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EMPLOYMENT TRIBUNALS

Claimant: **Ms D Richardson**

Respondents: **(1) The Belstead Group Limited**
(2) Mr Peter Adams

Heard at: **East London Hearing Centre**

On: **10, 11 & 12 July 2019**

Before: **Employment Judge G Tobin**
Ms A Berry
Ms V Nikolaidou

Representation
Claimant: In person (i.e. no representative attended)
Respondents: Mr David Welch (counsel)

JUDGMENT

The unanimous Judgment of the Employment Tribunal is that: -

1 The claimant's withdrawal of proceedings against the second respondent is accepted.

2 The claimant's application for the Employment Judge to be recused is rejected.

3 The claimant was not discriminated against on the grounds of her disability.

4 The claimant was not automatically unfairly dismissed because of her time off for her dependent child.

5 The claimant's application for her costs for the hearing of 14 February 2019 is refused.

6 The above claims having been withdrawn or rejected, proceedings are hereby dismissed.

REASONS

The Case

1 Proceedings were issued on 6 July 2018. The details of complaint said that the claimant worked for the respondent for around 3 months in total, initially at a care home and then for just over 1½ months as a teaching assistant at the [special] school prior to her dismissal on 22 February 2018. The claimant contended that while working at the care home she informed a manager that she suffered from stress, anxiety and depression and she also informed the Head Mistress when she moved to the school. The claimant said that she was made homeless in January 2018 and had to deal with her young autistic son being viciously attacked by his stepmother. These events made the claimant's stress, anxiety and depression worse. The claimant contended that she was summoned to a meeting on 22 February 2018 and summarily dismissed as a direct result of her illness. Her dismissal letter included reference to her absence for dealing with her son and a bank holiday absence.

2 The claimant said that she appealed her dismissal but, as no human resources representative turned up and as no notes were taken, she did not consider that she had the opportunity to appeal because the ACAS Code of Practice was breached. The claimant contended that the second respondent admitted that she had not breached the sickness policy. The claimant contended using past illnesses to determine potential future absences was illogical and unreasonable and a smoke screen to remove her.

3 The claimant claimed: discrimination arising from her disability; that the respondents failed to make reasonable adjustments; that she was subjected to a detriment (i.e. her dismissal) for taking time off for her dependent; and that she was automatically unfairly dismissed for taking leave for family reasons.

4 The Responses were completed on 10 August 2018 and 19 September 2018. The respondents contended that the claimant commenced employment on 5 December 2017, initially as a Support Worker at the Little Belsteads Care Home. The grounds of resistance contend that at the initial interview the claimant asserted she was sufficiently fit to fulfil the role and that she did not consider that she had a disability. The respondents denied that the claimant informed her manager of the care home that she suffered from stress, anxiety and depression. On 1 January 2018 the claimant transferred to the Belsteads School, where she worked as a Teaching Support Worker until her employment was terminated on 1 March 2018. The respondents denied that the claimant told the Headmistress of the school that she was suffering from stress, anxiety and depression; what she told the Headmistress was that she suffered significant difficulties in a personal life. The respondents contend that they allowed the claimant to deal with safeguarding issues relating to her son by taking time off work, and by making telephone calls in work time. The respondents contend that the claimant had a high absence record as follows:

11.12.17	because of snow
16.12.17	brother sick
01.01.18	family reasons (she was scheduled to work on the bank holiday)
29.01.18	ill
31.01.18	ill
01.02.18	ill
21.02.18	ill with diarrhoea

5 The respondents contended that in a meeting on 22 February 2018 the Headmistress and the claimant had a long discussion about the school's need for consistent staffing levels to meet its statutory duties to support the pupils with special educational needs. They also discussed: the claimant's personal difficulties; how these were impacting upon her attendance; and her work. Towards the end of the meeting, the claimant was informed that she had not passed her probationary period and that her employment would be terminated with effect from 1 March 2018. The respondents contended the meeting ended amicably.

6 The respondents said that an appeal meeting proceeded on 9 March 2018 which the claimant attended unaccompanied and stated that she was happy for the appeal to proceed. Notes were taken at the meeting and the claimant's dismissal was confirmed. The letter sent to the claimant after the appeal stated: "your level of attendance was not of a sustainable level within our business…" The respondents denied disability discrimination, automatic unfair dismissal and the detriment claim under section 48 of the Employment Rights Act 1996 ("ERA").

7 At a Preliminary Hearing (Open) on 14 February 2019 Employment Judge Burgher determined that, at the relevant time, the claimant was a disabled person for the purposes of s6 Equality Act 2010 ("EqA") by reason of her anxiety and depression. The relevant time was between November 2017 and 22 February 2018.

The List of Issues

8 The document provided to the Tribunal marked *Parties agreed List of Issues* was not an agreed List of Issues. At the outset of the hearing, Mr Walsh said that this List of Issues had been prepared by the claimant's solicitor and was not agreed. The claimant said that she did not know whether a List of Issues had been agreed or not, as she had left this to her solicitor, who was not present at the hearing. It was obvious upon reading the document that this was an early draft because most of the factual issues for determination were marked *not agreed* and the List of Issues was muddled; identified issues that were not relevant to any determination; and missed important aspect of the appropriate legal tests.

9 In accordance with the overriding objective, the Employment Judge went through the draft List of Issues with the parties. The claimant said that she could not assist because she had not been involved in preparing the draft List of Issues and that she did not understand it. When asked, the claimant was not able to explain either why proceeding had been pursued against the second respondent (a director of the first respondent) nor was she able to explain the claims against Mr Adams. It was not the claimant's case on the pleadings (nor in the witness statements) that Ms Burt or Ms Burdon (or someone else) had told the second respondent of her disability and that he then discriminated against her. The second respondent was not the dismissing officer and

the claimant said that she had not asked him to make adjustments in respect of her disability (or at all). Following discussion, the claimant withdrew her claims against the second respondent on the basis that he could not be personally liable for the dismissal and acts of discrimination contended.

10 The Judge queried in particular the issues set out under the claim of *failure to make reasonable adjustments*. The claimant clarified that she did not inform the respondents at any stage during her employment that she had a disability. She said that this was because she did not believe that she had a disability at the relevant time. The claimant could not say how, if she did not believe that she had a disability at that time, how the respondents could be expected to know that she had the disability contended (i.e. anxiety and depression). In addition, the claimant confirmed that she had not requested any officer or employee of the first respondent to make reasonable adjustments. Again the claimant was unable to say how the first respondent should have known to make such adjustments. The claimant's documents referred to 2 possible reasonable adjustments – discarding the claimant's absences relating to her disability and to have disregarded all absences under the previous contract of employment as these were for a different role. The claimant said this this was identified by her solicitor, but she did not know how these purported reasonable adjustments were formulated and she had not discussed these with her solicitor. The former contended adjustment was mentioned in the Claim Form, the latter arose from the draft List of Issues document.

