EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100395/2017

Held in Glasgow on 11, 12, 13, 14 and 15 February and 6 March 2019 (and deliberations on 18 April 2019)

Employment Judge: **W A Meiklejohn**
Members: **Mr I Poad**
Mr E Borowski

Ms Zoe Lucas — **Claimant**
Represented by:
Ms M Gribbon - Solicitor

Cosmeceuticals Limited — **Respondent**
Represented by:
Mr J Dawson - Barrister

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the Claimant's claims of unlawful disability discrimination under sections 15, 20/21, 26 and 27 of the Equality Act 2010 do not succeed and are dismissed.

REASONS

1. This case came before us for a Final Hearing on liability only on 11, 12, 13, 14 and 15 February and 6 March 2019. Ms Gribbon appeared for the Claimant and Mr Dawson for the Respondent. We had a joint bundle of documents to which we will refer by page number. As there was insufficient time to complete oral submissions on 6 March 2019 both representatives provided us with further written submissions. We held a Judge and Members meeting on 18 April 2019 (being the earliest date upon which all parties were available).

Preliminary matters

2. At the start of the Hearing we dealt with four preliminary matters. Firstly, the Employment Judge declared that Sutherlands, a hairdressing business in Newport-on-Tay referred to in the witness statements, had been a client of his former firm. No objection was taken by either side regarding this. Secondly, Mr Dawson sought to lodge additional documents demonstrating when a change in the date of a flight arranged for the Claimant had been made. Thirdly, Mr Dawson sought to submit an additional witness statement from a customer of the Respondent relating to the Claimant's alleged lack of product knowledge. Finally, Mr Dawson asked us to allow the Respondent's witnesses to be present in the Hearing room while evidence was given.

3. Not surprisingly, given that the joint bundle had already been finalised and witness statements exchanged, Ms Gribbon objected. We heard submissions and, after a short adjournment, decided to allow the additional documents to be lodged on the basis that the issue in dispute was not the fact of the flight change but the explanation for it. We decided not to allow the additional witness statement as we considered that there was prejudice to the Claimant – with the benefit of prior notice the Claimant might have been able to approach customers of the Respondent with a view to obtaining statements to the contrary effect.

4. We were not prepared to allow the Respondent's witnesses to be present in the Hearing room. We explained that this was not the normal practice of Employment Tribunals in Scotland.

5. Preliminary Hearings for the purpose of case management had taken place on 29 March 2018 (before Employment Judge Doherty) and on 8 October 2018 (before Employment Judge McPherson). Following the latter, detailed Orders had been made and directions given in respect of preparation for and conduct of the Final Hearing.

Issues

6. The Claimant was pursuing claims under sections 15 (discrimination arising from disability), 20/21 (failure to make reasonable adjustments), 26 (harassment) and 27 (victimisation) of the Equality Act 2010 ("EqA"). In respect of the failure to make reasonable adjustments claim the Claimant identified each of the following as a provision, criterion or practice ("PCP") of the Respondent –

   (a) The requirement for the Claimant to be predominantly field based ("PCP1").

   (b) The requirement/expectation for the Claimant to carry out three client appointments per day across Scotland whilst on field duty ("PCP2").

   (c) The requirement for the Claimant to meet set targets ("PCP3").

   (d) The requirement for the Claimant to make long drives/a drive from Cambridge to Dunfermline with a new pool car ("PCP4").

Relevant statutory provisions

7. The sections of EqA under which the Claimant's claims were brought are set out below.

15 Discrimination arising from 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 was 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.

20 Duty to make adjustments

(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 the 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….

21 Failure to comply with duty

(1) A failure to comply with the first….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….

26 Harassment

(1) A person (A) harasses another person (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 A's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B….

(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.

(5) The relevant protected characteristics are -

….disability….

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

8. We reminded ourselves of the provisions, so far as relevant to this case, contained in the Equality and Human Rights Commission: Code of Practice on Employment (2011) (the "Code").

Evidence and findings in fact

9. We had witness statements from each of the witnesses and we read these prior to the start of the Hearing on 11 February 2019. At the Hearing the witness statements were taken as read. Oral evidence was given by –

   (a) The Claimant

   (b) Ms A Rafferty, a self-employed trainer working with the Respondent

   (c) Ms S Deacon, the Respondent's National Sales Manager

   (d) Ms E Englezou, formerly an Internal Sales Adviser and currently Call Centre Team Leader with the Respondent

   (e) Ms A Coveney, the Respondent's Managing Director.

10. It is not our function to record all of the evidence presented to us and we do not attempt to do so. We have focussed on those parts of the evidence which we considered to be material for the purpose of determining the issues before us.

Background of the Respondent

11. The Respondent is a supplier of beauty products, training programmes and business support to the beauty and medical industries. The Respondent's clients range from beauty and hair salons, department stores and spas to doctor led clinics and mobile therapists and acupuncturists. In her role as Managing Director Ms Coveney oversaw the whole business. Ms Deacon as National Sales Manager reported to Ms Coveney and managed the Respondent's field sales team being the Business Development Managers ("BDMs") and also the internal sales team.

12. Ms Coveney was based at the Respondent's Essex office twice a week, at the London or Essex office once a week and for the rest of the week travelled

across the UK. Ms Deacon worked from home one day per week, at the Essex office one day per week and travelled across the UK for the rest of the week.

13. Each BDM had a specific sales region (pages 96-97) and was expected, in addition to operating as a sales representative, to develop a client's business, ie to work with the client to create plans to sell the Respondent's products, drive treatments and increase overall revenue. This applied to both existing clients and new clients.

Background of the Claimant

14. After qualifying as a Beauty Therapist in 1995 the Claimant worked as a Senior Cabin Crew team member, as a Freelance Make-up Artist, as a Class Tutor in Beauty Therapy, as a Sales Associate for Aveda and, immediately prior to entering the Respondent's employment, as a Business Development Manager for Neom Organics in Scotland. Pages 57/58 were the Claimant's CV.

15. In May 2015 the Claimant was diagnosed with multiple sclerosis ("MS"). She described her main symptoms as fatigue, persistent tingling and numbness in her right fingers and forearm, foot drop on the right when she was cold or stressed (leaving her unable to pull her right foot up and causing her to trip) and dropping of her right hand. She also referred to "brain fog" when she forgets words and visual symptoms when her eyes take longer to focus. These symptoms were confirmed in a report from Dr C J Mumford (pages 124-142) dated 16 October 2018.

16. Following her MS diagnosis the Claimant was prescribed a drug called Tecfidera. She described this as an immune suppressant which caused her to be more susceptible to illnesses particularly when stressed or tired. The Claimant said that, because Tecfidera can cause brain damage, she required to have regular medical check-ups and had blood counts taken every three months to check whether there was any inflammation on the brain. She also had to have an annual MRI scan. In his report Dr Mumford referred to the Claimant's medication as Dimethyl fumarate which is the same as Tecfidera.

