EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Barnes-Cannadine**

Respondent: **JL Health and Beauty Limited t/a Sheffield Sports Medicine**

Heard at: **Sheffield** **On:** **27, 28 and 29 March 2019**
18 July 2019
19 July 2019 (in chambers)

Before: **Employment Judge Brain**
Mrs J Lee
Mr D Pugh

Representation

Claimant: Miss L Barnes (sister)
Respondent: Mr R Taylor (solicitor)

RESERVED JUDGMENT

The Judgment of the Employment is that:

1. By consent, the respondent shall pay to the claimant the sum of £161.50 in settlement of her claims that she suffered an unlawful deduction from wages and for compensation for holidays accrued but untaken at the date of termination of her contract of employment. This is made up as follows:
    a. The sum of £126.85 for unpaid holiday pay.
    b. The sum of £34.65 for unpaid wages.
2. The claimant's complaints of direct discrimination related to the protected characteristic of sex, a failure to make reasonable adjustments and harassment related to disability fail and stand dismissed.

REASONS

1. After hearing the evidence and receiving the parties' helpful submissions the Tribunal reserved its Judgment. We now set out our reasons for the Judgment that we have reached.

2. By a claim form presented on 8 September 2018, following a period of early conciliation from 7 to 23 August 2018, the claimant brought complaints of discrimination related to the protected characteristics of disability and sex. She also brought complaints of unpaid holiday pay and unlawful deduction from wages.

3. The case benefited from a preliminary hearing that came before Employment Judge Rostant on 2 November 2018. A copy of his record of the preliminary hearing is at pages 23 to 30 of the hearing bundle presented to the Tribunal on the first morning of the hearing. We shall address the issues in the case in further detail in due course. For present purposes it is sufficient to observe that the claimant brings the following complaints:

   3.1. Direct sex discrimination because of the protected characteristic of sex.

   3.2. That the respondent failed to comply with the duty to make reasonable adjustments to alleviate a substantial disadvantage caused to the claimant because of the application by the respondent of a provision, criterion or practice and which disadvantage arose because of the claimant's disability.

   3.3. Harassment related to disability.

4. The relevant disability is depression and anxiety. The respondent accepts that the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of this mental impairment.

5. We shall firstly set out our factual findings. We shall then go on to a consideration of the relevant law and then apply the relevant law to those factual findings in order to determine the issues that arise in the case.

Findings of fact

6. The respondent offers a range of medical services to its clients. Its clientele consists of those suffering from a range of conditions. The respondent offers treatment programmes for pain relief and rehabilitation.

7. The claimant is a chartered physiotherapist. Her practice is governed by the Healthcare Professionals Council which is her regulatory body.

8. The claimant worked for the respondent as a neuro-musculoskeletal physiotherapist between 18 June 2018 and 23 July 2018.

9. The claimant applied for the role on 31 March 2018. At the time, she was employed by a company called Water Bumps. The claimant was employed in a managerial capacity for Water Bumps, which provides aqua-natal therapy for pregnant women. In evidence given under cross-examination, the claimant said that she had a wide variety of duties with Water Bumps overseeing the whole of its operation ranging from undertaking the hydrotherapy in the hydrotherapy pool to various administrative duties. The claimant worked for Water Bumps in a full-time capacity until she went on maternity leave. She was in the employ of Water Bumps at the time she applied for the position with the respondent.

10. She had worked for Water Bumps for six years. She wished to move roles in order to focus upon clinical work.

11. She was interviewed by Dr Michael Lee. He is a director of the respondent. The Tribunal had the benefit of hearing evidence from him. We also heard evidence from Mrs Joyce Lee who is the other director of the respondent.

12. Dr Lee conducted a telephone interview with the claimant on 1 April 2018. A transcript of the interview is at pages 33 to 35.

13. The claimant said that she wished to *"go back to clinical work and help patients recover".* She told Dr Lee that *she "thrived on pressure"* and had worked long hours in her managerial role with Water Bumps. There is much merit in Mr Taylor's cross-examination of the claimant to the effect that she sought to portray to Dr Lee that she was adaptable and flexible.

14. There was no suggestion within the interview notes that the claimant had a preference for working fixed days and fixed times. It was put to Dr Lee during his cross-examination that he had not raised with the claimant any issue around hours of work. Dr Lee fairly accepted this to be the case but said that it was inappropriate to do so at a first interview being conducted by telephone and which was expected to only last for 15 minutes.

15. A second interview then took place on 14 April 2018. This time, the interview was in person. The notes are at pages 36 to 39.

16. The notes record that Dr Lee asked the claimant when she would be available to start work if she were to be successful in her application. The claimant said that she was *"available to start in June/July after my holiday"* and went on to say, when asked what days and hours she would be available to work that *"I'm flexible with the days and hours but would need to work with childcare".* The claimant fairly accepted, when asked in cross-examination, that she did not say that she needed a particular work structure and simply intimated a requirement for flexibility around childcare issues.

17. The interview then turned to the reason why the claimant was leaving Water Bumps. The claimant repeated what she had said at the telephone interview to the effect that she wished to *"leave management and upskill myself as a clinician".* When Dr Lee asked her what she liked or disliked about her job with Water Bumps she said, *"I like the job, however like I said before I would like to change my career direction and become a clinician. I liked meeting the patients and what I didn't like was that I had limited time to treat".* She went on to say (in answer to a subsequent question) that she considered she had *"lost touch of the clinical side of being a physiotherapist".*

18. Dr Lee then asked a series of questions which elicited that the claimant would stay at work until she had completed all of her tasks. Dr Lee was sufficiently impressed to offer the position to the claimant. He commented that she was *"enthusiastic, excited to learn and flexible working hours".*

19. The claimant disputed the accuracy of the notes of interview. This was upon the basis that mention was made (in answer to question 8 on page 38) that she had arranged for an X-ray to be taken of a patient. The claimant said that she had never undertaken that type of work. That said, the claimant did not dispute the tenor of the notes of both interviews in so far as they recorded her portrayal to Dr Lee of a willingness on her part to work flexibly. Indeed, the claimant fairly and

realistically accepted this to be a reasonable interpretation based upon her answer to question 8 itself (at page 38).

20. It was suggested to the claimant that she had an opportunity (in particular by reference to the 11th question where she was asked to indicate her strength and weaknesses) to mention to the respondent a need for structure around her working days and working hours. The claimant accepted this to be the case and went on to say that she *"did not expect that my mental health would impact me as it did when I had the interview".* Mr Taylor asked the claimant whether she agreed that there was nothing within the interview notes to put the respondent on notice of any difficulty that she may have with flexibility in her working hours. The claimant fairly agreed with that suggestion.

21. On Sunday 22 April 2018 Dr Lee emailed the claimant. He offered her the position for which she had applied. The claimant replied the same day. She said that the offer was *"wonderful news to wake up to on a Sunday morning. I cannot even begin to describe how happy I am that you have offered me this position which I accept with huge thanks".* The claimant asked for some details about terms and conditions.

22. The offer of employment was confirmed in writing on 8 May 2018 (pages 42 to 68). The claimant signed to confirm her acceptance of the terms and conditions on 19 May 2018. The claimant was to be paid the sum of £8 per hour when undertaking non-clinical work for the respondent. This would rise to £16 per hour during her probationary period when undertaking clinical work. Upon satisfactory completion of the probationary period clinical work was to be paid at £20 per hour. This is recorded in the schedule at page 43. The claimant was to be employed upon a part-time basis. The schedule says that the respondent's *"core hours of operation are Monday to Friday from 06:00 to 22:00".*

23. The job description is at page 46. Not only was the claimant expected to undertake *"work with patients who have a range of conditions, including neurological, neuro-musculoskeletal, cardiovascular and respiratory"* but she was also expected to work with her practice manager in order to market her services and "*provide pro bono services to aid the marketing of the business and of your services for the purposes of the dedicated charity".*

24. The claimant's practice manager throughout her employment was Lauren Bray. During the course of the preliminary hearing before Employment Judge Rostant Mr Taylor indicated that it was the respondent's intention to call her as a witness.

25. During the course of the first part of the hearing held at the end of March 2019 Mr Taylor said (on the morning of 29 March 2019) that Miss Bray had in fact left the employment of the respondent not long after the claimant's departure.