11 The draft List of Issues identified a provision, criteria or practice ("PCP") as the sickness absence policy. However, the hearing bundle did not contain any sickness absence policy and Mr Welch said there was no formal sickness absence policy; The PCP drafted by the claimant's solicitor also identified a 3-aspect PCP: (a) sickness absence will be based on a rolling 12 month period; (b) that staff will be dismissed or disciplined if they breached 4 bouts of absences or 10 days; and (c) that the respondent would use past absences in a different role under a different contract of employment to work out hypothetical future absences. The parties could not explain, and the Tribunal could not understand this purported PCP, particularly as the claimant was on her probationary period and had not been subject to any disciplinary or formal process. So, after discussion, we determined the appropriate PCP should be formulated as follows: *that probationary employees would have a satisfactory attendance record*.

12 We then discussed this claim at length and the claimant agreed to withdraw her claim under ss20 & 21 EqA. She said that she did not believe that she was disabled until she discussed her claim with her solicitor and that she had not raised any adjustment nor could she see that any adjustment was necessary until her solicitor had raised this sometime after the events in question. In the circumstances, this potential claim was inconsistent with and appeared contradictory to her stronger claim under s15 EqA, so the claimant said that she was not going to pursue it.

13 The Employment Judge identified the issues for determination, with the consent of the parties and, so far as possible following lengthy explanations, their agreement. The issues for determination by this Tribunal are as follows:

Discrimination arising from disability

1. Has the first respondent treated the claimant unfavourably? The unfavourable treatment was the claimant's dismissal.

2. Was the unfavourable treatment because of something arising in consequence of the disability? The claimant contends that the something arising in consequence of her dismissal was her frequent sickness absence.

3. Did the first respondent's dismissal officer know, or could she be expected to know of the claimant's disability (i.e. her anxiety or depression)?

4. Can the first respondent show that the claimant's treatment was a proportionate means of achieving a legitimate aim? The legitimate aim being the efficient running of the special school.

Time off for dependent/automatic unfair dismissal

5. Did the claimant take time off to deal with an unexpected disruption or termination of arrangements for care of a dependent? If so, on how many occasions and when?

6. Was the time off necessary?

7. Was the amount of time off reasonable?

8. Did the claimant tell the first respondent's official as soon as reasonably practical that she required the time off?

9. Was the claimant automatically unfairly dismissed because the reason or the principal reason for her dismissal was that she had taken time off to look after her son?

The law

14 S4 EqA identifies "disability" as a protected characteristic. As stated above EJ Burgher previously determined that the claimant had a disability, as defined under s6 EqA, at the relevant time, this being anxiety and depression.

15 S15 EqA precludes discrimination arising from a disability:

> (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 a disability.

16 S15 EqA is aimed at protecting against discrimination arising from or in consequence of the disability rather than the discrimination occurring *because of* the disability itself, which is covered under direct discrimination. The term *unfavourably* rather than the usual discrimination term of *less favourably* means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because she had taken periods of disability-

related absence and this had caused her dismissal, the person may not suffer a detriment because they were disabled as such, but because of the effect of that disability.

17 In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15* the Employment Appeal Tribunal ("EAT") emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment. The burden on a claimant to establish causation in a claim for discrimination arising from disability is low. It will be sufficient to show that there is some causal link and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. The EAT in *Charlesworth v Dransfields Engineering Services Limited UKEAT/0197/16* said that s15 EqA requires unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If the *something* is an effective cause – and influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously) – the causal test is satisfied. However, even if a claimant succeeds in establishing discrimination arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

18 Section 57A Employment Rights Act 1996 ("ERA") makes provision for time off for dependents. S57A states:

> (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary –
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) because of the unexpected disruption or termination of arrangements for the care of a dependent, or
>
> (e) …
>
> (2) Subsection (1) does not apply unless the employee –
>
> (a) tells his employer the reason for his absence as soon as reasonably practical, and
>
> (b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

19 In *Qua v John Ford Morrison 2003 ICR 482* the EAT described the circumstances that trigger the right to time off under s57A ERA as being *unexpected or sudden*, which suggests that nothing short of a genuine and unforeseen emergency would suffice. The EAT in *Cortest Ltd v O'Toole EAT 0470/07* held that the purpose of the legislation is to cover emergencies and enable other care arrangements to be put in place. The EAT took a broader approach in *Royal Bank of Scotland plc v Harrison 2009 ICR 116*, unexpected and necessary should be given their ordinary natural meaning and there was no justification for reading into the statutory wording a requirement that the disruption in the employee's childcare arrangements must be "sudden" as well as unexpected. The EAT emphasised that it is for the Employment Tribunal in each case to find on the facts. Whether necessity has been established and that many factors will come into play, including considerations of urgency and time, but "there are no hard and fast rules". The EAT continued, "the obvious principle that the greater the time to make alternative arrangements, the less likely it will be that necessity will be established, hardly needs to be stated".

20 The reasonableness of the amount of time off depends on the circumstances of the individual case, in *Nim v Union Grove Community Day Nursery 2305431/06* the Employment Tribunal held that the claimant's need to take 1½ hours off to collect her son from nursery and take him to a doctor's appointment when the childminder had let her down was reasonable, although s57A(1)(d) did not confer authority for the employee to become the primarily carer for a lengthy period of time. This is contrasted with *Naisbett v Npower Ltd 2502795/12* which determined that repeated absences of a total of 7 days over 9 months was both necessary and reasonable.

21 If the contended detriment amounts to a dismissal, it is specifically excluded from the provisions relating to detriment pursuant to Regulation 19(4) Maternity and Parental Leave Etc Regulations 1999. Such dismissals are dealt with separately under s99 ERA.

22 S99 ERA states:

> (1) An employee who is dismissed shall be regarded or the purposes of this Part as unfairly dismissed if –
>
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
>
> (b) the dismissal takes place in prescribed circumstances.
>
> (2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.
>
> (3) A reason or set of circumstances prescribed under this section must relate to–
>
> (a) …
>
> (aa) …
>
> (ab) …
>
> (b) …
>
> (ba) …
>
> (bb) …
>
> (c) …
>
> (ca) …
>
> (d) time off under section 57A.

23 An employee who takes dependent care will be regarded as automatically unfairly dismissed if the reason or principal reason for her dismissal was due to the fact that she took, or sought to take, time off to care for dependents: s99(3)(d) ERA.

24 Where an employee lacks the 2-years continuous service required to claim ordinary unfair dismissal, as in this instance, the employee bears the burden of proof in showing that the reason, or principal reason, for dismissal was the prescribed reason within the meaning of s99 ERA (and the relevant regulations): see *Smith v Hayle Town Council 1978 ICR 996, CA*. If the reason for dismissal was an inadmissible reason, then unlike ordinary unfair dismissal, there is no room for the employer to argue that the dismissal was nonetheless reasonable in all the circumstances and therefore fair: see *George v Beecham Group 1977 IRLR 43*.

Determination on recusal

25 Following the first day of the hearing, i.e. after the claimant had given her evidence, the claimant's solicitor emailed the Tribunal an application that the Employment

Judge recuse himself on grounds of bias. The application was considered at the beginning of day 2, although the claimant arrived late because she said her train journey was disrupted.

