EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100690/2019

Held in Glasgow on 13, 14, 15, 16 January and 27 January 2020

Employment Judge S MacLean
Tribunal Member Mr I Ashraf
Tribunal Member Mr P Kelman

Mrs S Wood	**Claimant** **In Person**
Via-K Limited t/a PlanB Consulting	**Respondent** **Represented by:** **Mr A Hardman,** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims are dismissed.

REASONS

Introduction

1. The claimant presented a claim of discrimination contrary to sections 13, 15, 21 and 26 of the Equality Act 2010 (the EqA). The respondent denies these claims and denies having knowledge whether active or constructive that the claimant was disabled or of the substantial adverse effect the disability was alleged to have had on her ability to carry out normal day to day activities.

2. Following a Preliminary Hearing on 24 July 2019, the Tribunal issued a judgment that the claimant is a disabled person for the purposes of the EqA and made the following findings:

"14 The claimant commenced employment with the respondent in February 2018. This coincided with the claimant experiencing lower abdominal pain on her right side. She did not realise that this was IBS because the pain was different to what she had experienced previously. The claimant had several absences from work for ill health.

15 The lower abdominal pain was constant ranging from a dull ache where the pain intensity was about 4/10 to a sharp intense stabbing pain where the pain intensity was 10/10. The level of pain fluctuated from for example level 10 to level 6 and back to level 10 and down to level 4. For around 80% of 2018, the claimant's pain level was between level 5 and level 10. The claimant did not know what triggered the fluctuation in pain intensity.

16 The level 10 pain could last about three hours. At this level, the claimant could not function normally, concentrate or continue with normal activities and tasks. Level 4 was low grade discomfort which interfered with normal functioning but would not stop the claimant carrying out normal activities or duties. At level 6, the pain was too distracting for the claimant to drive to work.

17 The Tribunal then considered whether the substantial adverse effect was "long term". The claimant herself did not suggest that there was a substantial adverse effect before February 2018. The Tribunal considered that the substantial adverse effect started in February 2018 and continued until her employment terminated in October 2018. This is not a period of 12 months and so the Tribunal considered whether it was likely to last for 12 months (until February 2019). The fact that it has in fact lasted for that period is not relevant. The question is whether it was likely to last for that period as September/October was when the alleged discrimination occurred.

38 The Tribunal considered it was likely. The medical investigation established that the abdominal pain was not related to gynaecological abnormality. The claimant was recommended to another specialist for

further investigation. The respondent conceded this point. The Tribunal concluded that a substantial adverse effect on her day to day activities would likely to have lasted for at least 12 months from the onset in February 2018."

3. At the final hearing, the claimant gave evidence on her own account. The Tribunal heard evidence for the respondent from Fiona Carswell, Business Support Manager and Kim Maclean-Bristol, Director.

4. The parties provided written submissions which the Tribunal read with care during its deliberations. The Tribunal has summarised the submissions. It should not be taken that a point was overlooked, or facts ignored because the fact or submission is not in the Reasons in the way that it was presented to the Tribunal by a party. Not very fact that could be found in the documents or full evidence has been set out. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding the important parts of the evidence.

The issues

5. At the final hearing the following issues required to be considered by the Tribunal:

   a. Did the respondent know, or could the respondent not reasonably be expected to know that the claimant had a disability?

   b. If so, from what date is the respondent deemed to have had actual constructive knowledge that the claimant was disabled?

   c. By not allowing the claimant to work from home due to ill health from September 2018 onwards, did the respondent treat the claimant less favourably than it treated or would have treated an actual comparator who was not disabled? The claimant relies on an actual comparator, Consultant A who was allowed to work from home while she recovered from an illness in September 2018.

d. If so, has the claimant proved facts from which the Tribunal could fairly and properly conclude in the absence of any explanation from the respondent, that the difference in treatment was because of disability?

e. Can the respondent show a non-discriminatory reason for the act or potential discrimination identified?

f. Was the claimant treated unfavourably by telling her not to attend work or allowing her to work from home due to ill health; and instructing her not to complete client work?

g. Was the unfavourable treatment complained of because of something arising in consequence of the claimant's disability? The claimant relies on:

   i. an increased level of absence and decrease of punctuality;

   ii. tiredness and lack of concentration;

   iii. a small reduction in the quality of client work and requiring longer to complete the tasks due to pain.

