EMPLOYMENT TRIBUNALS

Claimant: **MISS SARAH MILLER**

Respondent: **VELINDRE NHS TRUST**

HELD AT: **CARDIFF** **ON:** **READING:** 22 JULY 2019
HEARING: 23, 24 & 25 JULY & 3 SEPTEMBER 2019

BEFORE:

EMPLOYMENT JUDGE: N W BEARD **MEMBERS: MR W HORNE**
MRS L BISHOP

Representation:

For the claimant: Mr M Maitland Jones (Counsel)

For the Respondent: Ms J Williams (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claim of unfair dismissal pursuant to sections 95(1)(c) and 98 is not well founded and is dismissed.

2. The claimant's claims of disability discrimination pursuant to section 15 of the Equality Act 2010 are not well founded and are dismissed.

3. The claimant's claim of disability discrimination pursuant to section 20 and 21 of the Equality Act 2010 is well founded and there shall be a hearing to consider remedy.

4. The claimant's claims of disability discrimination pursuant to section 26 of the Equality Act 2010 are not well founded and are dismissed.

REASONS

PRELIMINARIES

1. The claimant is represented by Mr Maitland-Jones of Counsel. The respondent is represented by Ms Williams also of Counsel. The claimant was a medical laboratory assistant who worked for the respondent in a department providing blood services.
2. The tribunal has been provided with a bundle of documents running to almost 900 pages. The tribunal was also provided with a list of documents which the parties asked us to consider on the day set aside for reading: we have read and considered those documents. The tribunal has not considered or taken account of any other document unless it was specifically referred to in a witness statement, during cross examination or in final submissions. Only a small proportion of the documents in the bundle were actually referred to either in the list or during the proceedings.
3. The tribunal heard oral evidence from the claimant; she called, as witnesses on her behalf: Mrs Miller, her mother; the claimant's partner Mr Fitzgerald; Ms Harris, a family friend that had assisted the claimant in her dealings with the respondent both before and after these proceedings were commenced. The respondent called: Mr Reynolds, who was head of laboratory services at the relevant time; Ms George who was lead scientist in blood medicine; Ms Davies a human resources adviser; Ms Ashley who was appointed to carry out an investigation into bullying complaints made against the claimant; Ms Pring a senior human resources adviser; Mr Prosser interim director of the blood service, who sat on the disciplinary hearing; Mr Pearce who was asked to manage the claimant's sickness absence; Mrs O'Brien who was director of the blood service.
4. There was a preliminary hearing in this case before Employment Judge Emery on 19 November 2018. He made a finding that it was just and equitable to extend time for the presentation of the discrimination claims made by the claimant. This tribunal is bound by that finding.
5. At the outset of the hearing the tribunal, in discussion with the parties, identified the issues to be resolved. There are two headline claims: unfair (constructive) dismissal and disability discrimination.
    5.1. In respect of the former the claimant identified the conduct relied upon as breaching her contract of employment as the 11 complaints set out in the document attached to the ET1 which were as follows:

5.1.1. A failure to make adjustments recommended in an Occupational Health report in September 2016.
5.1.2. A failure to investigate allegations before suspending the claimant on 5 October 2016.
5.1.3. A failure to follow the respondent's own policy when suspending the claimant.
5.1.4. A failure to properly investigate allegations before putting the claimant through a disciplinary review.
5.1.5. A failure to properly investigate allegations before putting the claimant through a disciplinary hearing.
5.1.6. A failure to compose correspondence in a sensitive way in accordance with policies with reference to the Equality Act 2010.
5.1.7. A failure to pass a sick note to the relevant manager after it had been handed in at reception in September 2017.
5.1.8. A failure to investigate and report on the loss of that sick note by the respondent.
5.1.9. A failure of the Occupational Health practitioner to view the claimant's file before or during the appointment the claimant attended on 26 October 2017. The claimant contended that the last straw was the Occupational health doctor asking the claimant to seek a recommended medication from her GP but not tell the GP that the recommendation came from him.
5.1.10. A failure to carry out grievance procedures in accordance with the claimant's contract.
5.1.11. Failing to protect the claimant from discrimination due to the claimant's disability.

5.2. The respondent denied that the above matters were factually correct. The respondent contended that even if the allegations were correct they could not amount to a breach.
5.3. The respondent denies that the act relied upon as a last straw could be considered an act of the respondent, nor could it, in any event amount to a "straw" in law.
5.4. The respondent argues that the claimant has affirmed the contract in respect of any earlier breaches that might be found.
5.5. The claimant's disability discrimination complaints were identified at a preliminary hearing and are recorded in the Order made by Employment Judge Howden-Evans on 1 August 2018 in respect of that hearing. They are set out at paragraph 8 of the Order. The tribunal explored the detail of these complaints with Mr Maitland-Jones and the following emerged as the relevant issues:
5.5.1. Was there in August 2016 a failure to continue with a reasonable adjustment, already in place which allowed the claimant to use annual leave to cover any shortfall in flexitime which she worked? At the outset of the hearing the issue was also put as a failure to allow the claimant a change in hours of work so that she would begin earlier in

the day? In respect of this latter matter this was expressed in relation to reasonable adjustments and not the section 15 and 20 claims.

5.5.1.1. The PCP was identified as a requirement to work within the limits of the Flexitime scheme.

5.5.1.2. The disadvantage identified was that the claimant had a particular difficulty when arriving at work to leave her car and start work and further that because of the removal she had to reduce her working hours.

5.5.1.3. Two adjustments were suggested first to allow the existing broader flexibility to continue, the second was to allow the claimant to work an earlier shift.

5.5.1.4. The argument advanced was that either of these adjustments would mean that the claimant had sufficient time to calm herself and make the adjustment necessary to leave the car.

5.5.2. The claimant contends that the facts of that complaint also give rise to an allegation of discrimination pursuant to section 15 Equality Act 2010.

5.5.2.1. The claimant contends removing the previous level of flexibility is an unfavourable act.

5.5.2.2. It is contended that the consequence arising from the claimant's disability is that the claimant will have poor timekeeping.