26. The respondent's solicitors served the claimant with Dr Lee's witness statement on 18 February 2019. About two weeks before that, on 6 February 2019, the respondent had told the claimant that Miss Bray was now unlikely to give evidence for the respondent. It appears that the respondent had not entirely given up hope of calling her because the email went on to say that *"if anything changes in the next couple of days we will let you know".* In the event, there was no such intimation and therefore it would have been apparent to the claimant on 18 February 2019 that Miss Bray would not be attending to give evidence for the respondent.

27. Notwithstanding that Miss Bray was a key witness, the claimant took no steps to obtain a witness statement from her. She could have done so as there is no property in a witness in Employment Tribunal proceedings.

28. In the event, due to late disclosure of documents upon the part of the respondent during the course of the hearing in March 2019, the claimant had taken the opportunity to contact Miss Bray. The respondent's late disclosure caused an adjournment of the hearing which presented an opportunity for the claimant to ask Miss Bray to give evidence on her behalf. This the claimant did upon the resumption of the hearing in July 2019. Miss Bray's evidence will be considered below. Miss Bray did not attend in person to give evidence. The Tribunal was presented with a signed witness statement from her dated 3 July 2019.

29. The late disclosed documents were presented to the Tribunal upon the resumption of the hearing on 18 July 2019. The documents in the supplemental bundle shall be referred to with the suffix '*SB'*.

30. We now pick up the chronology of events (from where we left off in paragraphs 22 and 23). Although it was anticipated that the claimant would commence work for the respondent on 2 July 2018, she was in fact able to start work sooner. She started work on 18 June 2018 and worked between 10.15am and 4.30pm. She worked on 19 June 2018 between 10.00 and 3.30 pm. On 18 and 19 June 2018 she undertook work upon marketing the respondent's business on Facebook.

31. Before starting work, she enquired of Dr Lee about the possibility of continuing to work for Water Bumps. The claimant's account is that she was *"advised by Dr Lee that I would need to decide between [the respondent] and Water Bumps as he would require 100% commitment from me".*

32. Dr Lee did not dispute that there was a conversation between him and the claimant on 19 May 2018 (prior to her date of commencement) about the claimant's wish to continue to work for Water Bumps. In paragraph 54 of his witness statement Dr Lee said that the claimant *"provided no information regarding the position offered, what the work was and what it involved. I replied that the claimant should read and refer to section 28 of the contract and if there were any questions she should let me know".* Dr Lee said that the claimant did not come back to him about the question of working for Water Bumps.

33. Section 28 of the contract of employment to which Dr Lee refers is copied into the bundle at page 63. The relevant provision is to be found at clause 28.3. This obliges the employee *"Not, without the written consent of us, [to] undertake any other (paid or unpaid) work, accept another role which is a conflict of interest, become an employee of, or act as a consultant or advisor to, any other company, corporation, organisation or person or accept a directorship of another company or an appointment to a public authority".*

34. The claimant accepted that she did not revert to Dr Lee about Water Bumps after 19 May 2018. She emailed Helen Straw at Water Bumps on 22 May 2018 (page 232). She said that she had discussed the possibility of continuing to work for Water Bumps "*with my new boss and the reaction was not a particularly positive one I'm afraid as he wants 100% commitment. Because he is offering me a minimum of 16 hours I just can't afford to turn it down and have had to make a decision that is best for my family at this present moment".* The claimant went on to say that *"after returning from Devon back in February, I wasn't sure if I was the*

right person for the job if I am being truly honest. I'm really sorry about this as I hope you know I would never ever want to let you down".

35. Clearly, the claimant had interpreted Dr Lee's comments on 19 May 2018 as a refusal of permission for her to do any work for Water Bumps. (The respondent does not undertake hydrotherapy for pregnant women. Dr Lee said however that he would treat pregnant women for musculoskeletal complaints if asked).

36. We accept Dr Lee's evidence that he did not expressly refuse the claimant permission to work for Water Bumps alongside her employment with the respondent. However, it is our judgment that the claimant could reasonably have interpreted Dr Lee's comments at the meeting of 19 May 2018 as being to that effect. The claimant could reasonably interpret his reference to clause 28 of the employment contract as being tantamount to a refusal.

37. The claimant says, at paragraph 5 of her witness statement, that, *"Whilst working 18/19 June 2018 my hours were verbally agreed as Tuesday/Thursday 9am to 5pm and can be demonstrated in the hours worked/paid for (… page 188) – hours of work submitted to business".*

38. Page 188 is a list of hours worked by the claimant. It is worth setting this out in full.

    - *18 June 2018 – 10.15 to 16.30. No patients. 6.25 hours.*
    - *19 June 2018 – 10.00 to 15.00. No patients. 5 hours.*
    - *26 June 2018 – 08.30 to 17.00. No patients. 8.5 hours.*
    - *28 June 2018 – 09.00 to 17.15. 1 patient (45 minutes) 8.25 hours.*
    - *3 July 2018 – 09.00 to 17.00. 2 patients. 8 hours.*
    - *5 July 2018 – 10.00 to 18.00. No patients. 8 hours.*
    - *10 July 2018 – 09.00 to 17.30. 1 patient. 8.5 hours.*
    - *12 July 2018 – 10.00 to 18.30. 1 patient. 8.5 hours.*

39. All of the days upon which the claimant worked (aside from Monday 18 June 2018) were a Tuesday or a Thursday. However, only on 3 July 2018 did the claimant work from 9.00 in the morning to 5.00 in the evening.

40. When cross-examined about what was said by her in paragraph 5 of her witness statement, the claimant said that she had agreed to work between 9.00 in the morning and 5.00 in the evening on Tuesday and Thursday of each week and that this agreement had been reached with Lauren Bray. The claimant accepted there to be no documentary evidence in the bundle to corroborate her account but said that she was *"under the impression that it was permanent – two days, 9 to 5".*

41. At paragraph 6 of her witness statement the claimant says that, "*within one week of starting employment Lauren Bray – practice manager (Lauren) approached me via slack messages to discuss my working hours (… page 156), however later in the conversation contradicts herself as there not being a need for my hours/days to change (… page 157). This made me feel unsure of my working arrangements. Lauren had stated the query had come from the directors (Dr Lee/Joyce Lee). However, her opinion was different, and so to me this showed inconsistencies between the management team. Which in my opinion is not fair to experience and this is what started to bring on my anxiety. Lauren took this query away to speak to Dr Lee about, however I did not receive any further response".*

42. The claimant is correct to say that Miss Bray contacted her on *slack* (which is a business messaging system) shortly after she started work. In a message copied

at page 156 we can see that Miss Bray said to the claimant, *"Hi Sarah, been looking at yours, would you mind spreading them over three days? Maybe if you did 9 to 2 on two days and then an afternoon the other? I totally understand about childcare though so honestly if you can't just".* The claimant responded, *"what time would the afternoon be? It really all does depend on childcare really so I will speak to my parents tomorrow. Is there a particular reason for the change to three days? I would rather do two days but if that's what Michael wants I can see if it will work out"* [emphasis added by the Tribunal]. The claimant expressed some optimism about being able to *"sort it"* (by reference to page 158). The messages at pages 156 to 158 are undated. However, by reference to the bottom entry at page 158 (which contains the date of 29 June 2018) we infer that these exchanges took place on 28 June. The claimant therefore is not far wrong in her assessment in paragraph 6 of her witness statement as to when the respondent started to correspond with her about her working hours.

43. The issue of the date of the exchanges at pages 156 to 158 was put beyond doubt upon production of the supplemental bundle. The messages at pages 156 to 158 are reproduced at 262SB and 263SB and are dated 28 June 2018.

44. The claimant also raised concerns over the respondent's expectations concerning the *"pro bono services to aid the marketing of the business"* referred to in the job description at page 46. We see a message to this effect at page 162. She pointed out that *"as a business one has to be careful how many unpaid hours over an employee's paid hours you are asking them to do as in theory they are still working and you can actually be making it so their hourly rate is taken below the national living wage/minimum wage which is illegal. Sports Direct got done for it quite recently".* Miss Bray responded on 1 July 2018. She appeared sympathetic to the claimant and said, *"to be honest all the charity and park runs are great, but people also need to have family time."*

45. Mr Taylor suggested to the claimant that the tenor of the messaging between her and Miss Bray towards the end of June was not consistent with there having been any agreement for the claimant to work fixed days and hours. However, the mere fact that an employer asks an employee to vary hours is not of course inconsistent with the employee having fixed days and hours of work. Further, the exchanges at pages 156 to 158 are such as to satisfy us that Miss Bray and the claimant had agreed that the claimant would work her 16 hours over two days. If it were otherwise Miss Bray would not have been asking the claimant if she would mind spreading her hours over three days and the claimant would not have responded to the request to say that she would rather do her hours over two days and questioning a need for a change to what had been agreed (as emphasised in paragraph 42) . Miss Bray also said (also at page 156) that Dr Lee did not want the claimant to do two long shifts. Therefore, the tenor of these exchanges is consistent with the claimant's case that there had been an agreement between her and Lauren Bray, that she would do her hours over two days. Upon this basis we accept the claimant's account.