26 Through the Tribunal's clerk, the Employment Judge asked that the respondents' counsel, Mr Welch, to respond to the application in writing. The Tribunal convened upon the claimant's arrival and the parties were asked if they wanted to make oral submission in respect of the application. The claimant merely said that she supported her solicitor's application and Mr Welch said that he had nothing further to add to his brief written response, other than he did not recognise the description set out in the claimant's application. The Tribunal then broke to consider the application.

27 Upon reconvening the Judge set out the appropriate guidance contained in *Porter v Magill 2002 2 AC 357 HL* which states that for the application to succeed, the Tribunal must be satisfied that a reasonable objective bystander present in the Tribunal room and knowing all of the relevant circumstances could conclude that there was bias against the claimant. The Tribunal was also mindful of the authority of *Bennett v London Borough of Southwark* [2002] EWCA Civ. 223 as authority for the proposition that a Tribunal should be slow to recuse itself unless there are proper grounds upon which it should do so.

28 The Judge emphasised to the claimant that the Tribunal is required to consider her application objectively and that this matter was considered by the 3 members of the Tribunal jointly and that each member of the Tribunal had an equal say. The Judge made clear that the claimant should be reassured that the Tribunal would not hold anything against her for making the application. It was important that if a party felt that they had not been fairly treated then they ought to bring this to the Tribunal's attention so that this could be dealt with openly and promptly. The claimant was entitled to make such an application and parties should not feel discouraged from doing so.

29 That said, the Tribunal also did not recognise the description of events contained in the claimant's solicitor's email notwithstanding the fact that the claimant's solicitor did not attend the hearing. The Judge addressed the points that were made from (a) to (h) briefly at the hearing so that the claimant could understand why her application was rejected. The Tribunal has recorded a more expansive response below.

29.1 The claimant said that she was criticised for not providing a copy of the list of issues. This contention is not factually correct. There was no criticism of the claimant in this regard.

The Judge explained carefully at the outset of the hearing that he thought a finalised list of issues had been produced because a finalised list of issues had been referred to in the Tribunal correspondence. The Judge said he thought the finalised version had been sent to, or retained by, the parties as the Tribunal file did not contain a finalised list of issues. The Judge merely asked both parties if they could forward a copy of the finalised list of issues to the Tribunal. As it happened, the list of issues had not been finalised, so the copy produced by the respondents' solicitors was utilised at the outset of the hearing as the basis for identifying the issues to be determined.

29.2 At the commencement of the hearing, the Judge and the parties spent some time identifying issues and attempting to narrow the issues as appropriate.

The Judge asked for clarification as to why the second respondent (Peter Adams) was included in proceedings given that the automatic unfair dismissal claim could only be brought against the employer (The Belstead Group Limited) and the detriment claimed was only in respect of the claimant's dismissal. It is correct, appropriate and within the over-riding objective to ask the claimant to explain her case, particularly if the claims are not clear. The claimant was not able to explain which discrimination claim were made against the second respondent. The Judge set out why he thought Mr Adams had been included as a respondent and when he asked the claimant who she felt her claims were against, she responded saying that she felt that her claims were against her employers. The claimant said that she did not know why her solicitor had involved the second respondent.

It was at that point that the Judge proposed that the second respondent be dismissed from proceedings. This matter was fully explained to the claimant and discussed and the claimant accepted the dismissal of the second respondent from proceedings at that time. The Judge reassured the claimant that such measure did not preclude a remedy against her employer, it merely *tidied up* the issues to be determined.

In view of the claimant's retraction of her agreement to withdraw her case against Mr Adams, the Tribunal will proceed to give a full determination in respect of Mr Adams.

29.3 At the outset, the Judge explained to the parties and witnesses that Tribunals will not read through the hearing bundles as a matter of course. This is not in accordance with the over-riding objective. Any document referred to in the witness statements would be considered by the Tribunal and, in addition, the Tribunal will read documents that it is specifically referred to. The Judge made the point in saying that if a party wanted the Tribunal to take into account a specific document then he or she will need to draw it to the Tribunal's attention, and the Tribunal will then read the document. So far as any additional late evidence was concerned the Judge said to the parties that they needed to have disclosed the documents in question to the other party (or parties), make 4 copies and then we would consider an application to admit the late evidence. The Judge did say at the outset that once the oral evidence had been commenced then the Tribunal would not retrospectively introduce new documents, except for in the most exceptional circumstances.

29.4 When the Tribunal and the parties went through the draft list of issues, the Tribunal and the parties explored all of the claimant's claims. The claimant said that she did not believe she had a disability at the relevant time (she later repeated this in evidence and throughout the hearing on a number of occasions). She said that she had not asked the respondents to make reasonable adjustments. In respect of disability discrimination, the claimant confirmed that her claim was that she was ill and that this gave rise to some absence. The claimant said that she was dismissed as a result of these absences.

The Judge went through s20 and s21 EqA and explained this to the claimant. The duty to make adjustments does not arise if the employer did not know, or could not reasonably be expected to know, that the claimant both had the disability and was likely to be placed at a substantial disadvantage. Because of the claimant's explanation, the Judge said that the claimant's disability claim was appropriately addressed through a claim of discrimination arising from her disability (s15 EqA) and not the reasonable adjustment claim. The Claimant indicated that she understood and accepted this argument, so the Judge dismissed the reasonable adjustments claim on this basis.

29.5 The Judge said that the claimant would need to draw the Tribunal's attention to the medical evidence where the claimant said her depression had caused her low immunity.

The Judge said that he was not going to go through the claimant's medical records in an open hearing. He also explained that the Tribunal could not be seen to be advocating the claim on the claimant's behalf. The claimant was advised to go through her medical records and identify any aspect that indicated that her depression had caused low immunity and/or susceptibility to illness and to bring them to the Tribunal's attention.

29.6 The Judge did not mimic the claimant's accent. The Judge explained that he had an accent which reflected his working-class inner-London background. He did not change his tone and he normally spoke with a slight accent. The claimant was not on trial for being from Essex.

29.7 The Judge said that the claimant would give evidence first, but that he would stop the respondents' counsel from asking irrelevant questions bearing in mind Judge Burgher's previous comment. It was the Judge's responsibility to make sure the hearing ran to time, so he asked how many questions the claimant had for the respondents' witnesses. He said that if the claimant were to ask questions that were not relevant, he would assist her in putting her case to the respondent. The Judge said that the questions needed to focus on the relevant issues that the Tribunal had identified in this case and that the claimant should not be deterred from answering appropriate questions.

So far as the evidence in respect of the claimant's miscarriage was concerned, the claimant said that she had depression and that in her occupational health questionnaire she referred to this as "postnatal". The claimant introduced this. The respondent contended that this was some time ago on the basis that the claimant's son was 13 or 14 years old. It was the claimant that referred to her miscarriage. The respondent's counsel did not cross-examine the claimant in respect of her miscarriage at all. The Judge asked one single question, "when was this?" The claimant answered 5 to 6 years ago. It was the claimant who raised the issue of her miscarriage and she said that this was relevant to her depression. This was dealt with sensitively and quickly by the Tribunal.