5.5.3. The claimant also contends that these facts give rise to a claim of harassment pursuant to section 26 EA 2010. The claimant contends that this would be based on the effect of the treatment.

5.5.4. The respondent contends in respect of this complaint that whatever the tribunal's factual findings (and it contends there is significant dispute with the claimant's version) that both in respect of the section 15 and 20 claims the defence of justification arises: the legitimate aim was for the respondent to ensure that sufficient staff worked during core hours. In respect of harassment the respondent contended that a reasonable person would not view the alleged effect as harassment.

5.5.5. The complaint related to a failure to look towards the claimant's health when she was suspended in allowing the claimant to drive from the respondent's premises. The complaint was pursued as a complaint under sections 15 and 26 EA 2010.

5.5.5.1. In respect of the section 15 complaint the unfavourable treatment relied upon was the respondent not intervening when the claimant intended to leave by driving her own car following suspension. The claimant also raised arguments about the manner and timing of the claimant's suspension.

5.5.5.2. It was argued that the consequence arising from the claimant's disability was that he fitness to drive was impaired.

5.5.5.3. The section 26 complaint was based on the effect of allowing the claimant to drive the unwanted conduct being the failure to intervene and stop the claimant from driving.

5.5.6. Again, without prejudice to the factual position (the respondent maintains that the claimant's version of the facts is not accurate) the respondent argues justification with a legitimate aim of suspending the claimant when circumstances dictated such suspension in dealing with the section 15 complaint. It argues that the claimant cannot make out an effect which would amount to discrimination in relation to the section 26 claim.

5.5.7. The claimant complains that a letter sent to her by the respondent on 22 September 2017 was not composed in a sensitive form. The claimant contends that this complaint is covered by sections, 15, 20 and 26 EA 2010.

5.5.7.1. In respect of section 20 the PCP relied upon is the sending of a standard letter. The adjustment sought was to vary the content of the letter to remove the indication that pay could be stopped. The disadvantage alleged is that the claimant's ability to return to work was impaired because of her reaction to a letter of this type.

5.5.7.2. The unfavourable treatment for the section 15 complaint is the sending of the letter. The consequence of the claimant's disability is her absence from work.

5.5.7.3. The section 26 complaint is based on the effect on the claimant of sending an unwanted letter.

5.5.7.4. The respondent (again subject to factual matters) contends that the adjustment sought was not reasonable and, in any event, would not alleviate the disadvantage. It argues that there was a legitimate aim in sending the letter in ensuring that the claimant was informed of the contractual and policy position in relation to the provision of sickness absence GP certificates and long-term absence. The respondent contends that it is not reasonable to argue for the effect contended.

6. The tribunal were concerned to discover in the reading day that without prejudice documentation had been included in the agreed bundle. However, on discussion with the parties at the outset of the hearing it was indicated that privilege had been waived in respect of this communication.

THE FACTS

7. The claimant began working for the respondent in April of 2001, throughout the course of her employment she worked as a medical laboratory assistant in blood services. The respondent provides blood services (i.e. blood and blood products) to the NHS in Wales. The respondent concedes that the claimant was disabled at all relevant times by virtue of the impairment of anxiety and depression. The claimant's employment came to an end on 1 February 2018.

The events with which we are concerned occurred between 2016 and the end of the claimant's employment.

8. The respondent operates a shift system in the laboratory where the claimant works, the shifts are described as morning and afternoon. The majority of staff work 9:00 am to 5:00 pm, however the necessity for staff to work in the afternoons has increased and this is a trend which has developed significantly over recent years. The claimant was employed to work the afternoon shift between 1:00 pm and 9:00 pm. This shift was subject to a flexitime scheme which set core hours of 1:30 pm to 3:30 pm and 5:00 pm to 6:30 pm. The core hours are imposed because of the service users demands at particular times of day.

9. In a discussion between the claimant and her supervisor, Samantha Rainbird, during the claimant's absence in early 2016, the claimant had made Mrs Rainbird aware that the claimant had difficulty in getting out of her car once she arrived at work due to anxiety. An arrangement was put in place that the claimant would be allowed to go beyond the flexitime arrangements and any shortfall would be dealt with by adjusting holiday to make up the time. In April 2016 the claimant returned to work after that period of illness and Mr Herbert, who had day to day management of the claimant, operated the system so that the claimant's work was adjusted to reflect any shortfall. The effect of the claimant's anxiety is this: the claimant is busy in the morning with preparation for her child to attend school, however, thereafter she has to wait a significant time before starting work. In this period the claimant's anxiety tends to grow as she ruminates over attending work. This has led to the anxiety being at such a level that when she drives into the car park for work it will sometimes take as much as an hour, sometimes with her needing to speak to her partner on the telephone for support, to be able to leave the vehicle and go into work.

10. Mr Reynolds, who had been recently appointed, had concerns about the claimant's work pattern, he discussed this with Ms George, also a recent appointment. Neither individual had received handover information which covered the arrangement that had been put in place for the claimant. The result of the concern was that the claimant was called to a meeting on 7 July 2016. The claimant indicated that she was asked to come in for a "chat" but found the meeting far more formal. Mr Reynolds describes this as an informal discussion. However, although nothing was being dealt with under the disciplinary or attendance policies, the tribunal do not underestimate the impact on the claimant of being invited to attend a meeting with two senior managers about her timekeeping.

11. There is a dispute between the parties as to the questions that Mr Reynolds asked of the claimant. This much is not in dispute: the claimant referred to the existing arrangement, the claimant was obviously and visibly distressed, that Mr Reynolds moved to asking questions about the claimant's welfare. The dispute relates to whether Mr Reynolds asked the claimant probing personal

questions and whether, in particular, he asked the claimant if she had ever been sectioned.

11.1. As to the personal questions we note Mr Reynolds background as a clinician, we consider it likely that he would have asked some of the questions the claimant describes as they would imply a clinical as opposed to managerial enquiry.

11.2. However, we do not accept that he asked whether the claimant had been sectioned. This was not foreshadowed at any stage before the claimant's oral evidence, we find it extremely unlikely that such a significant point would not have found its way into the claimant's documents or evidence before that point.