h. Do any of the matters set out above amount to something arising in consequence of disability?

i. If so, was the claimant subjected to the unfavourable treatment complained of because of that something in that it was a significant influence amounting to an effective cause for the behaviour complained of?

j. If so has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent is relying on its duty of care to staff by ensuring that they have the time needed to recover or get better and not to feel under pressure to work when not fit to do so; and pursuit of legitimate commercial interests by ensuring that the level of work produced for clients was at the level and standard expected by the clients?

k. Did the respondent apply the following provisions criterion or practice (PCP):

   i. operating standard hours;

   ii. homeworking;

   iii. not allowing staff to work from home when sick;

   iv. setting targets for consideration for promotion.

l. Did the application of the PCP relied on put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

   i. the claimant was unable to meet the standard of timekeeping expected;

   ii. the claimant has higher level of absences than her colleagues;

   iii. it adversely impacted the claimant's performance;

   iv. it prevented the claimant from meeting targets or being considered for promotion; and

   v. being removed from client projects.

m. What are the adjustments asserted as reasonably required by the claimant to remove the disadvantage she was put at because of the PCP:

   i. requesting access to the claimant's GP records and/or making a referral to occupational health;

   ii. allowing the claimant to work from home at short notice;

   iii. allowing the claimant flexible working;

   iv. changing the claimant's role to an office-based role with little to no client facing duties;

   v. changing or altering targets or milestones/promotion.

n. Did the respondent take such steps as were reasonable to avoid the disadvantage?

o. Did the respondent harass the claimant by engaging in unwanted conduct relating to a disability which had the purpose or effect of creating an intimidating hostile degrading humiliating or offensive environment for the claimant?

p. The claimant relies on:

i. accusing her of lying on 27 September and 25 October 2018;

ii. making derogatory remarks about the claimant on 25 October 2018;

iii. Mrs Carswell withholding details surrounding pay and not providing the claimant with a payslip in October 2018;

iv. being moved as project manager in September 2018;

v. Ms Maclean-Bristol failing to issue a final payslip in line with the respondent's procedure in December 2018.

q. Was the conduct unwanted?

r. Was the conduct related to disability?

s. Having regard to the circumstances of the case, including the claimant's perceptions was it reasonable for her to feel an intimidating hostile etc environment had been created as a result of that conduct?

t. Was the claimant entitled to a declaration in her favour?

u. What level of compensation is appropriate?

Relevant law

6. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant (section 23 of the EqA).

7. Section 15(1) of the EqA defines discrimination arising from disability. The provision requires there to be: (a) Unfavourable treatment; (b) Because of "something; (c) The "something" has to have arisen in consequence of the claimant's disability; and (d) Which the respondent cannot show was a proportionate means of achieving a legitimate aim. Section 15(2) of the EqA states that section 15(1) does not apply if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

8. Section 20 of the EqA defines the duty to make reasonable adjustments. To succeed, there requires to be: (a) a PCP applied by the respondent which; (b) puts the disabled person at a substantial disadvantage; (c) in relation to a relevant matter in comparison with persons who are not disabled; and (d) a failure by the respondent to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 of the EqA states that a failure to make reasonable adjustments is discrimination.

9. Schedule 8 of the EqA provides further provision on the issue of reasonable adjustments. Paragraph 2(2) states that a reference to a PCP is a reference to a PCP applied by or on behalf of the respondent. Paragraph 2(3) states that a relevant matter is that which is specified in the first column of the applicable table in Part 2 of the Schedule. Part 3 of Schedule 8 of the EqA provides for limitations on the duty to make reasonable adjustments. Paragraph 20 provides that the respondent is not subject to the duty to make reasonable adjustments if the respondent does not know, and could not reasonably be expected to have known (in essence) that the claimant (i) has a disability and (ii) is likely to be placed at the disadvantage referred to.

10. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation, that a person contravened the provisions of the EqA the court must hold that the contravention occurred.

11. Section 23 of the EqA states that on a comparison of cases for the purposes of section 13, 14 and 19 of the EqA, there must be no material difference between the circumstances relating to each case. Section 23(2) of the EqA specifically states that the circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 of the EqA the protected characteristic is disability.