29.8 The Judge had referred the claimant to her written submission and said that the Tribunal would read these in advance of commencing hearing evidence. For timetabling purposes, the Judge asked the claimant whether she would speak to her submission at the end of the case. She said not and the Judge said she should not be concerned by this; he emphasised that it was the witness statements and the evidence given at the hearing that was the primary focus of the Tribunal. The Judge did say to the respondents' counsel that he did not think that the Tribunal needed to hear long submissions and Mr Welch said that he was planning on doing relatively short submissions.

29.9 The Judge directed to both parties to keep question confined to the issues. The claimant was wrong to say otherwise. It was wrong to say that the claimant was told she would be stopped if her questions were irrelevant.

The witnesses and documentary evidence

30 The claimant, Ms Danni Richardson, provided 3 statements: a statement which dealt with her disability, a statement which dealt with liability issues and mitigation and a claimant's impact statement drafted by her solicitors. We (i.e. the Tribunal) also heard oral evidence from the claimant.

31 On behalf of the first respondent, we heard evidence from the following, who also provided witness statements: Ms Cindy Burt, who was at the material time the Registered Manager of the Little Belsteads Care Home, and Ms Joanne Burdon who was the Head Teacher of Belstead School, an independent school for children with special needs.

32 Mr Peter Adams (the former second respondent) provided a statement and also gave evidence. Mr Adams described himself as the proprietor of the Belsteads Group Limited.

The Facts

33 We made findings in respect of the following facts. We did not resolve all of the disputes between the claimant and the first respondent, merely those matters which we regarded as appropriate to determining the issues of this case. In determining the following facts, we placed particular reliance upon contemporaneous or near contemporaneous correspondence, emails and documents. We approached the witness statements with care because this evidence was prepared some months after the events in question and for the purposes of the hearing. Where we have made findings of fact and where we consider that this is appropriate, we have also set out the basis for making such findings.

34 The claimant originally applied for casual work at the first respondent's care home in August 2017. She applied through a company (or entity) called Prophet and she completed a Candidate Registration Form and an Occupational Health Questionnaire. Prophet Care Recruitment, the Little Belsteads Care Home and the Belsteads Special School were all part of the same group (the first respondent) of which Mr Peter Adams was the principal owner or shareholder.

35 The claimant's Candidate Registration Form, which was signed as true and correct by the claimant on 4 August 2017, contended that she did not have any disability

relevant to the role that she sought at the care home. The claimant also completed (and signed) an Occupational Health Questionnaire, which asked several specific questions, including the following:

> Declaration of Health
> Please answer yes or no to all of the following questions.
> Have you ever in your life, including childhood, had any of the following?
> …
> 4. Mental health problems or illness (e.g. nerves, phobias, stress, anxiety, depression, eating disorders), or drugs or alcohol dependency or misuse (including prescription drugs or recreational drugs).
> …

36 The claimant answered "postnatal" in the "Yes" column although she left blank the section indicated for "Question Q4 Details" where the questionnaire went on to say "If you have answered "yes" to any of the above, please give as much information as you can including dates and how you are affected at present".

37 The claimant answered "No" to the following questions:

> 6. Do you have a medical condition that may affect your ability to perform the proposed job?
>
> 10. Do you have a disability or health condition not mentioned above that may require additional help or support to perform the work tasks?

38 The claimant also answered "No" to enquiries about medication and sick leave absence in the last 2 years.

39 The claimant worked at the first respondent's care home on a temporary post during August 2017. On 26 October 2017 the claimant was interviewed for the role of a permanent support worker at the care home. The claimant was interviewed by Ms Cindy Burt and Ms Kelly Stevens who assessed the candidate's suitability for a role with a standard interview questionnaire, which was signed by the interviewers. It was put to the claimant in cross examination, which she accepted, that she was asked:

> Health
> As part of the recruitment process we need to verify that you are sufficiently physically fit to be able to fulfil the role.
>
> 1) Do you consider yourself sufficiently fit to be able to fulfil the role?
>
> 2) The Disability Discrimination Act protects people with disabilities from unlawful discrimination. If you tell us you have a disability we will make reasonable adjustments for your working environment and your working arrangements and practices, if it is reasonable for us to do so.
>
> Do you consider yourself to have a disability?

40 The claimant answered "Yes" to the first question and "No" to the second question. The claimant repeated during cross-examination, and at various stages, that she accepted she did not know that she had a disability at this time.

41 The claimant's 2 statements said that when she obtained the role at the care home, she informed Ms Burt that she suffered from depression. The claimant repeated this in cross-examination although she was unable to state roughly when it was that she informed Ms Burt, where the disclosure occurred (e.g. in an office or treatment or resident's room) or the words that she used with any precision. The contention that such a disclosure was made was consistent with the Claim Form and her solicitors' disability impact statement, although none of these 4 documents or the claimant's oral account could proffer any clear indication when this pivotal disclosure was supposed to have been made.

42 The health disclosures which the claimant did make were recorded in the documentary evidence of 4 August 2017 and 26 October 2017, which we regarded as reliable. These did not disclose any ongoing anxiety or depression related condition. The claimant's purported disclosure of stress, anxiety and depression was not consistent with these documents. If the claimant had made such an important disclosure about her health at this time, then this would have been recorded on either or both occasions, so this evidence contracted the claimant's account.

43 So far as we can see around this time there was no acute episode of the claimant's anxiety or depression or any other trigger that might lead to the claimant making such a health disclosure. The claimant did not indicate that there was a subsequent trigger to her anxiety or depression; indeed her evidence was contrary to this as she said she did not believe that her condition amounted to a disability.

44 At one point during her evidence, the claimant said that the first respondent ought to have known about her anxiety and depression because she wrote on her form that she suffered from "postnatal". Ms Burt said she did not explore this because when asked the claimant said that her son was aged 13 or so (Ms Burt could not remember the exact age). In evidence, the claimant said that her postnatal depression was 5 or 6 years earlier and there was no evidence to indicate that this was an ongoing condition. So we reject the assertion that the reference to "postnatal" when describing illnesses throughout her life could possibly give an indication that the claimant currently suffered from on-going anxiety and depression.

45 In contrast to the claimant's vague and contradictory evidence, Ms Burt's evidence was clear and convincing. Her witness statement addressed the claimant's purported health disclosure and she was expensive in her oral evidence. Ms Burt said that at no stage did the claimant ever inform her that she suffered from stress, anxiety or depression. Ms Burt said that if the claimant had mentioned stress, anxiety or depression then she would have recorded it. Ms Burt placed particular emphasis on the claimant's interview for the permanent post as a support worker on 26 October 2017. Ms Burt said that if she had been aware of any possible anxiety or depression then she would have raised this with the claimant when she asked questions in respect of the claimant's fitness to be able to fulfil the role and whether she considered that she had a disability. Irrespective of the fact that the claimant did not consider herself to have a disability, Ms Burt said the claimant did not raise anything, which Ms Burt said, might indicate that the claimant could have suffered from anxiety or depression.