11.3. It is clear that the claimant was distressed about the way she had been questioned and raised the issue with Mr Reynolds on the following day.

11.4. The result of the meeting was that Mr Reynolds had significant concern about the claimant's health and arrangements were made for the claimant to attend an Occupational Health appointment.

11.5. At this meeting the claimant was given no indication that the previous flexibility could be maintained, and the implication was that she would be required to work core hours.

12. The tribunal note that in her most recent appraisal with Mr Herbert on 6 September 2016 and prior to the matters we set out below about flexible working the claimant had indicated that she would wish to start earlier if she could. This was set in a context where the claimant would need to reduce her hours of work for more "family time" (her role taking up much of the evening) but would wish to work more hours if she could start earlier.

13. The claimant was absent due to a back injury for a short time. She returned to work on 30 August 2016 and a meeting was held with Ms George however this did not happen until 13 September 2016.

13.1. This would normally have been a meeting held with Mr Herbert but because the claimant had reached a trigger point in the absence policy it needed to be held with a more senior manager.

13.2. The claimant was concerned about her position because of her difficulties and the changed approach to her flexibility.

13.3. It is not entirely clear how the matter arose but on 13 September 2016 a flexible working request was considered. The return to work notes record that the claimant had anxiety issues which impact at the outset of her shift and that she had identified working less would be beneficial.

13.4. The notes indicate a verbal agreement to reduce from 5 day working to 3 day working. The claimant completed a flexible working request on the same date.

14. The claimant attended an occupational health appointment on 20 September 2016. (We note that the respondent did not use its own staff for such

occupational health examinations but contracted with another trust to carry them out).

14.1. The report prepared set out the following adjustment for consideration by the respondent: that the claimant commence work earlier in the morning as this would support the management of her depression.

14.2. This report was available to the respondent when a meeting was held between the claimant and Ms George about her flexible working request on 28 September 2019.

14.3. Ms George told us she just followed the claimant's lead and stuck to the flexible working request. The claimant's evidence was that she had discussed the report with Ms George and asked for an earlier start.

14.4. In our judgment we prefer the claimant's evidence on this point. It appears to us very unlikely that having raised the matter on 6 September 2016 in her appraisal and with the support of the OH report recommendation that the claimant would not have asked.

14.5. In our judgment Ms George was aware of the need for afternoon coverage. She was also aware, as she told us, that there were no specific vacancies in the morning shift. In our judgment we conclude that, as a result, Ms George preferred the flexible working outcome to making enquiries about the claimant starting work earlier.

14.6. In our judgment that is the reason why no consideration was given to the adjustment set out in the occupational health report and why that was not made as an adjustment.

15. The claimant has asked the tribunal to conclude that the following two events are linked.

15.1. On the 28 September 2016 the claimant's partner, Mr Fitzgerald, telephoned the respondent and spoke to Mr Reynolds. It is clear that Mr Fitzgerald was angry when he made the call. It is also clear that Mr Reynolds was disturbed by the content of the conversation as a he made a note about it. It is further clear that, amongst other things, Mr Fitzgerald accused Mr Reynolds of bullying the claimant.

15.2. It is also alleged that Mr Reynolds stated that he did not have to comply with the Equality Act in dealing with the claimant as it was only advisory. Mr Reynolds denies this vehemently.

15.2.1. Mr Reynolds made a note shortly after this telephone discussion. Nothing in there indicates that he took issue with matters relating to the Equality Act. His evidence coincided with the notes we have seen.

15.2.2. Mr Fitzgerald was clearly angry at the time he made the telephone call and was emotional because as he told us he had to deal with the aftermath when he saw the claimant. He made no notes.

15.2.3. In our judgment it would be very unlikely for Mr Reynolds, in dealing with an angry and emotional, individual to deliberately make a comment which would not only be unwise, because he knew it to be

wrong, but also likely to inflame the situation. In addition to this there is a contemporaneous note, if Mr Reynolds did genuinely believe the Act to be advisory we would expect that part of the conversation to be recorded, it is not.

15.2.4. Taking those matters into account we consider that, on the balance of probabilities, Mr Reynolds did not refer to the Equality Act being advisory in respect of his dealings with the claimant.

15.3. On the 29 September 2016 information was passed to the respondent alleging that the claimant, along with another person, had bullied other members of staff. The respondent took statements from two individuals about those allegations. Included in the allegations was an indication by one of the staff that she was afraid of repercussions because she had raised the issue.

15.4. The conclusion we are asked to draw is that Mr Reynolds, having had the conversation with Mr Fitzgerald, arranged for these accusations to be made against the claimant or, at the very least, that he allowed minor gripes to be exaggerated into bullying allegations.

15.5. The tribunal recognise the proximity in time of the two events. However, we are unpersuaded by the argument.

15.6. Firstly, such an approach by Mr Reynolds would require him to suborn three junior members of staff to conspire with him. These are Ms George and the two employees who complained of being bullied. We consider that such a step by Mr Reynolds would be unlikely in the extreme. Secondly, we cannot envisage why such a conspiracy would need to involve a complaint against another member of staff, particularly as this involved suspending the other member as staff (as it did for the claimant as we set out below).

16. The claimant was on holiday at the time the complaints of bullying were made. She returned to work on 5 October 2016. The respondent had already decided to suspend the claimant; however, it did not do so as soon as she arrived at work.

16.1. One thing is clear from the evidence on all sides, the claimant was significantly distressed when told about suspension.

16.2. The respondent has two policies, a disciplinary policy which permits suspension and a dignity at work policy which sets out a different approach.

16.3. The claimant argued that the respondent should have applied the latter policy instead of suspending the claimant under the first.

16.4. What is clear from oral evidence is that the respondent limited itself to consideration of the disciplinary policy and, although it was looked at, no real thought was given to the dignity at work policy at the time.

16.5. In the disciplinary policy suspension is permitted where keeping the employee at work might result in a compounding of the offence, interference with or prejudice of any investigation or where it might jeopardise staff or patient safety.