Claimant's appointment by Respondent

17. The Claimant applied for the position of BDM with the Respondent for their Scotland region (which also included part of the north of England). She was interviewed by Ms Coveney and Ms Deacon on 2 March 2017. She was told that the region had not had a dedicated BDM for six months since the death from cancer of the previous BDM, Mr K Muir. Ms Coveney and Ms Deacon indicated that the region had significant sales opportunities. There was discussion about the size of the territory and the amount of driving that would be required; there was reference to long journey times. There was also discussion about the number of client accounts in the region and the KPI (key performance indicator) for each BDM of three client meetings a day. There was an acknowledgement by Ms Coveney and Ms Deacon that the size of the region meant that it might not always be possible to achieve the KPI of three client meetings. The Claimant was told that this was predominantly a field based role but BDMs were permitted administrative days (which could be a whole day or two half days). The Claimant was told that she would not be micromanaged. The Claimant was offered the position.

18. After the interview the Claimant was asked to complete some pre-employment paperwork including a medical questionnaire (page 60). She disclosed that she was taking Tecfidera. She answered "no" to these questions –

- Are you currently receiving treatment for any physical or mental condition?
- Do you suffer from any injury, illness, medical condition or allergy that might affect your ability to perform your duties?
- Do you consider yourself to have a disability?

19. After she had completed the medical questionnaire the Claimant returned to Ms Coveney's office and advised that she had MS. She said that her MS was under control. Ms Deacon entered the office and the Claimant repeated what she had told Ms Coveney. Ms Coveney assured the Claimant that this did not affect the Respondent's job offer. The Respondent did not take any steps to

understand better the effect on the Claimant of her MS and the medication she was taking; they did not seek HR or occupational health advice.

20. Ms Deacon wrote to the Claimant on 6 March 2017 to confirm the Respondent's offer of the position of BDM. This was stated to be subject to satisfactory references and a satisfactory six month probationary period. There a dispute in the evidence as to whether the Claimant had offered a reference from her previous employer but we did not regard this as material.

21. The Claimant was issued with a Statement of Particulars of Employment (pages 62-69) and commenced employment on 13 March 2017.

Induction/training period

22. The Claimant undertook a three/four week induction/training period with Ms Rafferty. Ms Coveney made reference to the training period being longer but we believed this was not correct. Ms Rafferty said that she had never given a BDM as much training and assistance as she did with the Claimant and was critical of the Claimant's development of product knowledge. As we had no evidence as to what the normal level of training and assistance was we did not attach much weight to this assertion.

23. Towards the end of the Claimant's induction/training period she was advised by Ms Deacon on 3 April 2017 (page 72) that her sales region was being reduced (Darlington and Hartlepool were removed) with effect from 1 May 2017. We had no information as to whether the Claimant's sales target was adjusted to reflect this (although the different figures which we record in paragraphs 42 and 70 below suggest that it was).

24. Ms Deacon met with the Claimant on 5 April 2017 which was around the time when the Claimant completed her training and went "live" in her sales region. Ms Deacon followed up with an email to the Claimant on 6 April 2017 (pages 73-74) setting out the Claimant's key areas of focus. These included meeting with existing clients and making contact with her old Neom accounts (we understood that there was a degree of overlap between clients of the Respondent and those of Neom).

Absence on 10/11 May 2017

25. On 9 May 2017 the Claimant had three appointments in Aberdeen. She left home in Dunfermline at 6am and did not get home until around 8pm. During the last of her three appointments the Claimant started to lose her voice.

26. When the Claimant woke up on 10 May 2017 she could barely speak. She was due to conduct a training session at Sutherlands in Newport-on-Tay that day but telephoned to cancel. The Claimant then telephoned Ms Deacon and asked to work from home. Ms Deacon declined and directed that she should take the day as sick leave. The Claimant's perception was that Ms Deacon was *"cold and offhand"* and said that it did not look good. Ms Deacon denied saying that and adhered to the position that it was important for staff to recuperate when they were unwell. Sutherlands were a longstanding client of the Respondent and we believed that, on the balance of probabilities, Ms Deacon did say what the Claimant alleged.

27. The Claimant was still unable to speak on 11 May 2017. She contacted Ms Deacon and was told she should complete an absence form which she duly did (pages 76-77), recording the reason for absence as *"upper respiratory tract infection, resulting in lost voice"*. The Claimant alleged that Ms Deacon had been *"extremely offhand"* when they spoke and had *"sounded irate"* and wanted to set up a face to face meeting in Scotland. The Claimant was not paid her salary for these two days of absence.

28. The Claimant *said* nothing to Ms Deacon to indicate any link between her upper respiratory tract infection (and therefore her absence) and her MS. It did not occur to Ms Deacon that there might be such a link.

Events of 17 May 2017

29. It was arranged that Ms Deacon would come to Scotland on 17 May 2017 to accompany the Claimant on client appointments and that the Claimant would collect Ms Deacon from Edinburgh Airport. There appears to have been a misunderstanding about where the Claimant was to meet Ms Deacon. The Claimant alleged that Ms Deacon was *"fuming"* and had *"an adult tantrum".*

Ms Deacon denied this. Our view of this was that, on the balance of probabilities, Ms Deacon was irritated because she had expected to be picked up where the Claimant's predecessor Mr Muir had normally done so but the Claimant's description of *"adult tantrum*" was exaggerated.

30. Two client appointments were planned with Eden in Glenrothes for 12 noon and Sutherlands in Newport-on-Tay at 3.30pm (or perhaps 4pm – the exact time is not material). According to the Claimant (a) she became apprehensive that she and Ms Deacon were going to be late for the Sutherlands appointment as they were still at Eden at 2pm and she gently reminded Ms Deacon that they should get going, (b) when they had not left Eden by 2.30pm the Claimant went to her car hoping that this would hurry Ms Deacon up and (c) when Ms Deacon arrived at the car she (the Claimant) telephoned Sutherlands to say that they were running late and they arrived at Sutherlands at 4.10pm. We had some difficulty in understanding this as the distance between Glenrothes and Newport-on-Tay is approximately 21 miles and the journey time is approximately 30 minutes.

31. In any event, the Claimant and Ms Deacon arrived late for the Sutherlands appointment. According to the Claimant there was insufficient time to deliver the planned training session so instead there was a Q&A session. Ms Deacon asserted that the Claimant had forgotten that it was a training session and was unprepared but we preferred the Claimant's version of events.

32. The Claimant and Ms Deacon gave contrasting accounts of the Sutherlands session. The Claimant's version was that she delivered a *"poised and confident"* session and managed to *"effectively utilise the reduced time available to her"*. Ms Deacon's version was that this was not true – she said that *"I had to intervene at several points as Zoe did not have the product knowledge and, in addition, the session was confusing as Zoe would pass round a product, whilst talking about another product"*. She said that the client looked unimpressed. We did not consider that we could, or indeed needed to, resolve this conflict of evidence. What was significant was the evident tension between the Claimant and Ms Deacon which foreshadowed what was to follow.

Dialogue – Claimant/Ms Rafferty

33. Ms Rafferty alleged that on 17 May 2017 the Claimant had asked her to look after her existing accounts because the Claimant was not comfortable handling them and wanted to concentrate on generating new clients, and so that she (Ms Rafferty) could clock up more hours when training courses were not running. Ms Rafferty said that she reported this to Ms Deacon. Ms Deacon's evidence confirmed this. Ms Deacon said that she spoke to the Claimant who confirmed this, and Ms Deacon told her that this was not appropriate.

