you think' and had stated 'I will never go back he wants all my glory to himself, simple as that'.

74. Mr Heywood was subsequently contacted by a business associate, Mike Holden, who ran the BNI network, asking what had happened. As a result, the further allegation was added that; 'it is alleged that you have breached the terms and conditions in relation to your suspension, further particulars being that you have allegedly discussed your current suspension with business referral partners and clients of Fertile Frog and it is alleged that you have brought the company's name into disrepute. Further particulars being that the above allegation if proven resulted in clients of Fertile Frog making remarks to Mr Darren Heywood about your suspension'.

75. Further allegations were added; that she 'had, without authorisation, intercepted the delivery of a chair purchased by the company by an Access to Work grant; that she had, without authorisation, illegally downloaded movies onto the work's portable hard drive and that this placed the company at risk of large fines and the internal network at risk of viruses or malware'.

76. Mr Heywood gathered evidence together but no separate investigatory meeting was held with Ms Allen and the matter proceeded to a disciplinary hearing on 20 December 2017. Ms Allen was accompanied by Ray Howard of QHR Solutions. She was provided with all the documentary evidence gathered by Mr Heywood, in advance, including a statement from him. Ms Lang from 'HR Face to Face' conducted the disciplinary hearing. Ms Allen had opportunity to present statement and documents in advance of the hearing and to explain her position in detail during it. Ms Lang's recommendations were 'that having given full and thorough consideration to the information presented allegations 2b, 4 and 5 be upheld'. These were that Ms Allen had accessed third party subscription software, (Deposit Photos), that she had breached the terms and conditions of her suspension and that she had brought the company name into disrepute. Ms Lang went on to state 'considering the nature of the allegations and that KA has no other disciplinary matters on her file RL recommends that a finding of serious misconduct is reasonable in the circumstances for allegations 2b, 4 and 5. Based on KA's length of service there would be nothing unlawful about the employer choosing to dismiss KA with notice in line with the procedure laid out in the employment handbook. A copy of this report in its entirety should be made available to KA with the appropriate cover letter.'

77. Mr Heywood sent the report to Ms Allen on 28 December 2017 stating 'as you know we engaged a third-party consultant to conduct the disciplinary hearing on 20 December 2017, please find attached their report which represents my decision. This will take effect immediately and you will be paid one week's pay in lieu of notice'.

78. It was evident from the minute of the disciplinary meeting that Ms Allen had pointed out that she had made the comments on What's App before being told that she could not contact clients or colleagues. However, Ms Lang did not address this issue in her conclusions. Further, when asked by Mr Howard, Ms Lang was unable to provide specifics as to how Fertile Frog had been brought into disrepute. Despite this Ms Lang recommended that those allegations be upheld.

79. Ms Allen is noted as saying 'OK I was invited to a chat group on a personal What's App account on my personal phone with other BNI members. When I was

suspended I left the group and stated I was leaving because I had been suspended. The What's App message was sent to the group on 24 November at 2:58 pm. My suspension letter and terms were sent to me by email later that day at 39 minutes past 5. I didn't discuss my suspension, I stated I had been suspended to give reasons for me leaving the group. I have friends within the BNI group, some of which I invited myself, people I talk to outside of work and have personal conversations with. I had signed a document when joining BNI as a member. I contacted the President of the BNI group for further information about my membership at BNI, I was instructed to contact Mike Holden which I did to clarify my membership and obligational rules'.

80. In respect of the disrepute allegation Ms Lang simply stated, 'I don't have evidence to show you' to which Ms Allen had replied 'well if there is no evidence I can't comment on it can I' and Ms Lang had responded 'no the only thing that Darren has alleged is that he has been contacted by the head of BNI, Mike Holden'.