46. Further, the slack messages at 259SB (dated 20 June 2018) between the claimant and Miss Bray are also about the claimant's working days. The claimant said that she preferred to work two days with which Miss Bray agreed.

47. The claimant's concerns over her hours remained unresolved. On 2 July 2018 she sent a message to Miss Bray. She said, *"I just wondered if you knew what the decision was regarding my hours".* Miss Bray said, *"Joyce (Lee) has asked if you*

are free any evenings if childcare is too difficult? Tomorrow come in for your *__normal hours__* *and I will have a meeting with you if that's ok?"* [emphasis added by the Tribunal]. The claimant replied that, *"we can discuss everything tomorrow if that's ok?"* The relevant messages are at page 164. Lauren Bray's reference in her message (timed at 5.47pm on 2 July) to *"normal hours"* is significant. Plainly, Miss Bray (who was the claimant's line manager) regarded the claimant as having normal working hours.

48. That the actual hours worked by the claimant (as recorded at paragraph 38 above) varied is not inconsistent with the claimant having been told by Lauren Bray that she would work between 9am and 5.00pm on Tuesday and Thursday of each week. That the claimant was in fact working different hours to those is not inconsistent with the claimant having been told that she would be working such hours regularly. Indeed, it was the fact that the hours varied that prompted the claimant to raise her concerns with her line manager in the first place. On balance therefore, we prefer the claimant's account that Lauren Bray and she agreed that she would work between 9am and 5.00pm on Tuesday and Thursday of each week. That the claimant in fact worked Tuesday and Thursday (and no other days save for the first day) is consistent with that agreement.

49. It appears not to be in dispute that a meeting took place on 3 July 2018 between the claimant and Miss Bray. This is consistent with the claimant saying (at 5.52 on 2 July 2018) that she and Miss Bray would discuss matters *"tomorrow".* This is a slack entry at page 164. 3 July 2018 was a Tuesday. It is therefore credible that the claimant was in work that day as it was consistent with the pattern of undertaking work on Tuesdays and Thursdays. Again, the supplemental bundle is helpful. The entry at page 164 is reproduced at page 269SB. Further, on page 269SB there are exchanges between the claimant and Miss Bray in the evening of 3 July about the meeting. Page 3SB also contains the notes referred to below at paragraphs 52 and 53. Again, this corroborates our finding that a meeting took place on 3 July 2018 between the claimant and Miss Bray.

50. At paragraph 9 of her witness statement the claimant says that she and Miss Bray discussed a number of issues. It is necessary to set out paragraph 9 of the claimant's witness statement in full. She says that the following matters were discussed:

- *"My agreed working hours were Tuesday to Thursday 9am to 5pm.*
- *I wanted to understand the rationale as to why my hours were now being looked at when I was of the understanding that these had been agreed.*
- *I asked as to whether all staff were having their hours changed.*
- *I asked for clarity as to what the difference would be for the business if I worked over three days instead of two?*
- *I advised Lauren that I was worried of what would happen if I could not work the hours they wanted me to change to as I was in my probation period. I was concerned that they would terminate my contract if I couldn't do what they asked.*
- *I disclosed to Lauren that I suffer with mental health problems and have done in the past which is why I have become so worried about this situation.*
- *I asked around the overtime clause in my contract, compared to the expected voluntary work I was being asked to do.*
- *Would I be reimbursed for any additional travel costs."*

51. The claimant went on to say that, *"Lauren was making notes during this discussion, as she was unable to answer most of these questions so would need to refer them on to Dr Lee, she did however advise me at this point I was the only one being spoken to in relation to my hours. When disclosing about my mental health problems, I believe to put me at ease, Lauren also told me that she herself struggles with mental health. On conclusion of the meeting it was agreed I would continue to work Tuesdays 9am to 5pm/Thursdays 11am to 7pm in order for me to be flexible and compromise on the business request but also still being able to arrange my childcare".*

52. The claimant's reference to Miss Bray *"making notes during this discussion"* prompted the Tribunal to ask Dr Lee whether a search had been made for the notes to which the claimant referred. This prompted Dr Lee to undertake a search on the evening of 28 March 2019 (after he had finished his evidence). He was able to obtain some notes from a file created by Lauren Bray. These include notes for meeting with the claimant held on 3 July 2018 (page 3SB). (It was the late production of these notes that led to the adjournment of the case as was said at paragraph 28).

53. The notes are not *verbatim.* It is clear however that the issue of the claimant's hours of work was discussed. This was said to be to accommodate the claimant's *"needs"* and the respondent's patients. There was no express reference to the issue of the claimant's mental health.

54. Upon the issue of patient need Dr Lee explained that the claimant was the only qualified chartered physiotherapist in his employment at the time. Some of the respondent's clients have the benefit of insurance contracts with organisations such as BUPA. It is a condition of those contracts that therapy is undertaken by a professionally qualified therapist. Accordingly, the insurance clients would have to be seen by the claimant. Many such clients however wish to be treated outside core business hours entailing a need for flexibility upon the part of the therapist. In addition to those clients with insurance contracts Dr Lee said that his practice was to refer patients on to the claimant himself but again this entailed flexibility upon the therapist's part in order to meet client demands to be seen outside of core working hours.

55. Mr Taylor suggested to the claimant that her needs around her hours of work arose from childcare and not issues connected with her disability. He put it to her that it was striking that in the subsequent correspondence within the bundles the claimant did not make any reference to her mental health issues. The claimant fairly accepted this to be the case but said that she thought she had done enough by informing Lauren Bray of the needs that arose from her disability on 3 July 2018.

56. At paragraph 9 of her witness statement Miss Bray says that, *"I specifically made Dr Lee aware of Sarah's health concerns, as Dr Lee had helped me with similar issues."* When taken to this passage in cross examination, Dr Lee properly raised an issue of medical ethics as he was concerned about breaching Miss Bray's confidence. This was all the more the case given that she was not present in tribunal and her rights to a private life under the *European Convention on Human Rights* (to which the tribunal is obliged to give effect under the Human Rights Act 1998) may be infringed were her medical treatment to be discussed in a public forum and put in the public domain (particularly upon publication of the judgment upon the Employment Tribunals judgments website).

57. The Tribunal directed that Dr Lee may disclose certain information about his treatment of Lauren Bray and that the Tribunal's direction to this effect involved no breach of his duty of confidence towards Miss Bray. Dr Lee said that he had not treated Miss Bray for mental health issues. This was credible as Dr Lee is not qualified as a psychiatrist or psychologist. It was proportionate for Dr Lee to confine his evidence in this way, there being no public interest is obtaining details of his treatment of Miss Bray. It is sufficient for our purposes to have obtained credible evidence from Dr Lee that he did <u>not</u> treat Miss Bray about her mental health as she alleges.

58. At paragraph 10 of her witness statement Miss Bray says that on 3 July 2018, *"Sarah explained about her previous struggles, and how she was currently feeling whilst working for SSM, I knew routine was critical for Sarah, I would dread broaching the conversation of hours of work, as I knew the impact this was having on Sarah's wellbeing."* She says that the issue of childcare was discussed in the context of the claimant's working hours.

59. Following the claimant working on Tuesday 3 July 2018 (during the course of which she had her meeting with Lauren Bray) the claimant was next in on Thursday 5 July 2018. It appears that the hours were agreed on 4 July 2018 on *slack* (page 166).

60. On 5 July 2018 Miss Bray and Dr Lee discussed the possibility of providing the claimant with an ergonomic stool. Page 341SB evidences this discussion. There were slack messages about this (also on 5 July 2018) at page 57SB. There is no reference (in the exchanges about the stool) in addition to the fact of the claimant having divulged to Lauren Bray that she has the mental impairment of anxiety and depression. This condition was not mentioned in the slack messages between 3 and 5 July inclusive (48SB -60SB).