34. The Claimant denied this. The Claimant's position was that Ms Rafferty had approached her volunteering to look after some of her (the Claimant's) existing accounts so that she (Ms Rafferty) could increase her earnings with the Respondent.

35. We found this conflict of evidence difficult to resolve. We did not believe the evidence of Ms Rafferty and Ms Deacon was fabricated. However it seemed to us implausible that the Claimant would seek to offload a significant part of her workload to Ms Rafferty when she had been operating in the field for only six weeks.

36. We came to the view that, on balance, there had been some discussion between the Claimant and Ms Rafferty along the lines alleged by Ms Rafferty but it was more likely than not to have been hypothetical, along the lines of *"if you looked after some of my existing clients, I could concentrate on new business and you could increase your earnings".* We were unable to determine whether it was the Claimant or Ms Rafferty who had initiated this discussion.

37. We considered that the significance of this chapter of evidence, irrespective of where the truth lay, was the negative impression it gave Ms Deacon of the Claimant.

Sutherlands leave Respondent

38. On 19 May 2017 (which was a Friday) Mrs Sutherland, who the Claimant had known as a customer of Neom before she joined the Respondent, telephoned the Claimant and advised that she had decided to stop using the Respondent's products. The Claimant said that Mrs Sutherland had expressed unhappiness with the Respondent's brand and had referred to price increases and the Respondent's lack of support towards Mr Muir when he was diagnosed with cancer.

39. On 22 May 2017 the Claimant telephoned Ms Deacon to advise her about the call with Mrs Sutherland and her reasons for taking her business away from the Respondent. This conversation included references to the cancelled appointment on 10 May 2017 and the late arrival on 17 May 2017. According to the Claimant, Ms Deacon was angry and blamed her for the loss of Sutherlands' business. According to Ms Deacon, she did not blame the Claimant but expressed disappointment that a longstanding client had been lost and asked the Claimant if she thought the cancelled appointment and late arrival had any bearing on Sutherlands' decision.

40. It was understandable that the Claimant took Ms Deacon's reference to the cancelled appointment and late arrival as apportioning blame to the Claimant for Sutherlands' decision. Once again we considered that the significance of this evidence was its negative impact on the relationship between Ms Deacon and the Claimant.

41. We heard evidence from Ms Englezou and Ms Deacon about contact and attempted contact with Sutherlands subsequent to their decision to leave but did not regard this as material to the issues we had to decide.

Targets

42. The Respondent gave each of its BDMs an annual sales target and monitored performance against target. The Claimant's sales target for 2017/18 was £539669 which was an increase of 22% on the previous year. Ms Deacon did not consider this to be unachievable as the Claimant's predecessor had achieved an increase of 11% despite being unwell.

43. Page 102 recorded each BDM's sales performance against target. The Claimant achieved 76% of her target in May 2017, 59% in June 2017 and 67% in July 2017. The BDMs' performance was ranked and the Claimant came 5th (out of 6) in May 2017, 6th in June 2017 and 6th in July 2017.

44. The sales performance figures did not include new business and machine sales which were separately documented. The Claimant performed well in comparison with the other BDMs in these areas. We considered that it was unfortunate that we did not have information to demonstrate the relative performance of all BDMs with new business and machine sales included. However we accepted that the Respondent was applying its established monitoring process and that this applied to all of the BDMs.

Telephone calls – 21 June 2017

45. By June 2017 Ms Deacon was becoming unhappy about the number of appointments the Claimant was making. She was not achieving the KPI of three appointments per day. Ms Deacon spoke to the Claimant about this. The Claimant felt she was being micromanaged.

46. The Claimant said that Ms Deacon was comparing her with the BDM in central London in terms of the number of appointments she was making. The Claimant believed that Ms Deacon did not understand the geography of the Scotland region in terms of the distances that she had to cover. Ms Deacon denied this and stated that any reference she made to the BDM in central London related to business plans which had been successful in central London.

47. Ms Deacon spoke with Claimant twice on 21 June 2017. Ms Deacon's purpose in making the first call in the morning was to tell the Claimant that she was unhappy with the number of appointments in her diary. She said that she told the Claimant to update her diary. She described the Claimant as *"agitated"* during this call. The Claimant said that Ms Deacon was *"bullying"* and was always *"negative"* towards her.

48. The second call took place in the afternoon. At the start of the call the Claimant was in her car which was parked in Kilmarnock, waiting for Ms Rafferty who was visiting a client there. According to Ms Deacon the purpose of the second call was to talk about the car which was being provided to the Claimant to replace the hired vehicle she was currently using. The Claimant alleged that Ms Deacon was *"ranting and shouting"* at her during this call. Ms Deacon said that the Claimant had been *"aggressive"*. Both denied that they had behaved as alleged by the other. Our view of this was that the call had become heated on both sides. The call came to an end when Ms Rafferty returned to the car. We considered that this was further evidence of the deteriorating relationship between Ms Deacon and the Claimant.

49. According to Ms Rafferty, the Claimant was irate after her call with Ms Deacon and began to drive erratically. The Claimant denied this. We believed that the Claimant had been upset and distracted after her call with Ms Deacon and this might well have affected her concentration on driving.

Telephone calls – 22 June 2017

50. There were further telephone conversations between Ms Deacon and the Claimant on 22 June 2017. We had conflicting evidence about these.

51. According to the Claimant, during the first call Ms Deacon was aggressive and repeated her accusation that the Claimant was not attending enough client appointments and was spending too much time at home. The Claimant felt mentally and physically exhausted by Ms Deacon's *"relentless negativity"* towards her. She told Ms Deacon that she (Ms Deacon) might wish to try focussing instead on what the Claimant saw as her positive contribution to the business. Ms Deacon appeared unhappy that the Claimant was talking back to her and asked what she was doing on Friday 24 June 2017. Ms Deacon did not react well when the Claimant told her that she intended working from home cold calling prospective clients.

52. The Claimant said that Ms Deacon then told the Claimant that she was to drive her hired car to Cambridge on 24 June 2017, exchange it for one of the Respondent's pool cars and then drive back to Dunfermline. This was a

journey of some 800 miles to be completed in the same day. The Claimant saw this as punishment for not attending enough client appointments.

53. The Claimant said that she immediately told Ms Deacon that she was not comfortable doing an 800 mile drive in the one day. Ms Deacon replied that she and others had to do such tasks. The Claimant then referred to her MS and said that what Ms Deacon was requesting would be too much for her to do in the one day. The Claimant said that Ms Deacon had responded "*Well if you have got a problem perhaps you should come down to the office and have a meeting with myself and Amanda and discuss why you can't do your job properly".* The Claimant replied that she could do her job but did not feel capable of doing such a long drive in the one day. Ms Deacon told the Claimant that she would call her back.