81. Ms Allen appealed against her dismissal which was heard by Ms Satterly of 'HR Face to Face' on 4 January 2018 and a report was produced on 10 January 2018. Ms Allen made similar points in respect of those two allegations. Ms Satterly's recommendations were to uphold the appeal against the allegation that she had accessed third party subscription software but that the remaining two allegations; that she had breached terms and conditions of suspension and brought the company's name into disrepute, persisted and that her appeal on those points was denied. Ms Satterly's recommendation was that there was no evidence that would overturn the original sanction of dismissal and that it was clear from all the information provided that there had been an irrevocable breakdown in the trust and confidence required to maintain a working relationship between the parties, Ms Allen having made it clear that she would never go back.

82. Mr Heywood adopted the recommendations of Ms Satterly and confirmed to Ms Allen in writing on 10 January 2018 that the original decision taken by Rachel Lang stood, because she had breached the terms and conditions in relation to her suspension and she had brought the company's name into disrepute.

83. It was apparent to us that neither Ms Lang, Ms Satterly nor Mr Heywood had properly and adequately addressed Ms Allen's explanation that she had disclosed her suspension before being informed of the terms. Ms Allen was given no clear explanation as to how the company had been brought into disrepute and the nature and content of the contact made with Mr Heywood. In those circumstances she was not able to properly address that latter allegation and no-one properly investigated, considered or addressed the former allegation. These failures precluded Ms Lang and Mr Heywood from reaching a genuine and reasonable belief in her guilt.

84. In those circumstances applying the 'Burchell' principles we were satisfied that the decision to dismiss her fell outside the range of reasonable responses open to an employer in these circumstances and her dismissal was unfair.

Breach of Contract

85. Ms Allen had not committed any acts of gross misconduct entitling the first respondent to terminate her employment without notice. She was entitled to two

weeks' notice of termination of employment and was paid for one. The first respondent is in breach of contract in the amount of one week's pay.

The Law

Harassment

86. The definition of harassment appears in section 26 Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic** [in this case disability]**, and**
> **(b) the conduct has the purpose or effect of**
> **(i) violating B's dignity, or**
> **(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if –**
> **(a) A engages in unwanted conduct of a sexual nature, and**
> **(b) the conduct has the purpose of effect referred to in subsection (1)(b)**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

87. The burden of proof provision appears in section 136 Equality Act 2010 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

88. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. For the burden of proof to shift in a case of direct race discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms 'something more' than that would be required before the respondent is required to provide a non-discriminatory explanation. This principle applies equally to discrimination because of any of the protected characteristics.

89. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different relevant characteristic would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

90. Discrimination arising from disability

Section 15 of the Act reads as follows:

(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability.

The Equality and Human Rights Commission Code of Practice contains some provisions of relevance to this. Paragraph 5.2.1 of the Code suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the claimant is justified.

91. Reasonable Adjustments

Section 20 & 21 and Schedule 8 of the Equality Act 2010 lay out the duty to make reasonable adjustments.

92. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

93. Section 20 provides three requirements. The requirement of relevance in this case is the first requirement in Section 20(3):

94. **The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

95. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v-**

Rowan [2008] ICR 218 and reinforced in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632.**

81. As to whether a 'provision, criterion or practice' ('PCP') can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but 'should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions'.

82. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be considered appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

83. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being 'more than minor or trivial'.

Unfair Dismissal

84. S98 ERA 1996 provides as follows;

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
……
(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

85. We were guided by the EAT judgment in **British Homes Stores v Burchell 1978 IRLR 379 EAT**, being mindful that the employer must show that he had a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation. We were also guided by the Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23 CA** that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

86. In accordance with the Employment Appeal Tribunal's guidance in **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439,** we were mindful, in reaching our conclusions, not to substitute our own view of what the appropriate sanction should have been for that of the respondent's, but that we should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case.