46 We accept Ms Burt's evidence that the claimant did not inform her that she was suffering, or had suffered from stress, anxiety or depression. The claimant was appointed to the permanent role, which she started on 5 December 2017. Thereafter the claimant worked 7 shifts (including her induction). The claimant did not come into work for 2 shifts for non-sickness reasons. Ms Burt said that the claimant was very expansive about her private life (i.e. her son's difficult relationship with his stepmother, her brother's addiction problems and her money concerns) but she never raised her mental health issues. Ms Burt was very clear that the claimant did not give her any reason to suspect that she had mental health problems, so she saw no reason not to accept what the claimant said about her health when she was initially recruited for casual work and then recruited for the permanent job.

47 In December 2018 the Belsteads School had a vacant post for a Teaching Support Worker. Mr Adams informed Ms Burdon, the Head Teacher, that the claimant had expressed an interest in this post. The claimant was subsequently offered the post to work in the school commencing in the new year. Whilst working at the care home, the claimant had applied to Ms Burt for annual leave following Christmas and extending over the new year period. The claimant was due to return to work on 3 January 2018.

48 On 3 January 2018, the claimant reported for work at the Belsteads School. The claimant signed a contract of employment that date (i.e. 3 January 2018) and the contract records the claimant's start date as 1 January 2018.

49 The first respondent incorrectly recorded the claimant as being absent from school on 1 January 2018, which we accept was a typographical error and was meant to refer to 2 January 2018. The school was not open on 1 January 2018 and 2 January 2018 was an inset day. The claimant correctly believed that she was on annual leave this day because her leave had been approved by Ms Burt.

50 Notwithstanding that the claimant was equally consistent in her contention that she also informed Ms Burdon that she suffered from depression, stress and anxiety, she remained equally unable to clarify when this was, other than it was when she started her role (according to her statement) and after she started her new role (according to her oral evidence). The claimant could not say where she made such a disclosure or roughly what words she used. Given her purported desire to make her medical condition clear, particularly as her recent employer's records were said to be inaccurate, the claimant could not explain adequately why she did not confirm this in writing. In contrast, Ms Burdon was emphatic that she did not have any discussion with the claimant concerning her health when she commenced her new role. Ms Burdon was clear both in her statement and in answers to questions at the hearing that at no point during the claimant's employment did the claimant say that she was suffering from stress, anxiety or depression. On this fundamental aspect of the case, we prefer to believe Ms Burdon; her evidence was convincing. The evidence of Ms Burdon was also consistent with the contemporaneous documentation (including the lack thereof) which gave no indication that the claimant was suffering from the disability-related condition identified.

51 On 18 January 2018, the claimant took time off to attend a meeting with her son's social worker in Oxfordshire. The claimant's son lived with his father and stepmother; nevertheless, we accept that the claimant son was a dependent (within the scope of s57A(3)(a) ERA). The claimant said, and we accept, that she received a telephone call on 17 January 2018 from a social worker advising her of a meeting the following day. The claimant described this meeting as a case conference, and she said that she asked if she could attend. The case conference had not been set with the claimant's availability in mind, hence the late notice. We accept that Ms Burdon was supportive in affording the claimant the time off at relatively short notice to attend this meeting.

52 The claimant was thereafter absent from work for 3 days: 29 January 2018 (when Ms Burdon sent the claimant home because she was ill), 31 January 2018 and 1 February 2018. This amounted to 2 separate absences for the flu. The claimant was again absent on 20 February 2018 and 21 February 2018 which she attributed to an upset stomach (although the claimant referred to this absence as "loose bowels").

53 On her return to work, on 22 February 2018, the claimant was called to a meeting with Ms Burdon. In evidence Ms Burdon was not clear whether she explicitly told the claimant of the purpose of the meeting. However, she contended that she wanted to discuss the claimant's sickness absence with her upon her return to work and it was obvious that as the claimant was on probation this would be a formal meeting. Regardless of whether it was apparent that Ms Burdon wanted to discuss the claimant's absences, we are satisfied that Ms Burdon had not warned the claimant that this meeting might lead to her dismissal.

54 During the discussion with the claimant, Ms Burdon relayed her concerns about the claimant's difficulties in prioritising matters and her lack of focus on her work. The claimant had been made homeless around this time. Her brother had experienced addiction difficulties and her son's wellbeing and safety had caused her some concerns. Ms Burdon was not satisfied that the claimant's attendance and focus at work would improve. Ms Burdon suggested that the claimant pursue counselling and she also offered the claimant supply work (i.e. a more flexible ad hoc working pattern). The Tribunal is satisfied with Ms Burdon explanation that she recommended counselling to address the claimant's personal problems. We do not find that this counselling recommendation was made in respect of any perceived depressive illness that the claimant was suffering from.

55 The result of this meeting was that the claimant was dismissed. Ms Burdon then wrote to the claimant on that date to confirm her dismissal. She stated:

> I regret to inform you that you are deemed to have failed your probationary period due to your high absence rate since commencing employment.
> Recorded absences are as follows:
>
> 01/01/2018 – Family
> 18/01/2018 – Family
> 29/01/2018 – Ill
> 31/01/2018 – Ill
> 01/02/2018 – Ill
> 20/02/2018 – Ill
> 21/02/2018 – Ill
>
> In addition, there have been part absences during days when you have been unwell or engaged in matters and telephone calls concerning your personal circumstances.

56 We find that Ms Burdon based her decision on the claimant's absences in her decision to accelerate the claimant's probationary review and to dismiss the claimant.

57 The claimant's employment was terminated on notice. The claimant did not work her notice period and her effective day of dismissal was 1 March 2018. The claimant appealed promptly, i.e. on 23 February 2018. The appeal letter is quite detailed but nowhere in this appeal letter does the claimant mention any depressive illness. The claimant did say in this letter that the dismissal had:

> … totally knocked my confidence and I've never felt so low and alone… and the sheer panic and worry that I have now about finding a job similar especially given the harsh sounding letter that puts absolutely no context in my situation.. and just makes me look like I am just absent for no reason and without permission.

58 This is not a reference to any depressive illness or disability; it is merely the claimant's understandable reaction to her dismissal.

59 In her appeal letter, the claimant said, “Is this discrimination on personal family background and problems?” This was a reference to the claimant’s unfortunate and difficult background rather than any reference to time off. The appeal letter did refer to time away from work; however, this was with reference to other members of staff who had been struck down with flu at the same time as the claimant.

60 On 2 March 2018, Mr Adams wrote to the claimant to set the appeal hearing. He advised the claimant that she had the right to be accompanied by either another employee or a trade union representative. He asked the claimant to confirm her attendance and inform him who will be attending with her prior to the meeting.

61 The appeal hearing proceeded on 7 March 2018. The claimant contended that this was not a formal appeal hearing because the respondent’s human resources support manager did not attend and because she said she wanted to be accompanied by a trade union representative. The claimant had not organised the attendance of a trade union representative nor had she informed Mr Adams who would be attending with her prior to the appeal hearing. Mr Adams asked the claimant if she was happy to continue with this meeting in the absence of a trade union representative. The claimant confirmed that she was willing to continue the meeting, although she said that she regarded the appeal hearing as proceeding on an “informal basis”. That was not the understanding of Mr Adams who contended that the claimant said that she was happy to proceed. If there was any confusion, then this was caused by the claimant who had not arranged for any trade union representative to attend the meeting. Mr Adams took the claimant’s willingness to continue the meeting in the absence of a trade union representative as an indication that the appeal hearing was to continue. This was correct and appropriate in the circumstances. It is unfathomable how an appeal could proceed on an *informal basis*, and we reject the claimant’s evidence in this regard.