54. Ms Deacon called back later in the day and told the Claimant that she should take a flight instead to pick up the car at Cambridge on 27 June 2017. The Claimant was to fly to London, take a taxi to Cambridge to pick up the pool car, have a meeting with Ms Deacon in Cambridge and then drive back home, all in the same day. The Claimant suggested that the journey should be broken up as it would be less tiring for her and she could use the time better. She suggested that she should drive from Cambridge to Newcastle where she would stay overnight and then attend on clients there the following day. Ms Deacon then emailed her (page 78A) asking her to let Ms Deacon know once the flights were arranged.

55. The Claimant's evidence (at paragraph 32 of her witness statement) was that on 27 June 2017 she got up at 4am for a 5.30 check-in at Edinburgh Airport but she acknowledged that this was not correct. Pages 78B and 78C were emails between the Claimant and Ms Deacon later on 22 June 2017 referring to available flight times of 8.25am or 12.05pm. Ms Deacon suggested that the Claimant should take the later flight so she would not have such an early start and the Claimant replied *"Great that's perfect"*.

56. Ms Deacon's version of events differed from that of the Claimant. She denied that she had in the first call told the Claimant to drive from Dunfermline to

Cambridge and back in one day. She said that the Claimant had been unhappy about driving all that way. The Claimant had asked if there were any alternatives and Ms Deacon had suggested that she fly from Edinburgh to London Luton and then take a taxi to Cambridge to collect the car at the Respondent's expense. She had said that the Claimant could stay overnight at a hotel in Cambridge before driving back to Scotland the next day. The Claimant had indicated that she wanted to tie in the trip with visiting clients in Newcastle and it was agreed that she would fly in, get a taxi to Cambridge and then drive from Cambridge to Newcastle the same day, and that the Respondent would pay for a hotel in Newcastle. She denied saying what the Claimant alleged as recorded at paragraph 53 above.

57. The Claimant suggested at the Hearing that the Respondent should have arranged for someone else to drive her hired car to Cambridge but had not suggested this at the time. If she had, Ms Deacon said that she would have looked into it. Ms Deacon felt that, by agreeing to the Claimant's suggestion to break the journey home at Newcastle, she had been accommodating of the Claimant's wishes.

58. The Claimant had alleged that she did not get any internal support. The Claimant did not elaborate and Ms Deacon told her to think about what extra support she felt she needed and to let Ms Deacon know. Ms Deacon also said that the Respondent would work with the Claimant regarding the best way to collect the car as she was conscious that it was relatively short notice. Ms Deacon said she had mentioned an Occupational Health assessment, something which the Claimant denied.

59. According to Ms Deacon the outcome of her calls with the Claimant on 22 June 2017 was a number of action points –

- for Ms Deacon to visit Scotland as soon as possible
- for there to be an increase in office support for the Claimant
- to ask Ms Rafferty to spend at least one afternoon a week with the Claimant whilst training is quiet

- for Ms Deacon to have daily calls with the Claimant to catch up

60. Ms Deacon denied saying what the Claimant alleged at paragraph 53 above. She also denied that she had booked the Claimant on an early flight meaning that the Claimant had to get up very early. The travel arrangements had been left to the Claimant. Ms Deacon said that the Claimant had told her that she (the Claimant) did not want to pick a fight and wanted a good working relationship.

61. Ms Deacon said that she had intended to email Ms Coveney to set out the contents of her calls with the Claimant on 22 June 2017 but changed her mind and decided to speak to Ms Coveney in person. She therefore saved the proposed email as a Word document (pages 77A-78).

62. If this document was genuinely a draft email to Ms Coveney, it was very difficult to understand why Ms Deacon included the following –

- "Stacy (London BDM)"
- "Emma Supports you (internal sales)"
- "Archerfields, (a big new account of ours in Edinburgh)"
- "Vitage and Medik8 (our brands)"
- "Light Fusion (our device)"
- "(Kevin was her predecessor)"

The words in brackets made no sense in the context of an email from Ms Deacon to Ms Coveney who would not have required any such explanations. This caused us considerable difficulty in deciding whether this document was what Ms Deacon claimed and we were unable to come to a unanimous view on this.

63. The Employment Judge and Mr Poad were prepared to accept that there was a degree of veracity in so far as the document purported to record the conversations between Ms Deacon and the Claimant. Mr Borowski considered that the document – at least in the form it appeared in the joint

bundle - was clearly intended to be read by a third party, rather than by Ms Coveney, and felt unable to place any reliance on it.

64. We were unanimous in the view that this document undermined Ms Deacon's credibility for the reasons set out in paragraph 62 above. However, on balance, we believed that Ms Deacon's version of what was said during the calls on 22 June 2017 was more accurate than the Claimant's. In particular, we considered that while the Claimant had understood that she was being asked to drive from Dunfermline to Cambridge and back in one day, that was not what Ms Deacon said. By making no initial reference to an overnight stop, Ms Deacon was responsible for this misunderstanding. However, it was so implausible that Ms Deacon would have asked the Claimant to drive 800 miles in a single day that we did not believe that she had done so. We also did not believe that Ms Deacon had threatened that the Claimant's job could be at risk (which we understood to be the Claimant's interpretation of what she alleged Ms Deacon had said as quoted at paragraph 53 above) nor accused her of not doing her job properly – this seemed to us improbable in a conversation about collecting a car. The Claimant's mistaken recollection about the flight arrangements was a factor which tipped the scales in favour of preferring Ms Deacon's version of these events.

65. We noted that the Claimant referred in her evidence relating to the calls on 22 June 2017 to Ms Deacon being *"aggressive"* while Ms Deacon in her purported intended email to Ms Coveney referred to the Claimant being *"aggressive and shouting"*. It was apparent that both parties were unhappy at how they had been spoken to by the other.

Conversation – 27 June 2017

66. Ms Deacon and the Claimant met in Cambridge on 27 June 2017. Once again we had conflicting evidence about this.

67. According to Ms Deacon, she raised her concerns about how the Claimant had spoken to her on 22 June 2017. The Claimant said that she did not recall being aggressive. Ms Deacon then spent some time clarifying the Claimant's job responsibilities as she had failed to meet her target for June (achieving

59%). Ms Deacon described the meeting in her witness statement (at paragraph 60) as *"conductive"* – we think she intended to say *"productive"* – and said that she kissed the Claimant on the cheek when they parted.

68. According to the Claimant, she had not been rude on 22 June 2017 but for the first time had found the strength to stand up for herself. She described the meeting with Ms Deacon on 27 June 2017 as *"just dreadful"* as Ms Deacon had *"behaved appallingly"* towards her. She said that she was used to Ms Deacon's *"abrasive and blunt manner"* but was taken aback when Ms Deacon said "I am not sure what it is about you Zoe, but I just can't warm to you at all". Ms Deacon denied having said this. The Claimant said that she had felt "bullied and harassed" during this meeting and had left it *"extremely upset"*. The Claimant said in cross-examination that she did not recall whether Ms Deacon had kissed her on the cheek but that was "the nature of the job" which we took to mean that Ms Deacon probably did so.