Employment Status

87. The definition of an employee appears in section 230(1) of the Employment Rights Act 1996:

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

88. The statutory definition simply incorporates the common law concept of what is a contract of service or a contract of employment, traditionally distinguished from a contract for services which is a contract for a self-employed arrangement. There is a wealth of decided cases on what will amount to a contract of employment, beginning with the well-known summary in **Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497**:

The contract of service exists if these three conditions are fulfilled:

(1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(3) The other provisions of the contract are consistent with it being a contract of service.

That remains the starting point even though, of course, the language of master and servant is something from which the law has moved on.

89. More recently in **Carmichael v National Power Plc [1999] ICR 1226** the House of Lords confirmed that there is an 'irreducible minimum of mutual obligation necessary to create a contract of service'. It follows, as was confirmed in **Montgomery v Johnson Underwood Ltd [2001] ICR 819**, that unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

90. If those irreducible minimum requirements are met, the other considerations include how the parties have labelled or characterised their relationship, which is relevant but never in itself conclusive, the treatment of tax and national insurance, and any other matters that form part of the working relationship. Ultimately the task for the Tribunal is to look at all the relevant factors and form an impression, looking at the picture as a whole, as to whether the contract in question is one of employment or not.

The Tribunal's Conclusions

Employment Relationship:

90. For the reasons laid out above, we found that Ms Allen was an employee of Fertile Frog Limited as defined by S230 ERA 1996 from 1st October 2015 to her dismissal on 28th December 2017. She has sufficient continuity of employment to bring a claim of unfair dismissal and the Tribunal had jurisdiction to determine that claim.

91. There were no grounds for concluding that the contract of employment between Fertile Frog Limited and Ms Allen was void for illegality.

Sexual harassment:

92. There were facts before us from which we could conclude that Mr Heywood had engaged in conduct of a sexual nature. However, it was apparent from the weight of the documentary evidence and the accounts of the various witnesses and Mr Heywood's own explanation that this conduct was not 'unwanted'.

93. As we have found, Ms Allen actively engaged in, instigated and reciprocated Mr Heywood's conduct and so we concluded that Mr Heywood's conduct did not have the effect of violating Ms Allen's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Mr Heywood had a genuine belief, arising from Ms Allen's own behaviour towards him, that his conduct was not unwanted and we found that it did not have the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

94. When reaching our decision, we took account of the perception of Ms Allen, the other circumstances of the case and whether it was reasonable for the conduct to have the effect alleged. If Mr Heywood's conduct had been

unwanted and Ms Allen had not actively participated as described, Mr Heywood's behaviour could reasonably have been perceived as degrading. However, that was not the case.

95. The claim of sexual harassment fails and is dismissed.

Disability Discrimination – failure to make reasonable adjustments:

96. For the reasons given we found that Mr Heywood and Fertile Frog Limited did not know that Ms Allen was a disabled person and could not reasonably be expected to know that Ms Allen was a disabled person and likely to be placed at a disadvantage until February 2017 when she disclosed her disability.

97. During her evidence, Ms Allen had confirmed that the adjustments contended for and laid out at 8.26 of these reasons, were in respect of the Chorley office and the adjustment contented for in the home office was she to be seated at a position away from an opening window to avoid cold aggravating pain and mobility of her hands.

98. There was a period, between February and August 2016, at the home office when Mr Heywood knew that Ms Allen was a disabled person and the duty to make adjustments arose. However, we found that he did not fail in that duty. Ms Allen was seated in a small converted bedroom with 3 colleagues, with a radiator directly in front of her and a further heater in the room. We accepted Mr Heywood's evidence, confirmed by the other witnesses that the room was kept warm and Ms Allen kept her shoes on. Having been shown the floor plan of the room and given its layout and size, there was no other position which would have been warmer or less draughty.

99. We found that the respondents did not fail to comply with the duty to make reasonable adjustments between February and August 2016. Further, even if there was a failure, we found this was an act which came to end in August 2017. As proceedings were issued on 17th Feburary 2018, this claim was submitted significantly beyond the relevant time limit and there were no grounds advanced by Ms Allen to persuade us that it would be just and equitable to extend time to allow that claim to proceed.