16.6. The dignity at work policy deals specifically with bullying and harassment: this sets out a process where the complainants discuss the problem with an appropriate manager. At that stage there is obviously a decision to be made: the following aspects are important: the complainant should not be put in a position where further incidents may occur. When a person makes a complaint step 1 of the process talks of an informal meeting. It sets out that at this meeting the seriousness of the complaint can be assessed. It is made clear that at this stage a decision can be made to move to the disciplinary process.

16.7. The tribunal take the view that step 1 of the dignity at work process was followed. There was a meeting between each complainant and Ms George, where their accounts were noted down and where a decision was made that these matters were serious enough to warrant institution of the disciplinary process.

16.8. In our judgment given that the complaints made were of bullying of specific individuals over a significant period and where at least one of the individuals was expressing fear about the consequences of having complained, it was reasonable for the respondent to conclude that a disciplinary investigation should be undertaken and that suspension was an appropriate step.

17. The delay in suspending the claimant was clearly a significant failing on the part of the respondent.

17.1. This failing arose because Mr Reynolds was unsure whether, given the claimant had through her union and her partner raised issues about his management, he should be the person carrying out the suspension.

17.2. In the tribunal's judgment this is a matter that should have been considered and decided between the 29 September and 5 October 2016.

18. There is a dispute about whether the claimant was informed about the reason for suspension on the day. The claimant denied that she was.

18.1. We have no doubt that the timing of the suspension would have caused the claimant confusion as to what the reason for the suspension was, she could not have been aware without being told directly.

18.2. The respondent's evidence came from Mr Reynolds and Ms Davies, their accounts differed. Ms Davies said that the claimant was told that there had been a complaint of bullying and harassment, Mr Reynolds told the tribunal that he could not remember if he spoke about the claimant's behaviour and he told her that there were "serious allegations from members of staff".

18.3. There is a letter dated 5 October from the respondent to the claimant (the claimant's evidence is that she did not receive this letter), that letter does not use the phrase bullying and harassment but refers to dignity at work allegations and that the claimant had displayed unacceptable behaviour to staff.

18.4. We prefer the claimant's evidence that she was not told: the suspension meeting was held later than it should have been; the claimant was very distressed and Mr Reynolds, in particular, was aware of the claimant's anxiety issues; the evidence of Mr Reynolds as to what he said did not include an accusation of bullying and harassment; the claimant was adamant that she was not made aware; we take the view that Ms Davies is remembering what ought to have been said not what was.

19. The claimant complains that she was allowed to drive home, however her evidence was that she wanted to do this. The respondent asked if she was fit to drive and if the claimant wanted to and was told by her that she did. In those circumstances the respondent, having suspended the claimant and requiring her to leave, had no rights to control the claimant's decision making as to how she got home.

20. On the 13 October the claimant was sent a letter by the respondent. This letter did set out the misconduct that was alleged and which would be investigated. The letter also set out that Ms Ashley (an external HR consultant) had been appointed to carry out the investigation into the allegations.
    20.1. The investigation involved Ms Ashley interviewing the two complainants and various other members of staff.
    20.2. She explored five specific allegations from the complainants in interviews with other members of staff. The interviews were recorded and transcribed.
    20.3. Those interviews took place during the October and November of 2016 and the claimant was interviewed on 11 November.
    20.4. The tribunal were concerned with only one aspect of Ms Ashley's approach to the investigation which involved a witness who did not wish to confirm, as a statement, what he had said in interview. Ms Ashley wrote to the respondent, in terms, stating that the proposed change would weaken the case against the claimant.
    20.5. Miss Ashley's investigation was meant solely to be an evidence gathering exercise and she was not required to make value judgments. In talking about weakening the case against the claimant she was clearly expressing such a value judgment.
    20.6. However, the process of the investigation we have seen does not demonstrate any other aspects of potential bias e.g. asking questions which would influence an answer given.
    20.7. However, we do consider that her approach seeking to enforce the employee to confirm his original statement by referring to potential disciplinary matters against that employee betrayed the fact that she had developed a view of the case by the closing stages of the investigation.
    20.8. In our judgment, however, the report does not betray that view overtly and would not therefore have had any influence over the person deciding whether the matter should proceed to a disciplinary hearing. The report was completed on 12 January 2017.

20.9. In any event the claimant was unaware of this potential bias until disclosure as part of these proceedings, it cannot, therefore have had any influence on her decision to resign.

21. Initially a Mr Ellis was appointed to consider the report. His decision was that there ought to be a disciplinary hearing. A disciplinary hearing was arranged for 15 February 2017. However, because of difficulties in the availability of key persons Mr Ellis was replaced and Mr Prosser was appointed to deal with the disciplinary hearing. That hearing took place on the 7 and 8 March 2017, key witnesses did not attend and those who did attend gave some evidence at variance with what was contained in the report. At the start of the hearing on 8 March Mr Prosser indicated that his decision had been made in the claimant's favour. His findings, expressed at that time, was that there was a worrying culture of behaviours embedded in the team within which the claimant worked including crude and inappropriate language which could be considered bullying. He indicated that there should be a structured plan to return the claimant to work.

22. On 10 March 2017 Mr Prosser wrote to the claimant outlining his findings and recommendations. The letter indicated that the claimant would return to work on a day to be agreed. However, the letter went on to make recommendations in respect of process with reference to the investigation and the management of suspension. Mr Prosser also used the letter to set out inappropriate behaviours he had identified.

23. Further letters were sent to the claimant on the 17 and 24 March 2017. These were attempting to settle arrangements for the claimant's return to work. However, the claimant did not return to work because she became too ill and by the end of March 2017 had provided the first of a number of GP certificates; the claimant never returned to work again.

24. On 3 April 2017 the respondent sent a letter to the claimant. The letter set out an apology in the following terms: that the process of suspension was "not handled in line with good practice". The letter indicated that suspending the claimant after she had commenced work did not appear neutral and singled the claimant out in front of colleagues. It was accepted that this had caused the claimant personal distress. The letter then apologises for the respondent failing to meet its own standards. The letter then makes it clear that Mrs O'Brien (the author) would be taking an interest in pursuing the recommendations made by Mr Prosser within the department.