69. These differing accounts were largely a matter of perception. Ms Deacon acknowledged in the course of her evidence that she could be *"direct"* which the Claimant saw as *"blunt and aggressive"*. Given the evident tension in their relationship by this point, it seemed to us more likely than not that Ms Deacon had said what the Claimant alleged about not warming to her or words to that effect.

70. The outcome of this meeting was an email from Ms Deacon to the Claimant on 30 June 2017 (page 79) in which she said that she would like the Claimant to work on a number of objectives "in order to meet company expectations". These were expressed in the following bullet points –

- Your area target for 2017 is £505,003. You need to achieve your July monthly target of £32,694.
- You need to achieve the company expectation of a minimum of three confirmed appointments per day in advance.
- You are required to update your calendar a week in advance as well as submit your weekly report to me every Friday.

- In order to help you manage your diary effectively, please book your key accounts in advance and confirm the meeting.

Ms Deacon's email concluded by saying that these objectives would be reviewed on 19 July 2017. We heard no evidence about any such review but we were told that the Claimant achieved 67% of her July target for sales to existing customers (see paragraph 43 above).

71. The Claimant alleged that these objectives contradicted what she had been told at interview. We did not agree. We considered that Ms Deacon was clarifying the Respondent's expectations of the Claimant rather than altering them. We were not wholly convinced by Ms Deacon's assertion in evidence that *"three confirmed appointments"* meant an average of three but equally we did not see this as contradicting the acknowledgement by Ms Coveney and Ms Deacon at the Claimant's interview that the size of the region meant that it might not always be possible to achieve three client meetings. The Claimant was falling short of the Respondent's expectations in terms of the number of client appointments in her diary and Ms Deacon was seeking to address this. This was something which, as the Claimant's line manager, she was entitled to do.

Sales meeting – 20 July 2017

72. On 20 July 2017 there was a sales meeting in Essex which the Claimant and other BDMs attended. Each BDM had to present a SWOT analysis for their area. Pages 72-73 were the Claimant's SWOT analysis. Ms Coveney gave the Claimant positive feedback but denied telling the Claimant that she had "every faith" in her. We preferred Ms Coveney on this point. We accepted her evidence that the Claimant was underperforming with existing clients.

Ms Deacon's holiday/telephone call with Ms Coveney

73. Towards the end of July 2017, Ms Deacon took a week's holiday. She told the Claimant to report daily to Ms Coveney while she (Ms Deacon) was on holiday. The Claimant described this as an *"unpleasant"* call. The Claimant

said that she knew that no other BDM was asked to do this and she felt *"victimised"*. She expanded on this in cross examination, saying that she also felt "intimidated and embarrassed". She described this as a *"tipping point"*. She decided to telephone Ms Coveney about this.

74. According to the Claimant, Ms Coveney told her that her sales figures *"weren't as they should be"*. The Claimant became upset during the call. She said that she could not understand why she was being singled out considering the positive changes she was making in her area. The Claimant made reference to the sales figures of another BDM, Ms S Taylor (although it was not clear whether she did so during her call with Ms Coveney or simply in her witness statement).

75. According to Ms Coveney, the Claimant asked her how she thought the Claimant was getting on. The Claimant became *"quite panicky"* and said that she was *"trying her best but it wasn't going to happen overnight"*. The Claimant then asked Ms Coveney what she (Ms Coveney) thought of her. Ms Coveney referred again to the sales figures and told the Claimant that Ms Deacon was the right person to ask for feedback. Ms Coveney described the call as *"odd"*.

76. We could see nothing particularly unusual in Ms Deacon telling the Claimant to contact Ms Coveney during her holiday absence. We did not believe this was *"victimisation"* by Ms Deacon as alleged by the Claimant but rather a perfectly reasonable instruction to an employee who was in her probationary period. We considered this to be supportive of the Claimant and not in any way discriminatory. The Claimant's negative view of this instruction and her reference to this being a *"tipping point"* was further evidence of the deterioration in the relationship between the Claimant and Ms Deacon.

77. We also had some difficulty in understanding the relevance of the Claimant comparing herself with Ms Taylor. Ms Taylor worked in a different region and had her own sales targets. Accordingly a comparison of her actual sales figures with those of the Claimant was not appropriate. The sales figures within the joint bundle (when looked at in percentage terms) appeared to

demonstrate that Ms Taylor had performed better than the Claimant in sales to existing clients and that the Claimant had performed better than Ms Taylor in new business.

"We all get tired hun"

78. The Claimant's evidence was that Ms Deacon had said this to her on one occasion. There was no evidence identifying a specific date and/or the circumstances in which this was said. The Claimant asserted that this was demeaning of her disability.

79. Ms Deacon accepted that she used the word *"hun"* but not that she had said *"We all get tired hun"* to the Claimant. She said that the only time when the Claimant had mentioned her MS (apart from at the time of her appointment) was during their first telephone conversation on 22 June 2017.

80. Ms Deacon referred to a telephone conversation on 7 August 2017 during which the Claimant had told her that she had travelled to London and had been working in her flat there, and had then worked a full week. The Claimant did not say that she had been tired because of her MS. Ms Deacon's recollection was that she had said something to the effect that it was no wonder the Claimant was tired if she had worked for seven days.

81. Our view was that Ms Deacon may well have said *"We all get tired hun"* as alleged by the Claimant but, without knowing when and in what circumstances this was said, we could not determine whether was in any way linked to the Claimant's disability.

Decision to dismiss

82. The oral evidence given to us by Ms Deacon and Ms Coveney was that they had spoken by telephone on 7 August 2017 (when Ms Deacon was working from home) and face to face on 8 August 2017 and the outcome these discussions was the decision that the Claimant should be dismissed during her probationary period.

83. This important evidence was not foreshadowed in the Respondent's ET3 nor was it mentioned in Ms Deacon's witness statement. In paragraph 13 of Ms Coveney's witness statement she stated –

"When Sarah came back from holiday, we had a discussion about Zoe. Zoe's figures were still not where they needed to be and in addition, we were concerned by her erratic behaviour. We therefore made the decision to bring an end to Zoe's employment during her probationary period."

84. According to Ms Deacon's evidence, she telephoned the Claimant on 8 August 2017 and arranged to visit her in Scotland on 15 August 2017. When asked why she would arrange to visit the Claimant when a decision to dismiss her had been taken, Ms Deacon said it was *"business as usual"*.

85. The Claimant's evidence was that this conversation had taken place on or around 4 August 2017. She knew she had a medical appointment on 15 August 2017 but did not tell Ms Deacon about this because she was frightened of how Ms Deacon would react. The Claimant said that Ms Deacon had cancelled her visit to Scotland on 8 August 2017. The Claimant could not recall if this was done over the phone or by a voice message.

86. The Claimant emailed Ms Deacon on 8 August 2017 to advise her of the medical appointment on 15 August 2017 and also a neurology appointment on 25 September 2017. This email was sent at 22.27. According to the Claimant, Ms Deacon telephoned her on 9 August 2017. The Claimant described Ms Deacon as *"angry"* during this call. She required the Claimant to provide evidence of her medical appointments. She alleged that Ms Deacon had said that it was lucky for the Claimant that she was not coming to Scotland on 15 August 2017.