100. The claim of failure to make adjustments relating to the home office fails and is dismissed.

101. In respect of claim of failure to make adjustments in the Chorley office, we found that Mr Heywood did not apply a provision, criterion or practice of requiring Ms Allen to use 'normal equipment'; quite the reverse. Mr Heywood was willing to make adjustments to any equipment that Ms Allen used or needed.

102. Mr Heywood offered Ms Allen an adapted mouse, which she refused to use. He encouraged her to contact Access to Work and he agreed to provide every item recommended by the report. Most items were provided promptly, the only item that took time was the adapted chair, which required modification to meet Ms Allen's particular needs. Ms Allen's seating location was at her

behest and she was provided with heaters. Road side car parking was 300 feet away, however Ms Allen preferred to park further away and walk. Ms Allen was not placed at a substantial disadvantage compared to her non-disabled colleagues by any requirement to use normal equipment.

103. Even if any disadvantage existed, for the reasons explained earlier in this judgment, we found that Mr Heywood took all reasonable steps to avoid the disadvantage.

104. The claim of failure to make reasonable adjustments at the Chorley office fails and is dismissed.

Discrimination Arising from Disability:

105. We found that Ms Allen was not required to fill the hot water Urn or empty bins. Her participation in assembling furniture and painting was voluntary. Given these findings, there were not facts before us from which we could conclude that Ms Allen was treated unfavourably because of something arising in consequence of her disability; her physical limitations. Even if there were facts from which we could reach such a conclusion, we accepted Mr Heywood and his witnesses' explanations for all these events.

106. The claim of discrimination arising from disability fails and is dismissed.

Disability Harassment:

107. We found that the 'over the shoulder' comment had not been made and so cannot amount to harassment.

108. In respect of the furniture assembly and the painting; Ms Allen voluntarily engaged in these activities; she was not required to do so. There was no evidence from which we could conclude that by inviting or encouraging her to be involved in these activities, Mr Heywood's conduct had the purpose or violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her.

109. We took into account Ms Allen's perception of those incidents and given the recollection of those who were present, found that she did not genuinely perceive those activities to have that effect; even if she had done, in the circumstances described in our reasons, it would not be reasonable for that conduct to have that effect upon her.

110. The claim of disability harassment fails and is dismissed.

Unfair dismissal:

111. The first respondent had established a potentially fair reason for dismissal; conduct, falling within S98(1) Employment Rights Act 1996.

112. We considered whether the decision to dismiss was fair in the circumstances, applying S98(4) ERA 1996. Given our findings on the failure to properly

address the issues raised by Ms Allen during the disciplinary and appeal process; we find that the decision to dismiss fell outside the band of reasonable responses open to an employer in these circumstances and Ms Allen's dismissal was unfair.

113. The claim of unfair dismissal succeeds against the first respondent and remedy will be determined at a hearing in accordance with the directions below.

Breach of Contract:

114. Ms Allen's claim succeeds against the first respondent in the amount of one week's pay; to be determined at the remedy hearing.

Directions on Remedy

115. A hearing to determine remedy will be listed and the parties notified of the date.

116. By 15th August 2019 Ms Allen shall send to the respondents a revised schedule of loss together with all relevant and/or supporting documents; including evidence of any earnings since her dismissal and her attempts to find alternative employment or self-employment.

117. By 29th August 2019 the respondents must serve any counter schedule.

118. By 11th September 2019 the respondents must send to the claimant copies of all documents upon which it intends to rely at the remedy hearing, a draft index for an agreed bundle of documents for the remedy hearing and an outline of the respondents' arguments on 'Polkey' and 'contributory fault'.

119. By 25th September 2019 the parties must send the witness statements to each other (including Ms Allen's own statement), for any witness whom they intend to give evidence at the remedy hearing.

Employment Judge Howard

Date 11th July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2019

FOR THE TRIBUNAL OFFICE