61. There follow (at 62SB-77SB) messages concerning day-to-day matters concerning the claimant's work. There is no reason to detail them here. Suffice it to say that no reference is made to anything of relevance about the claimant's mental health or her circumstances.

62. On 12 July 2018, Dr Lee asked Miss Bray *via* slack whether the claimant had said anything about *"going to three days."* This enquiry corroborates our finding that the claimant had agreed to work two days a week. Otherwise, Dr Lee would not have couched it in terms of her *"going to"* three days a week (which is suggestive of a change or variation). Miss Bray replied, *"She was going to ask her parents to see if they can help. She gets ever so upset about things! Makes me think she has a lot going on as she's very emotional."* Dr Lee replied, "*Yes I think so too. Maybe I need to treat her for that."* (Dr Lee fairly acknowledged in evidence on the fourth day of the hearing that this was a misplaced attempt at humour as he was in no position to treat for mental health conditions).

63. In reply to Dr Lee's comment, Miss Bray said, *"Yes, every time she gets a bit het up about things she cries, even when she spoke about Colin [McCurdie, a sports therapist employed by the respondent] today she said she went home on Tuesday [10 July] and burst into tears. It might be worth treating her, I think she feels a lot of pressure of relying on her mum and dad for childcare."* Dr Lee said that he would speak to the claimant. Miss Bray was supportive of him doing so. Miss Bray did not message Dr Lee to the effect that she had told him of the claimant's disclosure to her on 3 July 2018. As Mr Taylor submitted, this may be considered surprising in the light of the exchanges of 12 July.

64. On 16 July 2018 (at 6.24 pm) Dr Lee sent a message to the claimant (page 168/ 83SB). He said, *"I've spoken to Lauren and she's let me know that there is some confusion on what is expected. It was me that asked Lauren to ask you to see if you could come in over three days as this is to benefit you when booking patients. I can see that you're upset and I would love to help you but please allow me to help as I want the best for you".* Dr Lee's message was prompted by a slack message from Miss Bray earlier the same day about the claimant's working hours (83SB).

65. The claimant replied to Dr Lee the same day (at 8.02 pm: page 169) to say that she had sent an email to him. This is at pages 69 and 70. Dr Lee acknowledged receipt of the email at 8.11 (page 169). He said that he would like to speak to the claimant. She replied (at 8.27) to say that she would wait for his written response and then arrange to speak with him.

66. Dr Lee responded on 16 July 2018 at 11.46 pm (pages 71 to 75). The email from the claimant at pages 69 and 70 had been sent at 8.01 pm. Dr Lee therefore worked quickly to reply to her.

67. There was some criticism of Dr Lee upon the part of the claimant in emailing his reply to her. This appears to be misplaced upon the basis that the claimant had expressly asked him to reply by email (page 70).

68. The claimant's email of 16 July 2018 (timed at 8.01 pm at pages 69 and 70) raised concerns about her working hours. She said that, *"When commencing employment it was agreed that I would work two days per week as this would fit with my childcare and was suitable for the business. It would seem that since starting the goal posts have changed however. It is not clear as to why. I am in no way inflexible as I have said I will work any shift times on any days (not Mondays where possible but could be discussed). However whilst I am not fully booked with clients I am unable to justify travelling three days a week as this would not be cost effective on a 16 hour contract. I appreciate this is my worry, however this is why it was agreed and both myself and Lauren confirmed two days per week met the needs of the business".* The claimant said that the situation was causing some uncertainty and *"a stressful environment for all of us both in work and at home".* She asked Dr Lee, *"am I able to continue my current working hours over two days a week (days/times to be flexible)?"*

69. In slack messages passing between them on the evening of 16 July 2018 (page 85SB) Dr Lee and Miss Bray were concerned to try to ensure that the claimant knew what was expected of her. Dr Lee opined, *"I think Sarah has a lot of anxiety."* Miss Bray agreed with that opinion (but did not say that she had been told of the claimant's mental health issues on 3 July or at any other time). When asked by the Employment Judge to explain his remark Dr Lee said he was seeking to convey that *"someone should be worried"* and the claimant had displayed *"an unusual reaction"* to events.

70. Dr Lee told the claimant (at pages 71 to 75) in reply to her email at pages 69 and 70 that her contractual hours were 16 per week. He apologised that matters had not been clear. He encouraged the claimant to speak to Lauren Bray or to him should she need clarity. He was prepared to accommodate the claimant's wish to work over two days *"for the foreseeable future".* This was with the caveat that the claimant would build up a portfolio of patients quicker if she were able to work over three days. Nonetheless, Dr Lee was prepared to allow the claimant to work two

days a week and hire other physiotherapists to cover patient demands on Monday, Wednesday and Friday.

71. The claimant also raised a complaint (at page 70) that she could not understand *"why me as the only female on the team is constantly having her hours reviewed while my colleagues, both male, are able to work around their commitments whether other employment or childcare. This does not seem very fair or reasonable to me".* Dr Lee assured her (at page 74) that the respondent was *"not picking"* on her. He said that *"the other practitioners complete their contracted hours over four days so that they can see patients within the hours or either side of the hours".*

72. The claimant emailed Dr Lee on 17 July 2018 at 13.07 (page 71). She told him that she *was "taking advice with regards to your responses".* She then sent a subsequent email the same day at 20.41 (pages 76 and 77). She remained concerned that the respondent was seeking to change what had been agreed between her and Lauren Bray. She was also concerned that the respondent was expecting her to provide "*pro bono* services" with the possible infringement of the National Minimum Wage Act 1998. She said that her expectation moving forwards was to enable her to work Tuesday and Thursday with a working week of 16 hours.

73. Towards the end of the email (at page 77) the claimant said, *"I will welcome a conversation with yourself on the above and on previous emails".* Dr Lee did not respond to the claimant's email of 17 July 2018 (timed at 20.41).

74. We are satisfied that up to this point Dr Lee had been ready, willing and able to discuss matters with the claimant. He had, as he put it in evidence, *"reached out"* to the claimant on several occasions-see the references at: pages 71 to 75 at 11.46 pm upon 16 July 2018; at pages 168 and 169 earlier upon 16 July 2018 at 6.24 pm); and upon 17 July 2018 (at 3.06pm) at page 209. Miss Bray was impressed with Dr Lee's response to the claimant at pages 71 to 75: she said in a slack message at 5.07 pm on 17 July 2018 that his response had been very good. She acknowledged that the claimant was *"upset."*

75. Nonetheless, the fact remains that he did not respond to the claimant's email of 17 July 2018 timed at 8.41 pm. We can see from the slack messages sent at around 11.45 pm on 17 July 2018 (page 94SB) that Dr Lee's thoughts were turning to ending the employment relationship with the claimant. *"I'm also thinking that we don't need a meeting with [the claimant] but just terminate"* was what he said in a message sent to Miss Bray at 11.45 pm that night. He followed this up with the comment that *"I think we need to terminate by Thursday [19 July]"* in a message sent at 11.57 on 17 July 2018 (page 95SB). Miss Bray undertook to ascertain the legal position and to speak to ACAS.

76. The claimant had been unsure as to whether to attend for work on Tuesday 17 July 2018. We can see from the messages between the claimant and Lauren Bray (at pages 171 to 187) that there was a lot of messaging backwards and forwards between them. The messaging was largely around whether the claimant should attend work on 17 July and then subsequently on 19 July 2018.

77. The claimant was disinclined to attend work on 17 July. In the event, her child was, unfortunately, ill on the evening of 16 July. The claimant therefore informed Miss Bray, on the morning of 17 July 2018, that she would not be attending work that day upon account of the child's illness. The claimant said, "*I'll take a day unpaid (parental leave or whatever it's called as per my contract)".*

78. As we say, it is clear from the messages between the claimant and Lauren Bray that the claimant was not inclined to attend work anyway pending satisfactory resolution of the issue around her hours of work. The claimant was in fact due to see a patient at 1.30pm on 17 July 2018. Alternative arrangements were made for the patient to be seen.

79. It appears to be the case from the text at page 183 (timed at 6.27 pm on 18 July) that the claimant had received a holding email from Miss Bray upon the claimant's email at 8.41 pm on 17 July. She asked her in the same message when she (the claimant) may expect to hear from Dr Lee. (From the slack messages at page 99SB we can see that Dr Lee and Miss Bray had agreed to send a holding email to the claimant to say that they would revert to her within the next 48 hours (presumably in response to her email of 17 July 2018 timed at 8.41 pm). The Tribunal has not seen a copy of that email).