87. According to Ms Deacon, she did not respond to the Claimant's email sent at 22.27 on 8 August 2017 because she knew the Claimant was going on holiday the following day. The Claimant actually took 10 and 11 August 2017 as holidays and not 9 August 2017 as suggested at paragraph 66 of Ms Deacon's witness statement. Ms Deacon initially said that she spoke to the Claimant on 14 August 2017 and explained that it was not commercially viable for her

to visit the Claimant in Scotland on 15 August 2017. However, she accepted under cross examination that this conversation had taken place on 9 August 2017. She said she would visit another time and joked that it was just as well she had not booked her flights. She told the Claimant that she did not have to take her medical appointments as holidays or unpaid sick leave.

88. We believed that it was more likely that the conversation about Ms Deacon coming to Scotland took place on or around 4 August 2017 as asserted by the Claimant rather than on 8 August 2017 as asserted by Ms Deacon. It would have made no sense for Ms Deacon to arrange to visit the Claimant in Scotland on 15 August 2017 if the decision to dismiss the Claimant had already been taken. We considered that Ms Deacon's reference to "business as usual" was based on her mistaken recollection that her conversation with the Claimant about coming to Scotland had taken place on 8 August 2017. We also believed that there was no particular significance in Ms Deacon requiring the Claimant to provide evidence of her medical appointments. We regarded this as a routine management instruction and we had evidence that Ms Deacon had made a similar request of another BDM (pages 55A-55D) (and we observed in passing that this recorded (at page 55B) Ms Deacon using the word "hun" as a form of greeting).

89. The Claimant's position was that the decision to dismiss her was taken on 9 August 2017 in response to her email advising Ms Deacon of her medical appointments. Ms Coveney had emailed the Respondent's HR advisers on that date (page 92) in these terms –

"We have a BDM that works for us still under probation (4 months into 6 months).

She is completely under performing and we have had a few issues with her with customers so have decided to terminate her contract and say that she has not passed probation.

As a side note she suffers with MS which was raised when we first gave her the position in her medical questionnaire, so I just wanted to double check if this comes up when we have the review meeting next week what do we say?

Her performance is not connected with this so im (sic) assuming we stick to that route if that makes sense."

90. The Claimant alleged that this was consistent with her belief that the Respondent's decision to dismiss her had been taken only after she disclosed her MS related medical appointments in her email sent at 22.27 on 8 August 2017. Ms Coveney's evidence was that, the decision to dismiss the Claimant having been taken on 7/8 August 2017, she did not seek HR advice until 9 August 2017 because she had been *"busy"*. We considered that there was nothing sinister in the Respondent asking for HR advice prior to dismissing the Claimant (nor in the timing of their doing so) and mentioning when doing so that the Claimant had MS. We did not believe that this was confirmatory of the decision to dismiss being taken only upon the Claimant's disclosure of her MS related medical appointments.

91. The Respondent had arranged to carry out BDM review meetings on 16 August 2017 followed by a sales meeting on 17 August 2017. Performance appraisal forms had been sent out and the Claimant emailed a revised version of her form to Ms Deacon on 15 August 2017 (pages 82-86). There was some conflict in the evidence as to whether another BDM who had been on bereavement leave would be attending the review meetings but we did not regard this as material. We were satisfied that the Respondent's decision to cancel the sales meeting on 17 August 2017 was principally due to the fact that there was already planned to be a sales meeting in September 2017 although the decision was also influenced by the Claimant's planned dismissal.

92. Arrangements had been made for the Claimant to fly down on 16 August 2017 and to fly back on 17 August 2017. These arrangements were changed on 9 August 2017 (pages 143-152) so that the Claimant would fly back on 16 August 2017. We found that the timing of the flight change was consistent with the decision to dismiss the Claimant having been taken on 7/8 August 2017 and we noted that the timing of the confirmation of the flight change to the Claimant (12.43 on 9 August 2017 - page 148) was before Ms Coveney's

email to the Respondent's HR advisers (2.15pm on 9 August 2017 – page 92).

Dismissal

93. The Claimant met with Ms Coveney and Ms Deacon at the Respondent's offices in Essex on 16 August 2017 for what she anticipated would be an appraisal meeting. Ms Coveney asked her personal assistant to *"keep an ear out"* during the meeting but we did not consider that this was of particular significance. After some small talk, Ms Coveney told the Claimant that she was underperforming. She and Ms Deacon expressed concern that, as the Respondent's business grew, the Claimant's role would become more difficult. Ms Coveney told the Claimant that she had not passed her probationary period and that her employment was being terminated.

94. The Claimant described herself as *"numb with shock"*. She said that she told Ms Coveney and Ms Deacon that she wanted to leave and asked them to order her a taxi to the airport. She wanted to get out of the building as soon as possible. She said that she suffered foot drop (see paragraph 15 above) and was *"humiliated and embarrassed"* at having to walk through an open plan office to collect her belongings.

95. Ms Coveney described the Claimant's reaction as *"very abrupt"*. Ms Deacon said that the Claimant *"became quite aggressive in her demeanour and pushed the chair back and stormed out of the meeting".* Neither noticed the Claimant's leg drooping.

96. We did not regard these accounts as irreconcilable. The Claimant had been upset and wanted to leave the meeting immediately. We felt the suggestion that she had *"stormed out"* was exaggerated. She probably did suffer foot drop brought on by stress but this may not have been as apparent to others as it felt to the Claimant.

97. We heard some evidence about what happened while the Claimant was outside the Respondent's building after the dismissal meeting which we did not consider to be relevant to the issues we had to decide. Ms Coveney

sensibly dissociated herself from the slightly bizarre assertion in the Respondent's ET3 (at paragraph 46 of the Grounds of Resistance) that she had found the Claimant *"hiding behind a bush"*.

98. Ms Deacon wrote to the Claimant on 21 August 2017 to confirm her dismissal, referring to the following reasons –

- Failure to meet monthly sales targets set.
- Failure to achieve minimal level of growth on your region within your probation period.

Ms Deacon's letter offered the Claimant a right of appeal but she did not exercise this.

99. There was reference in the Respondent's ET3 (at paragraph 44 of the Grounds of Resistance) to verbal complaints from customers regarding the Claimant's aggressive behaviour of which the Claimant had not been informed. We also had copies of a series of text messages exchanged between the Claimant and Ms Rafferty between 17 August and 1 September 2017 (pages 95A-95K) during which Ms Rafferty said –

"Everyone asking for you that I have spoke to. All only had good things to say! On my kids life!!"

We did not attach significance to these alleged customer comments. We had no details of the alleged verbal complaints (and no such details were given to the Claimant). Similarly we had no details of the alleged positive comments and we did not consider that, in the context of an exchange of text messages, the reference by Ms Rafferty to *"my kids life"* gave her statement any degree of solemnity.

100. In a similar vein, there were references in Ms Coveney's evidence to "erratic behaviour" on the part of the Claimant but we did not consider that this had a material bearing on the decision to dismiss. We were not entirely clear as to what *"erratic behaviour"* Ms Coveney was referring.