62 During the appeal, the claimant and Mr Adams discussed the reasons why the claimant had time off since she started work. We are satisfied that this discussion included time spent by the claimant working in the care home as, in the outcome letter dated 9 March 2018, Mr Adams referred to the claimant’s absence when she could not come to work because of the snow and also where the claimant took some time off to support her brother who had health and addiction problems.

63 Mr Adams rejected the claimant’s appeal as follows:

> Your level of attendance was not at a sustainable level within our business. If we disregard days that you took off to manage personal situations with your son, you had 7 additional and separate occasions of absence from sickness, to unable to travel because of the snow through to having a day off because your brother was sick. As I advised this level of non-attendance is not manageable within our small business.
>
> Owing to the nature of our business we really rely on staff as we have ratio of number that we need to adhere to, to open our school/run our care home etc. In addition due to the nature of the care of all children in the school and the home needs consistency in order for them to remain stable and progress.
>
> Finally, we would look for around 10 days or 4 bouts of absence in a 12 month rolling period to be of an acceptable level of non-attendance. You have breached this level within 2 months and it was therefore felt that we could not sustain this level of incapacity to attend work, in the longer term.

64 Mr Adams discounted the claimant’s absence for annual leave (on 1 and/or 2 January 2018) and the time off for her dependant to attend the social worker’s case conference (on 18 January 2018). However, he took into account the whole period that the claimant was employed within the same group (i.e. in the care home as well as the special school). The claimant was off for 7 days during her permanent (i.e. her non-casual)

employment and according to Mr Adams this was 7 occasions or bouts of absence. Mr Adams was wrong in this presumption as the claimant's absence for this period related to 5 bouts and 2 specific periods of illness.

Our determination

65 The claimant was an employee of the special school part of the first respondent's business with effect from 1 January 2018. Although the claimant did not report for work until 3 January 2018 and signed her contract on that date, the contract clearly identified the *Post Start Date* as 1 January 2018 and this is the date that the parties agreed for that part of the claimant's employment to commence. That said, notwithstanding the claimant's contract did not identify continuity, the claimant's continuity of employment included her work at the care home.

66 The first respondent did not record properly staff absences and annual leave for staff. We were not shown any annual leave request forms and claimant did not contend that she completed any annual leave or holiday request form. 1 January 2018 was the claimant's first day employed at the special school. This was a bank holiday, so the school was closed. We did not hear evidence as to whether the care home had a full staff compliment on this day, but in any event the claimant had not been scheduled to work at the care home because she was on annual leave up to and including 2 January 2018, her last working day being 26 December 2018. Ms Burt was aware of the claimant's annual leave absence and her transfer to the school in the new year.

67 Ms Burdon's dismissal letter recorded the claimant's absence on 1 January 2018 in error. Ms Burdon said that was a "typographical error" and that her letter should have read 2 January 2018, which was an inset day. We accept that the claimant was absent from work on 2 January 2018; however, this absence was, according to Ms Burt, authorised annual leave. Consequently, this absence should not have been taken into account. That said, the absence did not relate to either sick leave or amount to time off for her dependent.

68 The claimant accepted that she was absent from work for the other days in question, namely 1 further day for "Family" which the claimant said was time off for her dependant and 5-days sick leave in a 7½ week period since she commenced work at the special school.

<u>Disability discrimination</u>

69 The claimant was a disabled person pursuant to the EqA as this was the finding of EJ Burgher at the hearing of 14 February 2019. The impairment that the claimant relied upon was her anxiety and depressive illness.

70 The claimant said that her absences between 29 January 2018 and 23 February 2018 related to the flu and then to her stomach upset. These were not her disability. When questioned about this, the claimant said that she had low immunity because of her anxiety, stress and depression, so therefore, her absences were related to her disability because she was susceptible to viruses and infections. This contention is inconsistent with the claimant's reference to numerous colleagues who had fallen ill with the flu. Furthermore, when asked to refer the Tribunal to any medical records to support the contention that her susceptibility to viruses and infections arose from her anxiety and

depression, the claimant was unable to do so. Again, so far as the claimant's stomach problem (which she also described as loose bowels) the claimant was not able to take us to any evidence to support her contention that this was related to her anxiety and depression.

71 Ms Burdon called the claimant to a probationary review meeting, which she was entitled to do. Ms Burdon explained to the Tribunal her frustration with the claimant's poor attendance, which directly impacted upon children and young people with special educational needs at a school specifically registered to cater for these needs. We reject the claimant's evidence that she was taken by surprise with this meeting. The meeting occurred on the Thursday morning after the claimant's Tuesday and Wednesday's absence. Furthermore, we accept Ms Burdon's account (and reject the claimant's evidence) that the claimant had texted Ms Burdon's saying "I know I am at the tippy edge" with her absenteeism. Whilst it came as no surprise to the claimant that Ms Burdon was going to address her absence, either formally or informally, the claimant did not know that she might be dismissed at this meeting. Ms Burdon was looking for reassurance about the claimant's attendance and her commitment to her work and the claimant either could not or would not provide the reassurance that Ms Burdon was looking for. Consequently, Ms Burdon came to the conclusion that the claimant was unreliable, and she dismissed her. Had the claimant had the requisite 2-years' service for an unfair dismissal claim then this lack of a correct dismissal procedure would have played a prominent feature. However, we find that Ms Burdon probably acted in such a truncated manner because the claimant was new to the work and still well within her probationary period.

72 The first respondent did not have a sickness absence policy. The claimant was well within her 6-month probationary period according to Ms Burdon, which was set out in the claimant's contract of employment of 1 January 2018. In her decision to dismiss, Ms Burdon did not take into account the claimant's previous absences which predated 1 January 2018.

73 Ms Burdon advised the claimant to seek counselling because of her personal problems in the same manner that she advised the claimant to seek out information about welfare benefits. Had Ms Burdon been conscious of any anxiety or depressive illness then Ms Burdon would have recommended medical intervention rather than counselling. We accept Ms Burdon's explanation in this regard, and do not believe that her decision to dismiss was for any reason other than the claimant's high (overwhelmingly sickness) absenteeism.

74 Notwithstanding that the claimant withdrew her discrimination case (such that there was one) against the second respondent, for completeness we have addressed any potential claim against Mr Adams. At the appeal hearing, the Mr Adams reconsidered Ms Burdon's decision to dismiss. Mr Adams said that he regarded past absences as a good indicator of future absences. This is an objective factor and a reasonable basis upon which to make his decision so long as he did not include periods of disability-related absences. Mr Adams referred to an acceptable period of staff absence as not exceeding 10 days or 4 bouts in a rolling 12-month period as a guideline and when the Tribunal asked from where that guideline arose, Mr Adams said that this came from advice from Sage HR group. The Tribunal is satisfied that a guideline of 10 days or 4 bouts of absence in a 12-month rolling period is a clear and objective measurement and often accepted by employers to be the usual trigger for formal absence reviews.