80. Miss Bray referred the text timed at 6.27 pm of 18 July 2018 to Dr Lee. He directed Miss Bray not to reply to the claimant (page 101SB). Nonetheless, Miss Bray did do so.

81. The claimant was plainly undecided as to what to do about attending work on 19 July 2018. She texted Lauren Bray on the evening of 18 July 2018 (page 184) say that she felt that she was *"in limbo".* She then informed Miss Bray that she would await a response from Dr Lee before going into work. She appears to have been encouraged not to go in by Miss Bray's text (at page 184 and apparently issued in breach of Dr Lee's instruction) to the effect that she did not imagine that Dr Lee would be expecting her to turn up for work.

82. Dr Lee expressed relief to Miss Bray that the claimant was not intending to attend for work on 19 July. He said, *"that'll buy us time to review and terminate"* (page 103SB). Miss Bray was supportive of that sentiment.

83. The passages to which we have referred at paragraphs 81 and 82 illustrate the difficult position that Miss Bray had got herself into. She was portraying messages of support to the claimant against Dr Lee on the one hand while conveying a message of support to Dr Lee of his approach on the other. A further example of this may be found at page 77, that being a text of 16 July 2018 where Miss Bray agrees with the claimant's opinion that the respondent was engaging in exploitation of its employees. Miss Bray's inconsistent approach is such that the Tribunal is unable to place any reliance upon her evidence without it having been tested in cross examination.

84. The claimant did not attend for work on 19 July 2018. In her schedule of loss, she maintains that she was unfit to attend work by reason of ill health.

85. On 20 July 2018 Joyce Lee sent a letter to the claimant (page 78). The letter reads as follows: -

"I understand that you have not attended work today 19 July 2018 and sent an SMS message to Lauren with the following 'I think I will wait for a response, so sorry I'm letting everyone down'.

I now require you to attend an investigation meeting to be held on 24 July at Graves Health and Sports Centre at 09.30am. Please be aware that I consider that this is a reasonable and lawful instruction. Wilful refusal to follow this instruction is potentially an act of gross misconduct which may render you liable to summary dismissal."

86. On 23 July 2018 the claimant tendered her resignation by email (pages 79 and 80). She said:

    "Further to your letter dated 20 July 2018, please find below my resignation email.

    I'm resigning from the role of neuromusculoskeletal physiotherapist with immediate effect.

    I hoped it would not come to this as I wanted to work with yourself and the business to not only improve patients' lives but also to make the working practices on site better for your employees.

    From receipt of this letter it would seem that you are not willing to improve working practices and as such I will be obtaining legal advice regarding reporting this business for illegal working practices.

    It would also seem that you have chosen which text messages to use/interpret as I was off sick on Thursday due to the stress and anxiety this has caused me. As someone who has suffered with depression and anxiety it was not right for me to come to work on Thursday without a resolution. Again it would seem following the letter from Joyce that you were happy to discriminate against me not only as a woman but also as someone who suffers with mental health concerns".

87. The remainder of the letter concerned payment of the claimant's remuneration for her hours worked. There was also a reference to the claimant making contact with ACAS *"in relation to this level of discrimination".*

88. There is merit in the claimant's complaint that the letter from Joyce Lee misquoted the salient text message dated 18 July 2018 cited in Mrs Lee's letter at page 78. The text appears at pages 184 and 185. The claimant told Lauren Bray on 18 July 2018 that, *"I think I will wait for a response. So sorry, I <u>hate feeling</u> like I'm letting everyone down" [missing words underlined].* The text message was not correctly quoted in Joyce Lee's letter.

89. Further, the second sentence of the second paragraph was, in the Tribunal's judgment, written without reasonable and proper cause. The claimant was simply being asked to attend an investigation meeting. To write in such a heavy-handed manner was, in our judgment, seriously damaging of or destructive of mutual trust and confidence and was done without reasonable and proper cause. (This is however a moot point as the claimant pursues no complaint of constructive wrongful dismissal or constructive dismissal related to the protected characteristics of sex and/or disability).

90. Miss Bray said in paragraph 10 of her witness statement that she did not wish to put her name to the letter at page 78. This was because of her knowledge of the claimant's mental health. Mrs Lee said that it had been drafted by Miss Bray but upon Miss Bray adopting her position Mrs Lee agreed to take hold of the process. She took the view that this was appropriate as she had had no substantive involvement in the matter.

91. On 23 July 2018 Joyce Lee wrote to the claimant (page 81). An opportunity was given to the claimant to reconsider and rescind her resignation. The claimant did not respond within the period allowed by Mrs Lee who therefore wrote on 26 July 2018 to confirm that the claimant's contract of employment with the respondent had ended on 23 July 2018. She offered the claimant the opportunity of reconsidering her resignation. Should the claimant do so then she was told that Mrs Lee wold continue with the *"ongoing investigation process."*

92. It was suggested by Mr Taylor to the claimant that the reference in her resignation letter to her mental health issues was the first time upon which the respondent had been made aware of them. This the claimant denied.

93. We now need to make some findings of facts about the claimant's comparators for the purposes of her complaint of sex discrimination. She has named two comparators: Gary Newbould and Colin McCurdie.

94. The claimant says that she was less favourably treated than both of her male comparators. Firstly, she says that she was subject to a frequent change in her working hours whereas her male comparators were not. Secondly, her case is that she was prevented from taking up employment (with Water Bumps) whereas her male comparators were allowed to have employments alongside the respondent.

95. Within the bundle, at pages 105 to 113 and 237 to 245 are diary entries showing Mr Newbould and Mr McCurdie's working hours. Regrettably, these are poor copies. Mr Taylor helpfully prepared a transcription of these upon the evening of 27 March 2019.

96. It can be seen that Mr McCurdie's hours were very variable. Mr Newbould's hours were more regular. Approximately 85% of the 39 shifts recorded upon the transcript were worked by Mr Newbould between 3pm and 8pm. Dr Lee explained that there was patient demand to be seen outside regular working hours hence Mr Newbould's relatively regular shift pattern.

97. Mr McCurdie, at the material time with which we are concerned, undertook work as a strength and conditioning coach with Sheffield Hallam University. This was a voluntary position for four hours a week. It also appears from the documents at pages 118 and 119 that he also ran group exercise classes for a gymnasium called '*Sweat'.*

98. Dr Lee denied that Mr McCurdie was in breach of contract by undertaking these activities. It appears not to be an issue that Mr McCurdie was subjected to the same provisions as set out at clause 28 of the claimant's contract of employment. Dr Lee said that there was no conflict of interest between Mr McCurdie's activities for Sheffield Hallam University and 'Sweat' on the one hand and the respondent on the other. This is because the athletes being treated or seen by him at Sheffield Hallam University are contractually obliged not to seek treatment other than through those appointed by the university. Therefore, although the respondent does offer the type of services that Mr McCurdie was providing for Sheffield Hallam University the athletes being treated there would not have it in their gift to seek treatment from the respondent anyway. Further, the respondent does not offer the body conditioning treatment provided by 'Sweat 'in any event.

99. Mr Newbould is a sports therapist. He runs or has an interest in a property consultant and chartered surveyor's business. The claimant fairly accepted this not to be in breach of Mr Newbould's contract of employment. Such an interest cannot, of course, be in conflict with Mr Newbould's work for the respondent.

100. Mr Newbould at the material time also worked for Lincoln City Football Club. Dr Lee fairly accepted that the services which Mr Newbould was providing for Lincoln City FC are of the sort undertaken by the respondent. However, he maintained there to be no conflict of interest because of the geographical distance between Sheffield and Lincoln. Further, the professional football players employed by

Lincoln City FC would not be permitted to undergo any form of treatment independently of those recommended by the club.

101. Mr Newbould had another interest in a business called 'New Lease Sports Therapy'. Mr Lee said that he was unaware of this until this was disclosed to him in the course of the Employment Tribunal proceedings. Dr Lee's evidence is that he asked Mr Newbould to take down the website. It appears that this in fact has not been done. However, Mr Newbould resigned his employment with the respondent shortly after Dr Lee asked him to remove the 'New Lease' website.