12. Section 26 of the EqA provides that a person is harassed if the respondent engages in unwanted conduct related to disability which has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether conduct has the effect referred to in subsection (1)(b), the person's perception; the other circumstances of the case; and whether it is reasonable for it to have that effect must be considered.

Findings in fact

13. The Tribunal made the following findings in fact.

14. The respondent is a limited company carrying on business as consultants specialising in providing business continuity, crisis management and cyber incident management for clients worldwide. Charlie Maclean-Bristol and Kim Maclean-Bristol are co-founders, owners and directors of the respondent. Mr Maclean-Bristol is mainly engaged in client work. Mrs Maclean-Bristol has responsibility for finance and sales along with client work. Ewan Donald was at the relevant time Principal Consultant. He was responsible for managing the consultants and delivering client work. Fiona Carswell is the Business Support Manager with day to day responsibility for office management dealing mainly with finance, administration and human resources (HR). Although she has 19 years' management experience Mrs Carswell was "new" to HR.

15. In 2018 the respondent employed approximately 11 employees including the senior management team. Solve HR Business Consultants were retained by the respondent for support on HR issues and legal advice.

16. In November 2017 the claimant applied to the Civil Service for a job as a Criminal Investigator in HMRC Fraud Investigation Service. She was interviewed on 15 January 2018. On 16 February 2018 the claimant was advised that she was successful and would be placed on the reserve list which would last for 12 months.

17. On 26 February 2018, the respondent employed the claimant as a Consultant. She was issued with a contract of employment. Her normal place of work was the respondent's office in Paisley. She was required to travel to clients' sites which may involve travel outside the UK. Her normal hours were 37.5 per week; the normal pattern of work was Monday to Friday, 9am to 5pm.

18. The contract of employment also provided that if the claimant was absent for any reason, she had to notify Mr Donald or one of the directors by telephoning as far as before the designated start time but ideally at least one hour in advance. The call was to be made in person and text messages were not accepted. The claimant was entitled to statutory sick pay under the relevant statutory provisions provided she met the eligibility requirements.

19. The respondent has an employee handbook. It provides for salary to be paid monthly in arrears and directly credited into the bank on the last Friday of each calendar month. The final salary, less any deductions will be paid on the pay day of the month that the employee leaves. Any payment of contractual sick pay is at the sole discretion of the respondent at such rate and for such period as the respondent determines.

20. After her appointment the claimant had an induction period for two weeks. She then shadowed the project manager or project director (if on site) to become familiar with different clients' need and the respondent's methodology.

21. In recognition of the travelling that employees were undertaking the respondent decided in 2018 to trial home working to improve work/life balance. This allowed employees who had been working away from home subject to business needs and line management approval to work from home and catch up on everyday life.

22. Around 27 March 2018, the claimant informed Mrs Carswell that she had pelvic pain and required to attend her general practitioner.

23. The claimant was absent from work from 4 May to 8 May 2018. She had a return to work interview with Mrs Carswell on 9 May 2018. The claimant advised she was absent because of pelvic pain for which she had been prescribed antibiotics, of which she was suffering the side effects.

24. The claimant worked from home on occasion to deal with wedding related appointments; to use her time productively when later attending meetings in Edinburgh; and allowing the letting agency access to deal with a wasp infestation. The claimant also asked to work from home when she was taking new medication which was making her feel uncomfortable. Despite the claimant's requests for home working being on short notice they were granted. She was also permitted to leave the office early when she had return home late the previous day.

25. At a monthly management meeting on 8 August 2018, Mr Donald expressed concern that there had been increasing instances of staff working from home when ill. The management team agreed that if staff were sick, they should be encouraged to take sick days to avoid burnout and to look after the staff.

26. On 13 August 2018, the claimant messaged Mr Donald to say that she was going to try and work from home as she had a trapped nerve and thought it was unlikely that she would be available the following day. Mr Donald replied that if it was that painful, she should not be working at all and should put the day down as sick leave. The claimant was absent from work due to a trapped nerve from 13 to 15 August 2018.

27. In late August 2018 the claimant was approached by the Civil Service about a role as an intelligence rather than investigation officer. The claimant asked to be kept on the reserve list.

28. The respondent permitted the claimant to work from home on several occasions from 17 August to 28 August 2018 because she felt drowsy and not able to drive to work.