Comments on the evidence

101. Mr Dawson suggested to the Claimant on a number of occasions that she was *"developing"* her case – in other words she was interpreting what had happened differently, and less favourably to the Respondent, than she had done at the time. We did not consider that the Claimant was being deliberately untruthful but we believed that she was recalling matters through the prism of her belief that she had been treated unfairly by the Respondent, and in particular by Ms Deacon. As a consequence of that, where there were conflicts between the evidence of the Claimant and the Respondent's witnesses we found in most cases that the evidence of the Respondent's witnesses was to be preferred.

102. We found that the evidence demonstrated a deteriorating relationship between the Claimant and Ms Deacon. Each referred to the other's behaviour in negative terms such as *"rude"* and *"aggressive"*. This was to some extent explained by Ms Deacon's acceptance that she could be *"direct".* Their emails to each other were expressed in inoffensive and, at times, cordial terms but the Claimant told us (and we accepted) that it was different when they were in one-to-one conversation.

103. We found the evidence given by Ms Coveney and Ms Deacon as to the timing of the decision to dismiss the Claimant (ie on 7/8 August 2017) to be credible but it was undermined by the absence of any reference to those dates in the ET3 and in their witness statements. Indeed, there was no reference whatever to the timing of the decision to dismiss in the Respondent's Grounds of Resistance nor in Ms Deacon's witness statement. In Ms Coveney's witness statement, the reference to the timing of the decision was less than precise – "When Sarah came back from holiday…". However, in fairness to the Respondent, there was nothing in the Claimant's ET1 nor in the Further Particulars dated 26 April 2018 to flag up that the precise date of the decision to dismiss was an issue.

Submissions

104. We had the benefit of written submissions from both sides. These had been prepared with evident care and were of considerable assistance to us, and

we record our thanks to Ms Gribbon and Mr Dawson. We did not believe that we could do justice to these submissions by trying to summarise them here and so we do not attempt to do so. They are however available within the case file should reference need to be made to them.

Discussion

105. We will deal with matters by reference to each of the sections of EqA under which the claim is brought. We reminded ourselves that this was not an unfair dismissal case and so it was not our function to consider the fairness of the Claimant's dismissal as we would have done had that been so. We also reminded ourselves that the Claimant, having a diagnosis of MS, was disabled – paragraph (6)(1) of Schedule 1 EqA – within the meaning of section 6 EqA (Disability). The Respondent was aware that the Claimant had MS having been so advised by the Claimant on 2 March 2017.

Section 15 EqA (discrimination arising from disability)

106. We reminded ourselves of the section 15 case pled by the Claimant which was that (a) the unfavourable treatment was her dismissal and (b) the "something" arising in consequence of her disability was/were – (i) her absences from work on 10/11 May 2017, (ii) the reluctance she expressed to Ms Deacon on 22 June 2017 when requested to make a return journey from Dunfermline to Cambridge and (iii) her request for time off to attend medical appointments.

107. We also reminded ourselves of the terms of section 15 – there could be unlawful discrimination only where the unfavourable treatment was because of the "something" arising in consequences of the Claimant's disability. We did not consider that the Claimant had been dismissed because of her absences from work on 10/11 May 2017, the reluctance she expressed to Ms Deacon on 22 June 2017 when requested to make a return journey from Dunfermline to Cambridge and/or her request for time off to attend medical appointments. We accepted the evidence of Ms Coveney and Ms Deacon that the Claimant had been dismissed for the reasons stated at the meeting on 16 August 2017 and in the confirmation of dismissal letter dated 21 August

2017 (see paragraphs 93 and 98 above). The reason for the Claimant's dismissal related to her sales performance and not to the "something" contended for, and there was no evidence that the Claimant's sales performance was adversely affected by her MS.

108. While that was sufficient to deal with the section 15 claim, we agreed with Mr Dawson's submission that the Claimant had not been treated unfavourably. The Claimant was suffering from an upper respiratory tract infection on 10/11 May 2017 and her MS and medication made her susceptible to such an infection but there was no evidence to demonstrate that, on the balance of probabilities, that infection was linked to her MS/medication.

109. While we did not believe that Ms Deacon had told the Claimant to drive from Dunfermline to Cambridge and back in one day, we did not in any event find that Ms Deacon had treated her unfavourably when the Claimant expressed her reluctance. On the contrary, Ms Deacon had discussed and agreed with the Claimant travel arrangements which addressed such reluctance.

110. In relation to the Claimant's request for time off to attend medical appointments, we did not consider Ms Deacon's request for proof of the appointments to be unfavourable treatment of the Claimant but rather a routine management instruction, ie normal business practice. We also understood that the Claimant had not suffered any loss of pay in respect of the appointment on 15 August 2017.

Section 20/21 claim (failure to make reasonable adjustments)

111. We reminded ourselves of the terms of sections 20/21 EqA as they applied in this case – the Respondent would discriminate against the Claimant if a PCP of the Respondent put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled and the Respondent failed to take such steps as it was reasonable for the Respondent to have to take to avoid the disadvantage.

112. We also reminded ourselves of the terms of paragraph 6.10 of the Code –

"The phrase "provision, criterion or practice" is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions…."

The PCPs said by the Claimant to have been applied by the Respondent were those set out in paragraph 6 above.

113. The Respondent's position in relation to those PCPs was as follows –

- PCP1 (the requirement for the Claimant to be predominantly field based) was admitted under explanation that the Claimant had one day per week (which could be taken as two half days) to work from home.
- PCP2 (the requirement/expectation for the Claimant to carry out three client appointments per day across Scotland whilst on field duty) was not admitted as pled; the Respondent's position was that as from 30 June 2017 the PCP was to make three appointments per day, not to attend three appointments.
- PCP3 (the requirement for the Claimant to meet set targets) was admitted.
- PCP4 (the requirement for the Claimant to make long drives/a drive from Cambridge to Dunfermline with a new pool car) was denied on the basis that the Claimant was not asked to make the return journey in one day and was able to fly to England and break her journey on the way back as she requested.

114. In ***Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664*** at paragraph 71 of their Judgment the Employment Appeal Tribunal said –

"The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in Archibald v Fife Council [2004] IRLR 651*. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee."*

Accordingly, it would not be relevant that the Respondent was unaware of the duty to make reasonable adjustments if it had in fact complied.

115. In relation to PCP1, we did not agree with Ms Gribbon's interpretation of Ms Deacon's email to the Claimant of 30 June 2017 (page 79) as imposing a requirement on the Claimant to be out on field duties every day. It did not remove from the Claimant the requirement to perform administrative duties – indeed it referred to the requirement of the Claimant to update her calendar a week in advance and to submit her weekly report to Ms Deacon every Friday. There was no evidence to indicate that the Claimant changed her working pattern to five days per week on field duties nor that this was the Respondent's expectation of her.

116. We turn to the substantial disadvantages to which the Claimant was alleged to have been put by PCP1.

117. The first was that it had a negative effect on the Claimant's attendance record. The difficulty for the Claimant in arguing that she suffered this disadvantage was that was there was no evidence to link her absence on 10/11 May 2017 to her MS or its treatment (see paragraph 108 above).