102. On 17 August 2018, Dr Lee and Miss Bray were once again corresponding on slack. It appears that there was some discussion about the claimant having intimated a claim. Miss Bray expressed views that were critical of the claimant's prospects and surmised that *"she will probably say mental health and anxiety."* It was put to the claimant that this would be an odd thing for her to say had Miss Bray been aware of the claimant's mental health issues. This would have been a more forceful submission than is the case here had Miss Bray maintained a constant stance: see paragraph 83.

The issues in the case

103. We now turn from our findings of fact to a consideration of the issues in the case. As we said in paragraph 3, this case benefited from a preliminary hearing that came before Employment Judge Rostant on 2 November 2018. He identified the issues in the case at paragraph 4. These were identified as follows:

(4) *<u>Disability</u>*

1. Was the claimant a disabled person in accordance with the Equality Act 2010 at all relevant times because of depression and anxiety [this has been conceded by the respondent].

<u>EQA, Section 13: direct discrimination because of sex</u>

2. Has the respondent subjected the claimant to the following treatment:

(a) Preventing her from taking up employment with another employer during her employment with the respondent.

(b) Subjecting her to frequent changes to her hours.

3. Was that treatment "less favourable treatment" ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on Mr McCurdy and Mr Newbould as comparators in both complaints.

4. With regard to the first complaint the respondent's case is that the claimant was not treated differently to any male employee and that the comparators were not elsewhere employed. With regard to the second complaint the respondent denies that the claimant was subjected to regular changes of working time as alleged.

5. If so, was this because of the claimant's sex?

<u>Reasonable adjustments: EQA, Sections 20 and 21</u>

6. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person? The claimant asserts that she put the respondent on notice on 3 July.

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

(a) Frequent and regular changes to start and finish times of work? The respondent denies that the claimant was regularly subjected to changes in her working pattern.

8. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? In the claimant's impairment was made worse by the lack of regularity of working hours?

9. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage? The claimant asserts that she advised the respondent of this fact on 3 July.

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

(a) Ensuring a stable and regular pattern of work.

11. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

<u>EQA, Section 26: Harassment related to disability</u>

12. Did the respondent engage in conduct as follows:

(a) Inviting the claimant to an investigation meeting – suggestive of wrong doing on the part of the claimant?

13. If so was that conducted unwanted?

14. If so did it relate to the protected characteristic of disability? The claimant asserts that it does since it was occasioned by correspondence between her and a director about her absences from work due to illness.

15. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

104. Employment Judge Rostant then dealt with the issues that arose in the case about unpaid annual leave and unauthorised deductions from wages. There is no need for us to say anything about these claims because, by consent, the respondent agreed to pay to the claimant the sum of £161.50 for those claims.

The relevant law

105. Having made findings of fact and identified the issues in the case we now turn to a consideration of the relevant law. As identified by Employment Judge Rostant, the claimant's claims are of: direct discrimination because of sex; a failure to make reasonable adjustments; and harassment. This is conduct which is made unlawful pursuant to sections 13, 20 and 21 and 26 of the Equality Act 2010 respectively.

106. This conduct is made unlawful in the workplace by provisions set out in Part 5 of the 2010 Act. It is unlawful for an employee to discriminate against an employee

by, amongst other things, subjecting the employee to a detriment. A duty to make reasonable adjustments applies to an employer. An employer must not, in relation employment, harass an employee. The relevant provisions may be found at sections 39(2), (5) and 40 respectively.

107. We shall deal firstly with the complaint of direct discrimination because of sex. The first question for the Tribunal is whether the claimant received less favourable treatment than her comparators. Secondly, if she did, was the less favourable treatment upon the grounds of sex or was it for some other reason? The focus primarily must be on why the claimant was treated as she was.

108. The concept of direct discrimination imports the need for a comparative analysis. By section 23 of the 2010 Act on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case. In other words, it is necessary to look at how a comparator has been treated or would be treated in comparison with the claimant. The circumstances of the claimant and an actual or hypothetical comparator do not have to be precisely the same but they must not be materially different as one has to compare like with like. The treatment of a person who does not qualify as an actual comparator because the circumstances are in some material respect different may nevertheless be evidence from which a Tribunal may infer how a hypothetical comparator would be treated. Inferences may be drawn and one permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases were treated in relation to other individual cases.

109. For less favourable treatment to amount to discrimination the employer must subject the employee to the treatment set out in section 39(2). This includes subjecting the employee to a detriment. There is no statutory definition of the word *"detriment"* to be found in section 39(2) of the 2010 Act. The *Equality and Human Rights Commission's Code of Practice on Employment* (2011) says that generally a detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage.

110. We now turn to the reasonable adjustments complaint. An employer's duty to make reasonable adjustments arises where a provision, criterion or practice (*PCP*) (meaning broadly any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with those who are not disabled. The employer must then take such steps as it is reasonable to have to take to avoid the disadvantage.

111. Employment Judge Rostant identified the relevant PCP in this case as "*frequent and regular changes to start and finish times of work".* Having identified the relevant PCP, the Tribunal must then go on to consider the nature and extent of the substantial disadvantage suffered by the claimant in comparison to non-disabled comparators. "*Substantial"* in this context means *"more than minor or trivial".*

112. There must be evidence of apparently reasonable adjustments which could be made. It is for the claimant to show a *prima facie* case that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that the duty has been breached. The claimant must therefore identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage and having done so the burden will then shift to the employer to show

that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

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

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

115. A significant change brought about by the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when that was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with a duty, regard should be had to a number of factors. Those factors are not mentioned in the 2010 Act. However, paragraph 6.28 of the EHRC's Code gives examples of matters as a Tribunal may take into account. The Code stipulates that what is a reasonable step for an employer to take will depend on all the circumstances of each individual case. The factors to have in mind include for example the extent to which taking the step will prevent the effect in relation to which the duty was imposed, the practicality of such step, the costs that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking.

116. Paragraph 6.33 of the Code lists a number of adjustments that might be reasonable for an employer to make. These include altering the disabled worker's hours of work.

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

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

119. The 2010 Act does not require an employer to have actual or constructive knowledge of the precise diagnosis of the disability in question. Rather, it requires actual or constructive knowledge of the facts constituting the disability; that is to say, that the individual is suffering from a mental impairment which has a

substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities.

120. The Code states that an employer must do all it reasonably can be expected to do to find out whether a person has a disability. At paragraph 5.15, it is suggested that *"employers should consider whether a worker has a disability even where one has not been formally disclosed as for example not all workers who meet the definition of disability may think of themselves as a disabled person".*

121. Paragraph 6.19 of the Code says that the employer must do all they can reasonably be expected to do to find out whether or not a worker has a disability. What is reasonable will depend upon the circumstances. An example is then given in the following terms:

    "A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements".

122. The concept of constructive dismissal is aimed at the mischief of employers benefiting from an approach of not making any enquiries or investigations into an employee's medical condition and then praying ignorance in aid as a defence to a claim.

123. We now turn to the harassment complaint. There are three main essential elements. The first of these is that there must be unwanted conduct. The second is that the unwanted conduct has the proscribed effect or purpose: that is to say, the conduct was done with the purpose or had the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Thirdly, the unwanted conduct which was done with that purpose or which had that effect must relate to the protected characteristic of disability.

124. Paragraph 7.8 of the Code says that the word *"unwanted"* means essentially the same as *"unwelcome"* or *"uninvited". "Unwanted"* does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment. Unwanted conduct can include a wide range of behaviour including spoken or written words or abuse.

125. The second limb of the definition of harassment requires that the unwanted conduct in question has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Accordingly, conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect. Conduct that in fact does have that effect will be unlawful even if that was not the intention.

126. Therefore, a claim brought on the basis that the unwanted conduct had the <u>purpose</u> of violating dignity or creating an intimidating *etc* environment involves an examination of the perpetrator's intention. A claim brought upon the basis that that was the <u>effect</u> of the alleged perpetrator's behaviour involves a consideration of the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The test therefore has both subjective and objective elements to it. The objective element of the test is primarily intended to exclude liability where a claimant is hypersensitive and

unreasonably takes offence. Importantly however the Tribunal must consider whether it was reasonable for the conduct to have the effect on that particular claimant.

127. Finally, in order to constitute unlawful harassment, the unwanted and offensive conduct must be related to a relevant protected characteristic. As is said in paragraph 7.10 of the Code, protection is provided because the conduct is dictated by the relevant protected characteristic. A *"but for"* test is insufficient. It is not enough therefore, to say that but for the protected characteristic the conduct would not have occurred. If a protected characteristic is simply the setting for the unwanted conduct in question then that will be insufficient to meet the statutory test.