29. On 29 August 2018 the claimant told Mr Donald that she was concerned that her pelvic related issue was long term and had been referred to a specialist. Mr Donald arranged to speak with the claimant in early September 2018 for a return to work interview and her appraisal. Mr Donald alerted the management team about the discussion as the claimant was scheduled to attend an international business trip from 15 to 26 September 2018. He also suggested that advice be taken from Solve.

30. The claimant was absent from work from 30 August to 31 August 2019 due to pelvic pain.

31. On 31 August 2018 Mr Donald advised staff that the respondent was trialling more formal rules around working from home, aimed at improving work/life balance for all staff whist ensuing that business needs were fulfilled. This included that staff could work from home up to two days per week although this needed to be prearranged by the preceding Friday. This applied to all staff.

32. On 3 September 2018 the claimant was scheduled to attend a meeting with Mr Maclean-Bristol in Dundee. The claimant messaged him that morning to say that she was too ill to attend. Mr Donald became aware of this and messaged Mrs Carswell. He was frustrated that despite reminding the claimant of the need to telephone if she was ill, the claimant had messaged Mr Maclean-Bristol. Mr Donald wanted this to be mentioned as part of the discussion with the claimant because the claimant was “doing herself no favours by acting this way.”

33. On 5 September 2018, the claimant met Mr Donald and Mrs Carswell. The claimant asked to be removed from attending the international trip as she may require medical assistance as the ongoing pelvic pain had flared up and she was on a different course of antibiotics. The claimant did not want to let people down. This would affect her when she was doing more independent delivery. The claimant suggested that if there was not any treatment, she could perhaps change roles with her colleague.

34. At her six-month probationary meeting on 6 September 2018, Mr Donald and the claimant discussed amongst other things the need for the claimant to inform management when she was ill; that she was making matters worse by working from home when she was not fit to work.

35. The claimant asked Mr Donald if she could work from home on 12 September 2018 as her condition made it difficult to move about but was manageable when she was stationary. He agreed to the request.

36. There was a management meeting on 14 September 2018 when it was discussed that the claimant had an ongoing condition which meant that she struggles to work due to pain: this comes and goes with good and bad days. The claimant had a scan booked for the following week and an appointment with the specialist the week after. Mrs Carswell was meeting Solve in the following week to discuss sickness issues as the claimant was not the only employee who was absent from work due to ill health.

37. Mrs Carswell messaged the claimant on 18 September 2018 to ask how she was feeling. The claimant said she was getting some work done but asked for the rest of the day off and see how she felt the next day. The claimant messaged Mrs Carswell on 19 September 2018 to say that she was feeling okay to work and would telephone if this changed. Mrs Carswell asked her to amend her diary to say that she was working from home.

38. On 20 September 2018 the claimant attended a hospital appointment and was informed that she either had an infection or endometriosis. She was to have a laparoscopy to confirm this.

39. The following day the claimant messaged Mrs Carswell to say that she was working from home to complete some work for Mr Maclean-Bristol. She would drive into work later but did not want the return to work meeting until the Monday (24 September). Mrs Carswell asked if the claimant was okay and if there was anything to be done to help. On being updated about the claimant's hospital visit Mrs Carswell said that if the claimant was not able to come into the office because she was unwell, she should take the day as sick leave. The work that the claimant was doing could be arranged to be done by someone else. The claimant declined. The claimant and Mrs Carswell met that afternoon and competed the return to work documentation.

40. On 24 September 2018 at 7.55am Mr Donald sent a message to the consultants advising that he had taken the day off but was contactable by telephone and would be in the office the next day. Two other consultants, Consultant G and Consultant A replied before 9am that they were working from home. The claimant sent a message at 09.16, "Same".

41. Consultant A had been employed by the respondent for around two years and was able to work independently with clients. She was waiting for results from medical tests. Consultant A's condition and medication in September 2018 restricted her ability to be in public places but did not adversely affect her ability to work from home within the prescribed hours and communicate by telephone. The respondent was aware of this and planned work to allow Consultant A to work from home.

42. Mrs Maclean-Bristol saw the messages. She was unaware that the claimant was working from home and privately messaged the claimant at 09:27 to ask if she had spoken to Mrs Carswell or Mr Donald. The claimant replied that she was trying to avoid taking sick leave; she knew that she was not allowed to work if she could not make it into the office; she was okay but did not feel safe to drive because of medication. The claimant said that she would be in the office shortly. The message exchange continued:

Mrs Maclean-Bristol [09:48]: If you are not safe driving you need to take the day off - the type of work we do does not mean that we can operate if not

feeling 100%. [Messaging] is not the media for this that is why you need to call your Line Manager or a Director each morning if not feeling well.