25. The respondent appointed Mr Pearce to deal with processes related to the claimant's sickness absence. This was in recognition of the obstacles to a working relationship between the claimant and Mr Reynolds who would otherwise have had responsibility for that process. Throughout 2017 Mr Pearce arranged meetings with the claimant, some the claimant was able to attend others she was not. The claimant also attended occupational health appointments which were arranged in 2017. In meetings with the respondent before September 2017 the claimant indicated that she wished to return to

work and that it was her health which prevented this happening. She did also continue to indicate that she had been upset by the suspension and disciplinary process. In the August meeting the claimant apologised for being absent and indicated that the respondent could not provide additional support at that time which would allow her to return to work. Similarly, at the occupational health appointment in July 2017, the reasons given for the claimant's absence related to her health.

26. The claimant had presented a series of GP certificates to the respondent. Some of these arrived later than the expected date, however, the respondent took no action on their late arrival as the certificates would usually arrive within a few days of the due date.

26.1. The claimant had provided a GP certificate which covered the period up to the 2 September 2017.

26.2. The claimant did not obtain a further GP certificate until 8 September 2017 (although it was backdated to cover from 2 September 2017.

26.3. Mr Fitzgerald's evidence was that he delivered the certificate to the respondent's reception on 2 September 2017. When he was cross examined and it was demonstrated that he could not have done so he still maintained that he had.

26.4. The tribunal approached the matter on the basis that Mr Fitzgerald might have misunderstood the point being made. In order to clarify matters the Employment Judge intervened and sought to explain that the question being put was that if the dates on the document were correct, it he could not have attended the respondent on 2 September 2017. Despite this explanation of the question Mr Fitzgerald maintained his stance.

26.5. The evidence of Mr Pearce was that the fit note from the 8 September 2017 appeared on his desk without an explanation. This was after Mr Pearce had written a letter on 22 September 2017 explaining that in the absence of a fit note the claimant might not be paid.

26.6. The tribunal do not accept that Mr Fitzgerald brought the fit note on the 2 or 8 September 2017, we do not consider him a reliable witness. A more likely explanation on the evidence is that he had forgotten to hand in the fit note and was reminded of this when the claimant received the letter explaining potential consequences. We believe this to be far more likely than a document going missing from reception on the 2 or 8 September 2017 and emerging more than two weeks later, coincidentally shortly after the letter had been received by the claimant.

27. On the 7 September 2017 the claimant, through Sheila Harris (indicating that she is an old friend and representing the claimant), wrote to the respondent citing an irretrievable breakdown of the employment contract. The thrust of the complaints set out refer to the suspension, investigation and disciplinary

process. Those complaints relate to a process which had concluded in March 2017. There is then a reference to the letter from Ms O'Brien and a complaint that it is not a letter of apology because it only addresses the suspension and not the claimant's other complaints. The final complaint is that the claimant, in August 2017 was not given the correct venue for her sickness absence review meeting. The letter indicates that the claimant cannot return to work under the same management and suggests a mediation/settlement agreement. The letter does not ask that the complaints be dealt with under the respondent's grievance procedures.

28. The claimant attended an occupational health appointment on 26 October 2017. The claimant and her mother gave evidence about this appointment. The claimant alleges that the Occupational Health doctor was unprepared and had "obviously" not read the file and that he made an inappropriate recommendation that the claimant should suggest a form of medication to her GP but not say that the suggestion had come from him.

    28.1. We cannot say whether the doctor had read the file or not, but accept it was the honest perception of the claimant and her mother that he had not. The evidence, however, is not sufficient to draw the conclusion that the claimant asks us to. Practices vary; some physicians would indicate what they know, others might not to get a better view of a patient's own descriptions of symptoms are. The claimant points to report dates where the reference to the time the claimant has not been in work is incorrect (however there are two distinct parts of the claimant's absence and the reference could be directed to considering only one of them). However, whilst we do consider that the wording used could be read in the way the claimant suggests we do not consider it is sufficiently unambiguous for us to say that it shows that the doctor had not prepared for the consultation. On that basis the claimant's opinion of what preparation had been undertaken is not enough.

    28.2. In very broad terms the latter description of recommending medication is borne out by the evidence in an email from the doctor to the respondent. He states that he suggested a type of treatment and said that as he was not the treating physician he could not prescribe medication for the claimant. We consider that the claimant could not have considered this approach inappropriate as, at a later appointment (7 December 2017), having mislaid the recommendation the claimant asked for it again.

29. The claimant was asked to attend a further sickness absence review meeting to take place on 5 January 2018. On the 4 January 2018 the claimant wrote to the respondent tendering her resignation to take effect on 1 February 2019.

THE LAW

30. Section 95 of the Employment Rights Act 1996 provides so far as is relevant:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—*
>
> *----------*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

31. The approach to constructive dismissal is set out by Lord Denning in ***Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA*** in which he defined constructive dismissal as follows:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

32. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in ***Malik v. Bank of Credit; Mahmud v. Bank of Credit[1998] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606*** where Lord Steyn said that an employer shall not:

> *". . . without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

33. In this case, we must also pay mind to the fact that the claimant argues to establish her decision to resign on the last straw principle, in that she argues that the whole of the respondent's conduct over time has caused her to resign. In ***Lewis v Motorworld Garages Ltd [1986] ICR 157***, Glidewell LJ pointed out that at p 169 F-G that the last action of the employer which leads to the employee leaving need not itself be a breach of contract. In ***Omilaju v Waltham Forest London BC [2005] 1 All ER 75*** Dyson LJ said at paragraph 21:

> *"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see*

> *whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

34. The tribunal is therefore required to decide whether the respondent's conduct in this case could objectively be said to be calculated, or in the alternative likely, to *seriously* damage confidence and trust between the claimant and the respondent. Thereafter we are required to examine whether the claimant resigned in response to that conduct, and that conduct must include a final event which contributes to earlier actions so as to make the entirety of the conduct, taken together, sufficiently serious so as to damage the relationship of confidence and trust between employer and employee.