75 Mr Adams accepted that, with hindsight, he may have made an error in adding in 2-days absence (11 December 2017 and 16 December 2017) that related to the claimant's employment at the care home. He said he counted this because it reflected the claimant's total employment history, which we accept may be the more accurate measurement. He said he had assessed the claimant's absence from the commencement of her employment which was 5 December 2017, as set out in the Response. So far as the claimant's total absence for the whole of her permanent employment with the first respondent (i.e. from 5 December 2017), she was absent for 7 days out of 47 working days (almost a 15% absence rate). So far as the claimant's employment at the special school was concerned, the claimant was absent through sickness for 5 days out of 38 working days (an absence rate of over 13%). In the 7½ weeks she was employed at the special school (i.e. the more favourable calculation for the claimant), the claimant had 3 bouts of 2 illnesses. The Tribunal regards this as a high rate of sickness absence. Crucially, the claimant was subject to a probationary period and was in the early stages of this probationary period. So long as the employer avoided any discriminatory intentions or outcome Ms Burdon (and Mr Adams) was entitled to dismiss the claimant for her sickness and other absence.

76 The *something arising in consequence of the claimant's disability* was said to be the claimant's frequent sickness absence. However, the claimant was not absent, either through sickness, or at all, because of her anxiety or depression.

77 Given that the Tribunal rejects that the claimant was dismissed for any absence relating to her disability, the respondents' knowledge of the claimant's disability is irrelevant. Nevertheless, for completeness, we accept both the evidence of Ms Burdon and Mr Adams that they did not know that the claimant was disabled. S15(2) EqA provides that the respondents needed to know of the disability before any liability for discrimination could occur. Given that the claimant said she did not know that she was disabled at the relevant time either and that she (i.e. the claimant) did not take any steps to investigate her anxiety and depression, we do not accept that the first respondent or Mr Adams could be expected to know of the claimant's disability. This is not a case where the claimant's employer turned a blind eye to an obviously disabled employee. The claimant gave no indication to any employee of the first respondent or, indeed, to Mr Adams that she was suffering from anxiety and depression despite having ample opportunity to do so and despite the first respondent's extensive enquiries at the outset of the claimant's employment.

78 Similarly, a duty in s20 EqA is not to make adjustments to facilitate the employment of disabled people generally. The duty arises only in relation to particular identifiable individuals. Schedule 8 Part 3, paragraph 20 states that an employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know, that a person has (or has had) a disability and is likely to be placed at a substantial disadvantage. Even though the claimant did not pursue her contention that the respondents did not make reasonable adjustments, there is equally no basis upon which to make findings that the respondent (and Mr Adams) failed to consider reasonable adjustments in circumstances where no adjustments were raised by the claimant and where it was not obvious that such adjustments should be considered.

79 A legitimate aim was the efficient running of the special school. The claimant's attendance was regarded by Ms Burdon (and then Mr Adams) as unreliable. We accept that it was not inappropriate (indeed it appears appropriate) for the first respondent to

dismiss the claimant during her probationary period because of her poor attendance. However, proportionality is a wide concept. The respondent should have followed a fair process. We reject the claimant's claim that she did not have an opportunity to appeal. It is not a breach of the ACAS Code of Practice to fail to have a human resources representative at the meeting and the claimant was incorrect to contend that notes of the appeal were not taken as we were provided with such notes in the hearing bundle (which we accept represented a reasonably accurate version of events). That said, the claimant should have been advised prior to the meeting of 22 February 2018 that the probationary review meeting could have resulted in her dismissal. If Ms Burdon only decided upon dismissal after the claimant failing to provide the reassurances she sought then the review meeting should have been adjourned, and the claimant appropriately warned that Ms Burdon was considering dismissal at a reconvened hearing. It is rarely appropriate to dismiss a member of staff out of the blue and in this circumstance, no matter how justified the dismissal was, the claimant should have been forewarned of this possible outcome so as to prepare fully her response. Such a failure by Ms Burdon was a breach of the ACAS guidelines and for this reason, the claimant's dismissal was not *proportionate* to the legitimate aims contended.

80 The fact that the appeal proceeded as a full rehearing remedied the procedural defect in Ms Burdon's dismissal because the claimant had ample opportunity to think about her case and prepare for the appeal hearing. Consequently, insofar as it relates to the appeal only, the claimant's dismissal was a proportionate means to achieving a legitimate aim.

81 Returning to the first issue to determine, the claimant was not absent from work because of sickness related to her anxiety and depression, either while working for the care home or after 1 January 2018 when working for the school. The claimant's claim of disability discrimination was consequently wholly misconceived.

Automatic unfair dismissal

82 Mr Walsh questioned whether or not the claimant qualified for time off for a dependent on the basis that her son did not live with her as he had residence with the claimant's ex-husband and his wife. The appropriate definition of "dependent" includes *a child*: s57A(3)(b) ERA. There is no qualification stating that the child must live with the employee, and we are not going to read such a restriction into the legislation. In addition, s57A(5) ERA states that for the purposes of subsection (1)(d) "dependent" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care. So, the claimant qualifies under section 57A ERA, by virtue of s57A(3)(b) and also under s57A(5) ERA.

83 The claimant was not subjected to disciplinary procedures so this could not be advanced as a detriment for taking time off for her dependent. The only detriment that the claimant contended that she suffered from was the dismissal, i.e. an alleged automatic unfair dismissal.

84 In her evidence the claimant was unable to identify the precise dates that she had taken off to deal with issues regarding her son. She said that her employers were supportive and allowed her to book some days off that she did not take. She also said that her employers gave her time off to deal with telephone calls she made during her lunch breaks and at other times.

85 It is clear from our findings above that we accept Ms Burdon took into account the claimant's absence of 2 January 2018 when dismissing the claimant because she recorded this as a relevant absence in her dismissal letter. Whilst this was attributed as "Family", as a matter of fact the claimant did not take dependent leave on that date. Ms Burdon said in evidence that she was aware before the new year that the claimant would be absent on both 1 and 2 January 2018, and that this was due to her annual leave. This also fits in with the claimant's chronology as the claimant said that her son was assaulted by his stepmother in September 2018 and that she learned of this assault before Christmas, in time to utilise her annual leave entitlement to see him over the post-Christmas and New Year period. So, it appears that there was an immediate need for the claimant to be involved in her son's safeguarding issues in the period before Christmas; the suddenness or urgency for such time off had gone by 2 January 2018 so this was not qualifying leave under s57A ERA. Furthermore, the fact that the claimant took this time off as annual leave also revokes any argument that this was time off under s57A ERA.

86 Mr Welch identified 1-day that the claimant had taken time off to deal with her son, which was 18 January 2018, and the claimant accepted that she had not taken any other time off work to deal with her dependent between 1 January 2018 and her dismissal. The actual detriment that the claimant contended that she suffered for taking time off to deal with her dependent was that Ms Burdon counted the single day with 6 others (totalling 7) 5 weeks later and which thereby contributed to her dismissal.