The claimant [10:25]: If need to sit down and chat with Ewan and Fiona. It is looking likely it's Endometriosis (but won't know until the laparoscopy). I feel it would be helpful to me/the business to have reasonable adjustments now but I understand if I have to wait until I get the diagnosis/treatment.

Mrs Maclean-Bristol [10/44]: as I said [messaging] is not the place – I [am] concerned with procedures.

43. Mrs Carswell was informed about the messages received from the claimant. Mrs Carswell had previously met with Tracey Burke of Solve for advice about handling the sick absence of the claimant and Consultant A. Mrs Carswell sent an email to Ms Burke providing updated medical information for both employees. The advice given for both employees was similar. Once the test results were known a meeting should take place to gain a better understanding and seek medical reports. Ms Burke said that if the claimant's condition is prolonged the respondent will need to come to an arrangement about working from home but in a way that is planned and can be worked around. The claimant should be made aware that working from home at short notice is not acceptable; it is difficult to schedule activities and she need to seek permission first.

44. The claimant sent an email to Mr Donald at 11:57 on 24 September 2018, as follows:

"As you know I am struggling with my health. Based on what the gynaecologist has said, it looks like I will receive a diagnosis of endometriosis, but this won't be confirmed until I have had the laparoscopy. I am trying not to worry but if diagnosed, this means I will have a long term disabling condition which may cause infertility.

Currently I have been co-codamol and naproxen to manage the pain. The side effects I get are sleepiness, nausea and light-headedness.

Given you and Fiona have both stated I cannot work (even from home) if I am not 100%, as this is what the job requires. I don't think this is helpful to myself/the business. I appreciate I cannot ask for reasonable adjustments to be made until a diagnosis is reached (which will hopefully be soon) but I would like a common sense approach.

Last night/this morning, I had taken my pain management tablets but felt it was too dangerous for me to drive at 8am due to the side effects. I do feel able to work from home. The side effects also diminish with time so I could also have come into the office for an alternate shift (such as 10.30am to 6.30am) however I can't opt for this as I am not 100%. This rule seems unfair and I feel singled out. It also means I feel under pressure to drive into the office when I feel its unsafe.

I appreciate the business has policies and procedures are in place for a reason and I am honestly not trying to be difficult but I really need some extra support. The existing policy is that staff can work from home, two days a week, with notice. Could I work from home without notice when I'm feeling under the weather (but be capable of working) and have no delivery/clients/work meetings? Could we meet to discuss? Would be really grateful for any help."

45. Mr Donald replied to the claimant on 25 September 2018 advising that the reason that staff are not allowed to work to work when not "100%" is that the respondent has:

"…a duty of care towards everyone that works here and we want to ensure that if you are ill then you are resting rather than working when you are not fit to work. I'm sorry that you feel singled out, but it is absolutely not the case, as expectation is that you do not work if you are not well, it is the same for every member of staff here. Additionally if you are unwell, it may affect your ability to perform your role to the best of your ability and thus may affect the service we provide to our clients. Ideally we would prefer you to take the necessary time off to aid your recovery.

As previously discussed with you on your back to work on 5 September, the problem with your absence from the Angus Council job is that you did not

follow the policy on absence detailed within the employee handbook, which requires you to phone your line manager to inform them of your illness; the issue was that you did not follow procedure rather than that you were ill. I think the issues in relation to your working from home yesterday are due to a similar lack of communication rather than the request itself. Although it is important to clarify that your working from home does not relate to a company "policy" as it is a trial period to see if it works for the company and staff. I did clearly explain some guidelines in relation to the trial period at a meeting of all staff on Friday 31 August. As you outline in your email, one of these is that staff can work from home up to two days per week but this must be arranged in advance and at least by a Friday meeting the week before.

The reasons you have outlined for wanting to work from home on Monday are totally understandable but it is not acceptable to ignore the guidelines we have in place. If you had contacted myself, Fiona or a Director to discuss at the time and to request to work from home, we would have been happy to work this out with you, although the advice would still be not to work if you are not well. It is not acceptable for you just to decide to work from home without contacting anyone else to outline the reasons.