35. The conduct relied upon as the last straw is that of an occupational health doctor who was not an employee of the respondent. In order to for the doctor to impact on the claimant's contract i.e. to create a fundamental breach the respondent must, in some way be responsible for his actions. The boundaries of vicarious liability in tortious matters have been expanded over recent years to permit employee "type" relationships to found a duty of care. Thus, if the doctor's conduct had been tortious there is a possibility that the claimant could argue that the respondent was vicariously liable for any injury to the claimant caused by the doctor's conduct. The same cannot be said of contractual relationships; the principles of agency, set out in the authorities and extracts from practitioner textbooks the parties have provided, demonstrate that, when considering the liability of a principal for the actions of an agent, there is a requirement that an agent can, actually or ostensibly, agree alteration to contractual terms. Mr Maitland-Jones contended that the tribunal ought to adapt the decisions about the existence of a duty of care in tort to this type of contractual situation. His position was that there was an analogy between the situations in that it was the doctor's manner of conducting the respondent's request for a report that was in issue. We consider that to accede to that submission would be for us to ignore indistinguishable authority. In order for the respondent to be considered as having breached the claimant's contract by the conduct of the doctor, in our judgment it must be established that the doctor is an agent of the respondent who had actual or apparent authority to change the terms of the claimant's contract of employment.

36. Disability being a protected characteristic under the Equality Act 2010 the relevant aspects of the legislation are as follows:

36.1. Section 15 provides:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

36.2. Section 20 deals with the Duty to make adjustments and provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

36.3. Section 21 deals with the Failure to comply with the duty and provides

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

36.4. Section 26 provides:

(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
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(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

37. Section 136 deals with the Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
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(6)A reference to the court includes a reference to—
(a)an employment tribunal;

38. In addition, with regard to the Burden of Proof, the provision in section 136 above is the UK implementation of the EU Directive 2000/78/EC general framework for equal treatment in employment and occupation at Article 10 which provides

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

39. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the

protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799***

40. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. Unfavourable treatment is treatment that is disadvantageous to the claimant see ***Swansea University v Williams [2018] UKSC 65*** anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable. The tribunal must consider two distinct elements of causation. Firstly, what is the something caused by the disability, what arises as a consequence of the disability? This must not be considered narrowly, there can be a number of links in this chain of causation. Secondly, we must consider whether that “something” has caused the respondent to treat the claimant unfavourably; the something must be a significant or effective cause of treatment it need not be the sole or even principal cause. anything done which is advantageous, even if less advantageous than it might be if not for the consequence of the disability, is not unfavourable.

41. The test for justification is whether the unfavourable treatment is "a proportionate means of achieving a legitimate aim” this test is squarely one of objective justification. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The employer needs show that unfavourable treatment was reasonably necessary in order to achieve the legitimate aim. If it is shown that the respondent could have taken other measures with a less discriminatory impact, but which would have achieved the same legitimate aim, the treatment would not be considered to be reasonably necessary. Less favourable (here unfavourable) treatment will be incapable of objective justification where there was an obviously less discriminatory means of achieving the same legitimate aim

42. In terms of disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the Employment

Appeal Tribunal in the ***Environment Agency v Rowan UK EAT/0060/07/DM***, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in Rowan, to identify the actual provision criterion or practice on the facts of the case.

43. The tribunal has sought to remind itself of the statutory reversal of the burden of proof in discrimination cases. We consider the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The ***Madarassy*** case also makes it clear that in coming to the conclusion as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

44. In dealing with issues of harassment, the Tribunal has to have in mind the guidance given by Mr Justice Underhill, the President of the Employment Appeal Tribunal in ***Richmond Pharmacology V Miss A Dhalliwell*** where it is said that prior case law in respect of harassment is unlikely to be helpful in interpretation of the statutory tort of harassment that we are dealing with, and that even less assistance is likely to be gained from the provisions of the Protection from Harassment Act 1997.

    44.1. The statutory consequences

    44.2. We must note that there is a formal breakdown of element 2 within the harassment provisions into two alternative bases of liability, that of purpose and effect, which means that the Respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the proscribed consequences but did not, in fact, do so.

    44.3. Then there is the proviso in Sub Section 2 such that the Respondent should not be held liable merely because his conduct has had the effect of producing the proscribed consequence. It should be reasonable that the consequence has occurred and that the alleged

victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created.

44.4. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the alleged subject of the discrimination felt, about the alleged subject of the discrimination, and must subjectively feel that their dignity has been violated, etc.

44.5. Finally, we must consider an enquiry into why the perpetrator acted as they did. This is distinct from the purpose question and relates the reasons why the person has done something not the results they intended to produce.

ANALYSIS

45. The claimant's first claim of unfair (constructive) dismissal requires the tribunal to consider whether there has been a dismissal and therefore to consider whether any conduct is sufficient to reach the Malik threshold.

45.1. The claimant contended that there was a failure to make the adjustments recommended in an Occupational Health report in September 2016. We consider this is correct as we explain below when we deal with the issue of reasonable adjustments discrimination. This also connects to the claimant's complaint about failing to protect the claimant from discrimination due to the claimant's disability, however as set out below we find no other occasions of discrimination.

45.2. The complaint that there was a failure to investigate allegations before suspending the claimant on 5 October 2016 is clearly not correct on our findings. A complaint was raised by employees, an initial investigation of those complaints took place and a conclusion drawn that there should be a suspension. There was sufficient information to justify suspension given the fear of repercussions expressed by one of the complainant's. This also rules out the complaint that the respondent failed to follow its own policy when suspending the claimant.

45.3. The complaint that there was a failure to investigate allegations before putting the claimant through the disciplinary review and disciplinary hearing is again without foundation in our judgment. An independent individual was appointed to carry out an investigation. Witnesses were interviewed, the evidence revealed in those interviews was sufficient to cause concern. The claimant was allowed to respond to the issues raised in an interview. The one concern in the investigation was of the investigator taking a biased view. However, this was at the end of the process and it would be unusual if an investigator had not developed a personal view of the evidence. The important matter was that view did not find its way into the report and could not have influenced the decision maker. The claimant has made much of the findings of the disciplinary hearing, however what was found was that a culture of behaviour existed. It is apparent that the culture is one in which the

claimant was involved and although the disciplinary conclusion absolved her it does indicate that evidence of the claimant's conduct was not without foundation. On that basis we consider that this was an investigation which fell within ordinary parameters and betrays no significant failings.