118. The second alleged disadvantage was that the Claimant suffered financial loss. Again, the difficulty for the Claimant was the lack of an evidential link between the absence on 10/11 May 2017 and her MS or its treatment. Mr Dawson relied on what the EAT had said in ***O'Hanlon v Commissioners for HM Revenue & Customs [2006] IRLR 840*** at paragraph 67 –

"In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment."

Even if we had been persuaded that there was a link between the Claimant's absence on 10/11 May 2017 and her disability, we would not have been persuaded that this was the "rare case" where it would have been a reasonable adjustment for the Respondent to pay the Claimant for the absence.

119. The third alleged disadvantage was that the Claimant was treated as being unfit to perform any of her duties when unable, by reason of her disability, to carry out field duties. Ms Deacon's position was that it was important for staff to recuperate when they were unwell (see paragraph 26 above). Once again, the lack of an evidential link between the absence and the Claimant's MS or its treatment was fatal to the argument that the Claimant had suffered disadvantage when compared with persons who were not disabled. The Claimant had not been treated differently from a non-disabled person suffering from an upper respiratory tract infection.

120. The fourth alleged disadvantage was that the Claimant faced the risk of her MS symptoms being triggered. We understood that the reasonable adjustment contended for was that the Claimant should have been allowed to work from home on days when her disability prevented her from carrying out field duties. There was no evidence presented to us to suggest that a non-disabled employee with an upper respiratory tract infection would have been allowed to work from home. The Claimant had not been put at a substantial disadvantage compared with a non-disabled person.

121. The fifth and final alleged disadvantage was that the Claimant had been dismissed. We could find no connection between PCP1 and the Claimant's dismissal. We did not consider that any adjustment to the requirement that the Claimant should be field based would have been reasonable given the

nature of the Claimant's job as a BDM. The Respondent's stated reason for the Claimant's dismissal related to her performance and there was no suggestion that the Claimant's performance had been adversely impacted by a requirement to be field based.

122. In relation to PCP2, we understood that making three client appointments per day was one of the KPIs of the Claimant's BDM role. We had no evidence to suggest that the Respondent insisted upon 100% compliance by BDMs with all KPIs – indeed the evidence pointed the other way. We understood that attainment by BDMs of their sales target was also a KPI and the statistics presented to us (at page 102) showed clearly that this was not being met by most of the BDMs most of the time.

123. We agreed with Mr Dawson's submission that the Claimant had not explained why PCP2 had placed her at any of the disadvantages referred to in paragraphs 117-121 above.

124. In relation to PCP3, the Claimant's position was that the disadvantage to which she was put by the requirements for three appointments per day and meeting her sales target could have been avoided if the daily appointments and sales target had been modified. However, we did not understand it to be the Claimant's position that she could not achieve three client appointments per day and meet her sales target because of her MS or its treatment. We had no evidence as to what change to the number of appointments or the amount of the sales target would have been a reasonable adjustment.

125. In relation to PCP4, we reminded ourselves of the evidence about the conversations between Ms Deacon and the Claimant on 22 June 2017 and our view of these (see paragraph 64 above). The alleged disadvantage was the risk of the Claimant's MS symptoms being triggered. We did not accept Mr Dawson's assertion that there was no medical evidence that undertaking a long drive would trigger the Claimant's MS symptoms. One of those symptoms was fatigue as confirmed in Dr Mumford's report (para 11.5 on page 136). While we found that Ms Deacon had not asked the Claimant to drive from Dunfermline to Cambridge and back in one day, there was a

requirement that the Claimant should drive her new pool car from Cambridge to Dunfermline. This was on any reasonable view a long drive and so PCP4 was engaged.

126. However, Ms Deacon's agreement to the Claimant's suggestion that she should break the journey by staying overnight in Newcastle was a reasonable adjustment to which the Claimant was happy to agree – see page 78B where she responds to Ms Deacon *"Great that's perfect".* There was no failure by the Respondent to comply with their duty under section 21 EqA.

Section 26 claim (harassment)

127. The Claimant complained about three matters said to constitute unlawful harassment –

(i) Ms Deacon threatening her with her job and accusing her of not doing her job properly during their telephone conversation on 22 June 2017 (relating to the journey to/from Cambridge).

(ii) The instructions given to her by Ms Deacon on 27 June 2017, confirmed by email on 30 June 2017, which contradicted the information provided at interview.

(iii) The manner and tone of Ms Deacon's request on 9 August 2017 for the Claimant to provide proof of her medical appointments.

128. In relation to matter (i), we preferred the evidence of Ms Deacon to that of the Claimant in relation to the telephone conversation on 22 June 2017 during which it was alleged by the Claimant that she had been threatened with her job and accused of not doing her job properly (see paragraph 64 above).

129. In relation to matter (ii), we did not believe that the instructions given to the Claimant by Ms Deacon during their meeting in Cambridge on 27 June 2017 and confirmed by email on 30 June 2017 contradicted the information provided at interview. We refer to paragraphs 71 and 121 above. The Respondent expected the Claimant to make three client appointments per day but this was in practice qualified by (a) the one day per week, or two half days,

the Claimant was expected to devote to administrative tasks and (b) the Respondent's awareness of the size of the Claimant's region which could impact on her ability to meet this expectation.

130. In relation to matter (iii), the Claimant had described Ms Deacon as "angry" when she asked for proof of the Claimant's medical appointments during their conversation on 9 August 2017 but we were not persuaded that this had violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We accepted that it had been the Claimant's perception that Ms Deacon had been angry. However, as we have recorded, relations between Ms Deacon and the Claimant had become strained and Ms Deacon had accepted that she could be "direct". We did not consider that it was reasonable for the Claimant to regard Ms Deacon's reaction to her disclosure of her medical appointments (which she had not disclosed when they had on 4 August 2017 discussed Ms Deacon's planned visit to Scotland on 15 August 2017, one of the appointment dates) as having the purpose or effect of violating her dignity etc.

Section 27 claim (victimisation)

131. The alleged protected act for the purpose of section 27(2)(d) EqA was the Claimant's reference to her MS during her telephone conversation with Ms Deacon on 22 June 2017. The alleged acts of victimisation (ie the detriments to which the Claimant alleges she was subjected) were the same as the matters alleged to constitute harassment.

132. For the same reasons we did not find these acts to amount to harassment as set out in paragraphs 128-130 above, we did not find them to amount to victimisation. We agreed with Mr Dawson's submission that it did not amount to a detriment for an employee to be managed and given goals nor to ask the employee for proof of medical appointments.

Disposal

133. We were not persuaded that the Respondent's treatment of the Claimant was in any way influenced by her disability. We believed that the evidence showed

a deteriorating relationship between the Claimant and her line manager, Ms Deacon, and a failure by the Claimant to achieve the level of performance the Respondent had expected of her during her probationary period.

134. For the reasons set out above in respect of each of the Claimant's claims under sections 15, 20/21, 26 and 27 EqA, these claims do not succeed.

Employment Judge: WA Meikejohn
Date of Judgment: 09 May 2019
Entered in register : 10 May 2019
and copied to parties