87 We were not satisfied that the social workers case conference was a genuine and unforeseen emergency. A case conference occurred some months after the stepmother's assault on the claimant's son and had obviously been set without reference to the claimant's availability. That said, we favour the more liberal approach of *Royal Bank of Scotland v Harrison* and we accept – as did Ms Burdon – that it was necessary that the claimant attend the case conference and reasonable for her to take the day off to do so. The claimant told Mr Burdon that she needed the time off very soon after she was informed of the case conference.

88 However, Ms Burdon took into account the claimant's absence of 18 January 2018 in her dismissal. This absence did qualify as time off for a dependent pursuant to s57A ERA. Ms Burdon was wrong to take this date into account when dismissing the claimant. However, the trigger for the claimant's dismissal was her 2-day absence on 20 February 2018 and 21 February 2018, which was over 1-month from the s57A absence. The claimant's most recent absence occurred within 3 weeks of her previous 3-day sickness absence and led Ms Burdon to the conclusion that the claimant was not reliable. Ms Burdon said in evidence that the work of a Teaching Support Worker was demanding and because the children at the school had special educational needs, it was particularly important that she had reliable staff. In her letter of 1 March 2018, Ms Burdon said the claimant was not able to cope with the demands and commitment of a full-time post, which is why she offered her supply work. Ms Burden said in evidence, that when the claimant was at school she was not focused on the job. We determine that Ms Burdon did take into account the claimant's absence on 18 January 2018 but that was 1 day of 7 days. We are satisfied that but for the claimant's ensuing 5 days of non-disability-related sickness, then she would not have been dismissed.

89 It is the Tribunal finding that Ms Burdon was supportive of the claimant in affording her time off to deal with issues arising from her son. There is no evidence from the claimant that prior to her dismissal Ms Burdon or others made any adverse comment or

subjected the claimant to any negative treatment in respect of taking time off to look after the interests of her dependent. Therefore, we conclude that Ms Burdon was sympathetic and understanding of the claimant's needs in taking time off for her dependent son. The fact that she considered the 18 January 2018 absence in the accumulation of the claimant's absence was an error, although the reason, or the principal reason, for the claimant's dismissal was not because of the 18 January 2018 absence. We accept that this was an error in the same way that Ms Burdon incorrectly counted the claimant's annual leave of 1 January 2018 or 2 January 2018.

90 Arising from Ms Burdon's evidence we conclude that the Respondents school's records appear to be chaotic. Ms Burdon got the annual leave date wrong (although it was also wrongly recorded as family leave elsewhere in the records). Ms Burdon's evidence was that she recorded the claimant's absence but did not take into account the reason for these absences. We are satisfied that that is an accurate explanation of the events. Ms Burdon was concerned about the claimant's focus at work and her attendance and ultimately the claimant was dismissed because of her poor attendance, which was wrongly recorded by her as 7 days in 7½ weeks. The fact that 2 of these days were incorrected included is important but the key factor was the claimant's excessive absence in the early weeks of her employment. Ms Burdon's primary concern was the claimant's haphazard attendance at school and the disruption that this had caused to the school which had particular sensitive needs. As set out in Ms Burdon's letter of 1 March 2018 to the claimant *"as we discussed at our meeting, at present you are not able to cope with the demands and commitments of a full-time post… so offering you supply was intended to be as supportive as I can be".*

91 In response to the claimant's letter about her personal circumstances, Mr Adams discounted the absences of 2 January 2018 and 18 January 2018. He said so in his appeal outcome letter and he said in evidence to this Tribunal, which we believe. So in the appeal rehearing Mr Adams discounted the s57A ERA absence.

92 Mr Adams referred to 7 additional and separate occasions of absence from sickness. So whilst accepting that the first respondent had mistakenly taken into account annual leave and time off for the dependant, Mr Adams included 2 absences in December 2017 when the claimant worked at the care home. These additional absences for snow and the sickness of the claimant's brother were not absences that related to time off for a dependent (or for the claimant's disability). Consequently, Mr Adams's rehearing took no account of the s57A absence.

93 The Tribunal is satisfied under the circumstances that the claimant was not dismissed because she took time off for a dependent. Consequently, this claim is dismissed.

Cost Application

94 The claimant contended that the hearing of 14 February 2019 was unnecessary and, therefore, the respondents should pay the costs occasioned by her attendance. The claimant's application for her costs was made under Rule 76 of The Employment Tribunal's Rules of Procedure, which is Schedule 1 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013. Rule 76(1) says:

> (1) A Tribunal may make any cost order or a preparation time order, and shall consider whether to do so, where it considers that –

> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonable in either bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted…

95 We considered the conduct of Mr Welch at the hearing. We noted paragraph 24 of Employment Judge Burgher's determination following the hearing of 14 February 2019 at paragraph 24:

> I add that having considered the evidence, I found it disappointing that the Respondent continued to dispute disability and subject the Claimant to lengthy anxiety inducing cross examination when the medical evidence, witness statement and impact statement provided by the Claimant were clear and compelling and that there was no contrary factual or medical evidence which the Respondent could refer to challenge this.

96 So far as the amount claimed, Mr Welch said that he could not understand the claimant's quantification of her costs application. We asked the claimant for clarification of this and she said she did not know. The claimant said that this application had been made on her behalf by her solicitor. So far as the expenses actually incurred for this hearing, the claimant attended in person and again without her solicitor. She did not lose any pay because she was not working. The claimant did incur a return train fare which was surprisingly high in the circumstances at £39.20. The claimant also said that she incurred petrol expenses in travelling to the station, so she rounded her claim up to £40, which we considered an appropriate quantification of her claim.

97 Because the claimant modified her claim to a more modest and appropriate level, it does not relieve the Tribunal from properly assessing whether costs would be payable in such circumstances. Whether the claimant claimed a modest amount or great amount the quantification makes little difference to whether a cost award is deemed payable.

98 Mr Welch said that Judge Burgher decided that, at the relevant time, the claimant was a disabled person and the respondents accepted the judicial determination. However, the claimant confirmed throughout this hearing that she did not know that she was a disabled person and Mr Welch contended that it was reasonable for the respondents to dispute that the claimant was disabled within the meaning of the EqA. Mr Welch also said that there was contrary evidence within the claimant's medical notes – which we accept, which suggested that the claimant was not disabled, and it was reasonable that he put those notes to the claimant. He said that there was nothing wrong with challenging the claimant's contention that she was a disabled person. The respondents did not request the hearing, the hearing was set by the Employment Tribunal. So, participation in this hearing was reasonable in the circumstances.

99 There is nothing in EJ Burgher's minute to suggest that Mr Welch's conduct was vexatious or abusive or disruptive or otherwise similarly unreasonable. That the claimant suffered from stress and anxiety was, in our determination, not a sufficient reason to deny the respondents a proper opportunity to challenge her evidence. So far as the conduct of Mr Welch at the hearing, Mr Welch said that he asked the claimant questions in the same manner that he asked questions in this hearing. We do not find that Mr Welch was disruptive, vexatious or abusive in any way at this hearing. His conduct was reasonable and acceptable at this hearing and there is not sufficient basis to find the respondents' representative has breach the high threshold of Rule 76.

100 Under the circumstances we do not accept the claimant's application in respect of the costs for the hearing on 14 February 2019.

Employment Judge Tobin

1 October 2019