45.4. The complaint that there was a failure to compose correspondence in a sensitive way in reference to the Equality Act 2010 led us to consider whether any discrimination was shown by writing this letter. Only sections 15, 19 and/or 20/21 could be engaged. Whatever the bases of those claims, which we do not consider it necessary to explore in detail, in respect of each of the first two defence of justification is available. In respect of section 20 the question of reasonableness is engaged.

45.4.1. The respondent's aim was to inform the claimant of a risk that in the absence of a GP certificate her contractual terms could lead to her pay being stopped. Given the numerous reasons why the certificate might not have reached the respondent this aim which would allow an explanation or rectification of the situation was entirely legitimate. Was it proportionate given the claimant's anxiety condition? The result of doing nothing would have been to stop the claimant's pay without warning, that would not be appropriate. The reason for the claimant's anxiety was the fact of a warning, the methods of communication other than letter would have been a personal visit or a telephone call this would not have prevented a warning being given. In our judgment writing the letter was appropriate and reasonably necessary. Therefore, the defence of justification would be made out.

45.4.2. With regard to an adjustment the question for a tribunal is would it be reasonable for the respondent to have to make that adjustment. Firstly, adjustments are made in order to allow a person to work, no adjustment in this case would meet that requirement. Secondly, it would not be reasonable for the respondent to have made an adjustment as to how the warning was delivered because it was the warning itself which was important. Finally, it would not have been appropriate not to give the warning as this could have led to the claimant's pay being stopped unnecessarily.

45.5. The complaints that the respondent failed to pass a sick note to the relevant manager and to investigate and report on the loss of that sick note is not supported by our factual findings.

45.6. Again, with regard to the alleged failure of the Occupational Health practitioner to view the claimant's file before or during the appointment on 26 October 2017 is not supported by our factual findings.

45.7. The claimant gave no evidence of raising a grievance with the respondent. The tribunal considered whether the letter from Sheila Harris could amount to a grievance however the content is obviously an attempt at without prejudice negotiation rather than an informal means of

raising a complaint. In those circumstances we cannot find that the respondent failed to carry out grievance procedures in accordance with the claimant's contract.

45.8. The claimant's argument that the last straw was the occupational health doctor asking the claimant to seek a recommended medication from her GP but not tell the GP that the recommendation came from him has some difficulties.

45.9. Firstly, the tribunal conclude, on the matters we found as fact, that the conduct relied upon can, in the absence of anything else, be properly described as innocuous. We are bolstered in this conclusion because, in our judgment the claimant saw it as innocuous evidenced by her asking the doctor to repeat the recommendation on her next visit. Secondly, we cannot say this is conduct which could be said to be connected to the earlier matters such that, in context, the conduct becomes more than innocuous. Thirdly, the only conduct capable of amounting to a breach of contract occurred in Autumn 2016 when the respondent failed to implement the recommendations of the occupational health report.

45.9.1. The claimant did not act upon that breach in any way until a year later when the letter from Sheila Harris was sent.

45.9.2. The claimant was aware of the contents of the occupational health report and its recommendations and could have complained at the time but did not.

45.9.3. Objectively viewed, the respondent would not have been aware that the claimant considered that the failure to implement the recommendation was problematic.

45.9.4. The claimant, simply put, left things too long before complaining and, in our judgment, that amounts to an affirmation of the contract despite the breach.

45.10. Finally, the actions of the occupational health doctor are those of a professional, not employed by the respondent, carrying out a professional function under contract. This conduct is relied upon to support a breach of contract claim. There is no evidence to support a conclusion that the occupational health doctor could in anyway alter or be perceived by the claimant as being permitted to alter any of the claimant's contractual terms with the respondent. Even in terms of the reports to be prepared the doctor could not go beyond advising the respondent, any changes in contract arising from that advice would arise between the claimant and her employer. We cannot say therefore that the doctor could be considered an agent of the respondent. Certainly, he had no actual authority to act on the respondent's behalf and we do not consider that it is possible to say that there was any apparent authority to do so. The doctor was asked to and did advise the respondent on the claimant's health, his discussions with her about medication were suggestions of treatment which she might consider, this fell within his professional boundaries and outside the respondent's authority to act. On that basis

we do not consider that the conduct of the doctor can be attributed to the respondent.

45.11. Given all of those matters we do not consider that the claimant has established a last straw which revived the earlier potential breach (discrimination) which we found to be affirmed. As such there has been no breach of contract. In those circumstances the claimant has not established that she was entitled to leave because of a repudiatory breach and dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996 is not established.

45.12. The claimant's claim of unfair dismissal is, therefore, not well founded and is dismissed.

46. Dealing first with the issue of a failure to make reasonable adjustments.

46.1. Was there, in August 2016, a failure to continue with a reasonable adjustment which allowed the claimant to use annual leave to cover any shortfall in flexitime which she worked?

46.1.1. The claimant had, on our findings, been afforded the opportunity to "catch up" on flexitime by using holiday.

46.1.2. This was an adjustment to the normal working arrangements; it did alleviate the claimant's disadvantage of being unable to immediately leave her vehicle upon arrival at her workplace.

46.1.3. However, in our judgment this was not an adjustment it was reasonable for the respondent to have to make. Holiday is an important part of contractual arrangements which is meant to be used to allow a person rest from work. In using holiday to catch up effectively the claimant was utilising those time when she was too anxious to leave the vehicle as part of her holiday entitlement. In respect of holiday permitted under the Working Time Directive that has been held to be an important element of the provisions in respect of health and safety. In our judgment it is not conducive to health and safety for the claimant to use that proportion of holiday anxiously sitting in car too distressed to leave it. In respect of any holiday over and above that provided for under the Directive we are of the view that a contractual arrangement for time off work should be just that, it is not reasonable when someone is, effectively, incapacitated for that to be considered holiday.