128. It is, we think, worth mentioning claims that may be brought under section 15 of the 2010 Act. This provides for a remedy in the case of discrimination for something arising in consequence of disability. Such type of discrimination is made unlawful in the workplace pursuant to section 39(2) of the 2010 Act. This is a complaint that may be raised where an employer treats an employee unfavourably because of something arising in consequence of the employee's disability which the employer cannot justify by showing the treatment to be a proportionate means of achieving a legitimate aim. Again, an employer facing such a complaint has a defence of lack of knowledge: that is to say, there will not be discrimination if the employer shows that the employer did not know and could not reasonably have been expected to know that the employee had the disability.

129. By section 136 of the 2010 Act, it is for the claimant to show a *prima facie* case of unlawful discrimination. This applies to all of the discrimination claims and the harassment claim. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was an infringement of the 2010 Act then the Tribunal must hold that contravention occurred. However, the requirements to uphold the complaint will not apply in circumstances where the respondent to it shows that it did not contravene the relevant provision in question.

Conclusions

130. We have set out our detailed findings of fact and the issues in the case. We have also considered the relevant law. We now turn to our conclusions.

131. We shall start with the consideration of the complaint of sex discrimination. The claimant compares her treatment with that of Mr Newbould and Mr McCurdie. The first limb of the complaint of sex discrimination is that the respondent prevented the claimant from taking up employment with another employer during her employment with the respondent. She complains that Mr McCurdie and Mr Newbould were allowed so to do.

132. We found as a fact that the claimant was prevented from taking up employment with Water Bumps during the time that she worked for the respondent. We refer to paragraphs 31 to 36. In reality, Water Bumps was not a business in competition with the respondent. As we said at paragraph 35, the respondent does not undertake hydrotherapy for pregnant women.

133. We have found as a fact (at paragraphs 95 to 101) that Mr McCurdie was allowed to work for Sheffield Hallam University and the gymnasium known as Sweat during his employment with the respondent. We accept Dr Lee's account that neither Sheffield Hallam University or Sweat were competing businesses with the respondent.

134. Mr Newbould was permitted to work for Lincoln City Football Club. Again, we accept Dr Lee's evidence that this was not a competing business with the respondent.

135. Mr McCurdie and Mr Newbould are both sports therapists. The claimant is a qualified chartered physiotherapist. However, the claimant and her two male comparators were all subjected to the same contractual provision. Their work is, in our judgment, sufficiently similar such that Mr McCurdie and Mr Newbould are legitimate actual male comparators. The question of how a hypothetical male comparator would have been treated does not arise.

136. In our judgment, the claimant has demonstrated that she was less favourably treated then were her male comparators. She was not permitted to work for a non-competing business whereas both Mr McCurdie and Mr Newbould were. The claimant has therefore established less favourable treatment of her as a woman in comparison to comparators of the opposite sex. There is therefore a difference in status and a difference in treatment. The claimant has also shown, as an additional feature, that she made a request of Dr Lee to work for Water Bumps and was refused. Mr McCurdie and Mr Newbould were granted permission to work for non-competing businesses.

137. However, the difficulty for the claimant is that although she was less favourably treated than her male comparators she has not, in our judgment shown that she was on the face of it subjected to any actual discrimination by reason of the refusal. Only if there is discrimination can there be a contravention of section 39(2). It is not enough to show less favourable treatment. The less favourable treatment must result in treatment of the kind referred to in section 39(2); in this case, that the claimant was subjected to a detriment by reason of Dr Lee's refusal. As we have said, a detriment is anything which the individual concerned might reasonably consider to be to their disadvantage or a worsening of their position. The difficulty for the claimant upon the direct discrimination complaint is that Dr Lee's refusal to allow the claimant to work for Water Bumps could not reasonably be considered by the claimant to have been to her disadvantage given that she considered that she was not the right person for the job in any event. We refer to paragraph 34.

138. In conclusion therefore, the complaint of direct discrimination because of sex fails. Although the claimant has shown less favourable treatment of her when her treatment is compared with that afforded to her male comparators such cannot constitute discrimination unless the claimant can show that she has been subjected to detriment because of that treatment. The reality of the situation is that Dr Lee refused her permission to work in a position which she did not wish to undertake anyway. That cannot reasonably be considered to be to the claimant's disadvantage or a worsening of her position and upon that basis she has not shown that she was discriminated against because of it.

139. The second limb of the direct discrimination claim is that the respondent subjected the claimant to a frequent change to her hours. In so far as a complaint is brought upon the basis of a comparison of her treatment with Mr McCurdie, the claim must fail on the facts. Mr McCurdie's hours were very variable. The claimant was not less favourably treated than him. Mr Newbould's hours were more regular. As we said at paragraph 96, approximately 85% of the 39 shifts recorded upon the transcript prepared by Mr Taylor were worked by Mr Newbould between 3pm and 8pm.

140. In so far as this aspect of the claim is brought upon the basis of working upon days other than Tuesdays or Thursdays, it must fail upon the facts. The claimant worked only upon a Tuesday or Thursday (apart from Monday 18 June 2018). There is more merit in the claimant's complaint about being expected to do irregular hours upon the Tuesdays and Thursdays.

141. There is merit in the claimant's complaint that she was subjected to more variable working pattern than her male comparator Mr Newbould. Only on one occasion did the claimant work her contractually agreed hours: that was on 3 July 2018. We therefore agree with the claimant that in comparison to Mr Newbould she was less favourably treated. This has resulted in a detriment for her as she could reasonably consider the variable working pattern to be to her disadvantage. She has shown a *prima facie* case of direct sex discrimination: there is a difference in treatment and a difference in sex and she asked to work ore regular hours which did not materialise.

142. The essential question therefore is to ask the reason why the claimant was treated as she was. In our judgment, although she has shown less favourable treatment in comparison to Mr Newbould the less favourable treatment was not because of her sex. The reason why she was treated as she was because of patient demand. As we explained at paragraph 96, Mr Newbould had a regular work pattern of working between 3pm and 8pm because of patient demand to be seen outside regular working hours. That is the reason why Mr Newbould was treated more favourably than the claimant. There is no link between the claimant's sex on the one hand and Mr Newbould benefiting from regular working hours on the other. Upon this basis therefore, the complaint must fail. The respondent has discharged the burden upon them to show that there was no contravention of the 2010 Act.

143. We now turn to the reasonable adjustments complaint. It is apparent from the list of the claimant's hours of work at paragraph 38 that the respondent did impose upon her a requirement to vary her working hours. That is a provision criterion or practice. It has such an element of repetition about it that it effectively became the respondent's practice to require the claimant to change her hours frequently.

144. The question that arises therefore is whether this put the claimant at a substantial disadvantage <u>as a disabled person</u> in comparison with persons who are not disabled. There must therefore be some causal link between the relevant PCP on the one hand and the claimant's status as a disabled person on the other.

145. Upon this issue, the evidence is that the claimant was disadvantaged by the requirement placed upon her by the respondent to work variable hours. Plainly, the constant changing of her hours was a difficulty for her. However, the disadvantage was not caused by her disability. The evidence is that the difficulty was caused by her child care issues. We refer to our findings of fact at paragraphs 16, 42, 47, 51, 55, 58, 63, 68 and 71. Nowhere did the claimant intimate to the respondent that the change in her working hours was causing her a difficulty because of her disability. In our judgment therefore, the claimant has failed to show a *prima facie* case that the respondent's practice of changing her working hours frequently placed her at a substantial disadvantage because of her disability when compared to somebody not disabled. The claim fails simply because the claimant has not shown that her disability caused her a disadvantage in accommodating the respondent's needs for flexibility. The disadvantage to her was caused by her childcare issues.

146. We agree with Mr Taylor that it is striking that, while childcare issues were raised by the claimant frequently as being an issue, she never raised her disability as an issue of concern and that the changes to the working hours were a problem for her for that reason.

147. Even if we were to be wrong upon this issue and were to find that the claimant had established that her disability substantially disadvantaged her (*i.e.* that it was a more than minor or trivial reason for her disadvantage (even if not the sole reason for any disadvantage)) by reason of the application to her of the relevant PCP in comparison with non-disabled persons then we would hold it not to be a reasonable adjustment in the circumstances for the respondent to provide her with regular working hours. As we said at paragraph 54, the claimant was the only qualified chartered physiotherapist. The respondent is a small undertaking. In order to meet client need, the respondent must provide qualified chartered physiotherapy sessions to accommodate patient demand. Were the claimant to have been one qualified chartered physiotherapist amongst many at a much larger organisation then there would be much merit in her claim that it would be a reasonable adjustment for the employer to provide regular fixed hours for her. However, that is not this case. The size of the employer's undertaking must be considered by application of paragraph 6.28 of the Code.

148. Our findings upon the issues of the cause of substantial disadvantage and reasonableness render otiose the issue of knowledge of disability. By way of reminder, an employer may defend a reasonable adjustments complaint upon the basis that it did not have and could not reasonably be expected to have knowledge both of disability and the disadvantage caused to the employee by reason of it.

149. Although we derived little assistance from Miss Bray's witness statement for the reasons given at paragraph 83, we accept the claimant's account that she informed Miss Bray of her mental health issues at the meeting of 3 July 2018. We found the claimant to be a very honest witness and the Tribunal has no reason to disbelieve her. There is of course merit in Mr Taylor's point that there appears to have been no further mention of mental health issues emanating from the claimant (as we said in paragraph 55). This corroborates our finding upon the question of disadvantage to the claimant because of her mental health issues as explained at paragraphs 145 and 146.

150. Mr Taylor's submission upon the point at paragraph 149 also assists the respondent upon the issue of actual or constructive knowledge in that the claimant's silence after 3 July 2018 upon the issue of her mental health persuades us that the respondent could not have known and could not reasonably have known that the mental health issues were causing her a disadvantage in the workplace. Indeed, the claimant's own account of the meeting of 3 July 2018 (at paragraph 50) simply records the disclosure to Miss Bray of the fact of the claimant's mental health issues but not how she says she was disadvantaged by them in the workplace. As we have said, the claimant's focus was upon child care issues. Miss Bray's knowledge of the fact of the claimant's disability fixes the respondent with knowledge of it as she was the claimant's line manager. However, that is not enough as it must be shown that the respondent was also aware of or ought to be aware of the disadvantage caused by the disability as well. We note that Miss Bray says, at paragraph 10 of her witness statement, that the discussion held on 3 July 2018 around the hours of work focussed upon childcare.

151. The claimant had intimated at interview that she was flexible provided her child care requirements could be accommodated. She had said nothing to the respondent about the need for regularity of working hours to accommodate mental health issues. We refer in particular to paragraphs 16, 20, 68 and 71.

152. Even if we were to be wrong in our finding that the claimant informed Lauren Bray of her mental health issues on 3 July 2018, we would have held that the respondent had constructive (if not actual) knowledge of the fact of her disability by mid-July 2018. The slack messages between Dr Lee and Miss Bray remarked upon the claimant's upset such that Dr Lee accepted that she was presenting in such a state that *"someone should be worried".* We refer to paragraph 69. By reference to paragraph 6.19 of the Code cited above at paragraph 121 there was sufficient, in our judgment, to put the respondent on notice that something was wrong and enquiries ought to have been made. While we accept Dr Lee not to have any psychological or psychiatric qualifications the fact of the matter is that he is medically qualified and in our judgment ought to have been alive to the possibility of the claimant presenting with a mental health issue.

153. As no reliance could be placed upon Lauren Bray's evidence, we cannot find that she informed Dr Lee of what she had been told by the claimant on 3 July 2018. However, the claimant had done sufficient in telling her line manager of the position and therefore Lauren Bray's knowledge may be imputed to Dr Lee. (We accept that Dr Lee himself did not actually acquire constructive knowledge of the claimant's disability until mid-July 2018 (paragraphs 60 and 61)). Our conclusion therefore is that the claimant informed the respondent of her mental health issue on 3 July 2018 or in the alternative the respondent had constructive if not actual knowledge of her mental health issues by mid-July 2018.

154. However, this only gets the claimant so far as she still needs to demonstrate that the respondent had actual or constructive knowledge not only of the disability but also that her disability disadvantaged her in comparison to a non-disabled comparator by reason of the application to her of the practice of requiring variable working hours. There is simply no evidence that the respondent knew or ought to have known that this practice disadvantaged the claimant by reason of her disability (as opposed to by reason of her child care issues). Mr Taylor's point that there is an absence of contemporaneous messages from the claimant to the respondent to the effect that her mental health was causing her difficulty in meeting the flexible hours requirement is sufficient for us to make a finding in favour of the respondent that there was no failure upon its part to make reasonable adjustments. Had the respondent made further enquiries of the claimant there is nothing to suggest that she would have attributed disadvantage to her mental health as opposed to childcare issues. She did not alert the respondent to this being an issue at the time.

155. In summary, upon the reasonable adjustments complaint we find that: there was a practice of requiring the claimant to work variable hours; this disadvantaged the claimant because of childcare issues and not disability issues; that even if the disadvantage was in part because of disability, it would not be a reasonable adjustment to allow fixed hours upon the claimant's working days because of the needs of the practice; that the respondent had actual knowledge of the claimant's disability from 3 July 2018; but that the respondent could not have had actual or constructive knowledge of disadvantage caused by her disability.

156. We now turn to the complaint of harassment. The Tribunal accepts the claimant's case that the letter from Joyce Lee of 20 July 2018 (paragraph 85) was unwanted conduct. By application of paragraph 7.8 of the Code, the receipt by an employee of a letter such as that quoted at paragraph 85 would be unwelcome and uninvited. This is all the more so given the somewhat heavy-handed nature of the letter as we have commented at paragraph 89.

157. We do not find that Joyce Lee sent the letter with the purpose of violating the claimant's dignity or creating an intimidating *etc* environment for her. Miss Barnes did not make any such suggestion when cross-examining Dr Lee. It was sent for the purpose of trying to get to the bottom of the reason why the claimant was absent from work on 19 July 2018. We can however accept that the letter, objectively, would have had that effect. It would in our judgment be reasonable for the claimant to consider that the letter violated her dignity given that the call for the claimant to attend an investigation meeting was accompanied by the threat of disciplinary action against her should she fail to comply. Such a letter would have been warranted had the claimant failed to comply with such a request but was in our judgment an unnecessary thing to have said when simply issuing the first invitation. This was particularly misplaced in circumstances where Dr Lee had by this time acknowledged the claimant's propensity for upset (paragraph 62).

158. The difficulty for the claimant is in establishing whether such unwanted conduct was related to with the protected characteristic of disability. Certain it is that but for the fact of her disability the claimant would not have been absent from work on 19 July 2018. That was the setting for her absence. It was the reason for it. However, the unwanted conduct must be dictated by the relevant protected characteristic which constitutes unlawful harassment. Upon the facts of this case the unwanted conduct was not so dictated. It was dictated by the claimant's absence from work (as opposed to her disability). Therefore, the harassment complaint fails.

159. In our judgment, the claimant was in reality seeking to pursue a complaint of unfavourable treatment for something arising in consequence of her disability. Such a complaint was not in fact brought by the claimant. Had it been, she would have had a reasonable prospect of showing that she was unfavourably treated (by being sent such a letter) and that that unfavourable treatment was because of 'something' arising from her disability, the 'something' being her absence from work due to mental health issues. However, had such a complaint been brought then the claim is unlikely to have succeeded. Although the respondent had by 20 July 2018 constructive if not actual knowledge of the claimant's mental health issues, the respondent would have been able to justify the letter as a proportionate means of achieving a legitimate aim.

160. The legitimate aim in question is the provision of a reliable qualified chartered physiotherapist service. The claimant was the only qualified chartered physiotherapist employed by the respondent. It was therefore essential from the respondent's perspective for the claimant to attend work upon a regular basis when required to attend upon patients. In the circumstances it was proportionate for the respondent to call upon the claimant for an explanation for her non-attendance on 19 July 2018. Therefore, the respondent would have been able to establish the legitimacy of its aim (namely the provision of a qualified chartered physiotherapist service) and the proportionality of asking the claimant to explain her absence from work on 19 July 2018 in pursuit of that aim.

161. Our comments are of course moot upon the question of a section 15 action given that the claimant did not pursue such a claim. We make these remarks however for the sake of completeness.

162. In the circumstances, the claimant's complaints are dismissed save in respect of the money claims for which Judgment is given in her favour by consent.

Employment Judge Brain

Date 8 August 2019