46.2. There was a failure to allow the claimant a change in hours of work so that she would begin earlier in the day?

46.2.1. The PCP identified as a requirement to work within the limits of the Flexitime scheme is a provision required of all staff.

46.2.2. The claimant was disadvantaged in that part of the effects of her disability was that the claimant was unable when arriving at work to leave her car and start work immediately.

46.2.3. The first adjustment suggested was to allow broader flexibility. This would have alleviated the disadvantage to the extent that the claimant could allow her anxiety to become controlled.

However, without the addition of allowing the claimant to be paid as by using holiday entitlement the claimant would lose money by this method. Given our view on the use of holiday, set out above, we consider that this adjustment was not one it was reasonable for the respondent to have to make.

46.2.4. The second adjustment argued for was to allow the claimant to work an earlier shift.

46.2.5. The medical report recommended this change and was clear that it related to the claimant's difficulties. Therefore, the disadvantage existed. This change was likely to alleviate the disadvantage by allowing the claimant less time to become anxious before attending work.

46.2.6. The evidence of the respondent was that although there were no specific vacancies it could have transferred the claimant to the morning shift. We do not consider that there was any specific practical reason that prevented that happening. The respondent indicated that it made an adjustment by allowing the claimant to work fewer days. The tribunal did not consider that this change was sufficient to satisfy the duty so that it removed the obligation to make the recommended adjustment for the claimant. This was clearly the least attractive of two potential adjustments, it reduced the claimant's hours and pay.

46.2.7. The test we must apply is was the early shift adjustment one that it would have been reasonable for the respondent to have to make. In our judgment it was: there was a report recommending such a change from occupational health. The change in the number of days worked still meant that the claimant was at the same disadvantage on the days she did attend work, therefore although having some impact on disadvantage that was partial. The claimant was seeking a reduction in working days at a time when the respondent was not indicating that the claimant could have an alternative adjustment so that her agreement is of no particular significance in our judgment. There was no difficulty in practical terms for the respondent to make the adjustment set out in the occupational health report. That adjustment would have a much greater impact on reducing the disadvantage to the claimant whilst allowing her to work the number of hours she usually worked.

46.2.8. On that basis the claimant's claim that the respondent failed to make reasonable adjustments is well founded.

47. The claimant contends that removing the additional flexibility over and above the core hours also give rise to discrimination pursuant to section 15 Equality Act 2010.

47.1. Removing the additional level of flexibility is unfavourable to the claimant if it is disadvantageous. In our judgment we consider that this removed an advantage that had been given to her over

and above flexitime and could be considered unfavourable to place her back within an ordinary flexible system. However, Flexitime is itself an advantage so that hours worked can be changed within limits. On that basis; applying the rationale in ***Williams*** this does not amount to unfavourable treatment.

47.2. It is contended that the consequence arising from the claimant's disability is that the claimant will have poor timekeeping. We do not conclude that the claimant's poor timekeeping is the cause of the respondent requiring her to work core hours. The cause of that was the respondent's wish to have sufficient workforce to carry out its function at the times when they were needed. On that basis whilst the claimant could demonstrate the first element of causation necessary to prove section 15 discrimination, she cannot establish the second.

47.3. Finally, even if we were wrong about both the above matters, we consider the respondent establishes the justification defence. The respondent's legitimate aim is to ensure that the provision of its services operates efficiently and effectively. The operation of flexitime within core hours assists this aim. The claimant not working within those hours causes difficulties with the aim. The imposition of the requirement is reasonably necessary because that is when service demand arises. In our judgment the application of the requirement is therefore a proportionate means of achieving the aim.

47.4. On that basis the claimant's complaint that she has suffered disability discrimination pursuant to section 15 Equality 2010 is not well founded on these facts.

48. The claimant also contends that the removal of flexibility gave rise to a claim of harassment pursuant to section 26 EA 2010. The claimant contends that this would be based on the effect of the treatment.

48.1. The conduct in question is removal of additional flexibility and the practical consequence of this change is that the claimant has more difficulty attending work.

48.2. The section requires that the conduct is unwanted, the claimant has established this element. The section also indicates that the treatment should be "related" to disability. This means that there has to be some association between the respondent's reasons for the conduct and the claimant's disability. There is no connection the reason for applying the change was to limit flexibility to core hours to ensure an efficient and effective service to users.

48.3. Even if the claimant could establish that the conduct was related to disability, in our judgment there is difficulty in equating a requirement to work core hours as creating circumstances which violated the claimant's dignity, or resulted in an intimidating, hostile, degrading, humiliating or offensive environment for her. In our judgment section 26 is not apposite to deal with the type of circumstances that we have found to exist. This is a complaint about specific working arrangements which

apply to all and do not demonstrate the state of affairs that the statutory language envisages.

48.4. On that basis we consider that the claimant's complaint of Section 26 harassment based on these facts is not well founded and is dismissed.

49. The complaint that the respondent failed to consider the claimant's health when she was suspended is not established on our findings of fact. The respondent had no power to alter the claimant's decision to drive and did explore with her whether she should do so. In those circumstances the claimant's claim's pursuant to sections 15 and 26 EA 2010 are each not well founded and are dismissed.

50. The claimant complains that the letter sent to her by the respondent on 22 September 2017 was not composed in a sensitive form. We have already indicated that we consider that the respondent has established the defence of justification for the purposes of section 15 and reasonableness in respect of section 20 in relation to the sending of this letter. The claimant contends that this complaint is also covered by section 26 EA 2010.The section 26 complaint is based on the effect on the claimant of sending an unwanted letter.

50.1. We consider that sending the letter was legitimate as set out above. Even if the effect on the claimant was deleterious it was necessary for the claimant to be informed. Whilst this was unwanted conduct and was related to the claimant's disability it was not objectively reasonable for the claimant to consider that this impacted on her dignity. The letter did not, in our judgment, create the prohibited environment, there was no ongoing state of affairs.

50.2. The claimant's claims pursuant to sections 15, 20 and 26 EA 2010 are not well founded and are dismissed.

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Employment Judge W Beard
Date: 15 October 2019

Order sent to Parties on 16 October 2019

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FOR THE TRIBUNAL OFFICE