Unfortunately we can't really look at reasonable adjustments until we know what we are dealing with – I hope you understand this. In the meantime as ever I am more than happy to discuss ways of making things easier for you – but you need to communicate issues and follow procedures and guidelines that we have in place.

Moving forward, transparent communication is going to be key to finding a resolution and supporting you. I don't think email is necessarily the best way to discuss these issues – why don't we have a meeting with Fiona when you are back in the office and we can discuss everything and see how we can continue to support you in this?

Please be rest assured we want to support you whilst you are going through this difficult time."

46. Mrs Carswell and Ms Burke had an email exchange about the correspondence between the claimant and Mr Donald. Ms Burke said that endometriosis may be a disability under the EqA and once the claimant had her test results an occupational health referral should be made for guidance on disability and what if any reasonable adjustments are required to support the claimant. Mrs Carswell wanted to support the claimant but said that the complication was that despite raising the matter informally the claimant was not following procedure and had poor communication with management when she was feeling unwell. Ms Burke said that the return to work meeting would be a good opportunity to remind the claimant and the concerns of not following policy. Mrs Carswell was advised to, "Reassure her that you appreciate that she is going through a difficult time and that you want to support her but she has an obligation to follow the company's procedure and that you have gone over this with her previously so you are disappointed that she is still not complying. As you have had to repeat this to her you will type up a note of concern letter to outline your concerns and confirm your discussion."

47. Consultant A had longer service and more experience working independently for the respondent than the claimant. Consultant A was waiting for test results and until her medication took effect, her immunity was low and restricted her ability to be in public places. It did not adversely affect her ability to work from home within the prescribed hours and communicate by telephone. The respondent planned work to allow Consultant A to work from home in September 2018.

48. On 26 September 2019 Mrs Carswell liaised again with Ms Burke about the employees who were sick absent. Consultant A was feeling better and fine to work but her low immune system meant that she was susceptible to pick up an infection, so she was working from home. The claimant had called in sick. The advice given was that if the claimant was still not fully fit and unable to attend work it was probably better to be signed off rather than taking ad hoc days off. Mrs Carswell was encouraged to obtain as much medical evidence and guidance as possible to decide the best course of action. Mrs Carswell also discussed that the respondent was paying employees full pay while

absent on sick leave rather than adhering to the contractual terms. Advice was given about the importance of following policies to maintain consistency.

49. On 27 September 2018 the claimant called Mrs Carswell to say that she would not be coming into the office. Mrs Carswell said that she was driving and would call the claimant back. The claimant sent Mrs Carswell and Mr Donald an email updating them on her medical appointment from the following evening. The claimant confirmed that she was probably having a laparoscopy procedure on 4 October 2018. This would investigate the recent bladder infection and see if there was evidence of endometriosis. The claimant asked for the support of speaking to an occupational health adviser.

50. Mrs Carswell telephoned the claimant. Mrs Carswell said that HR advice had been sought to help support the claimant, but the respondent needed to know what it was dealing with. The claimant said that she wanted to work. She was not feeling 100 percent but approximately 80 percent but had been told that if she could not drive, she could not work. Mrs Carswell said that no one has put down a rule that if you cannot drive you cannot work; the claimant had said that she was dizzy and not feeling 100 percent. The claimant referred to Mrs Maclean-Bristol's message sent on 24 September 2018. Mrs Carswell said that was not what was said. The claimant disagreed as it was in writing. Mrs Carswell confirmed that she had seen the message. Mrs Carswell said that if the claimant was feeling dizzy and unable to drive but okay to work from home, she would tell Mrs Maclean-Bristol and Mr Donald.

51. After the telephone conversation Mrs Carswell spoke to Ms Burke then sent an email to the claimant. Mrs Carswell confirmed that having spoken to the HR adviser the referral to occupational health would take place after the test results were know so that all the necessary information was available and a the meaningful consultation took place. Meanwhile the claimant was sent documentation to consent to the respondent obtaining a medical report from her gynaecologist. Mrs Carswell confirmed that the claimant main concern should be her health and it was understood that she might need to take additional time off. It was also confirmed that to make things easier Mrs Carswell would be the claimant's one point of telephone contact and if

necessary, email (Mr Donald and Mrs Carswell) in addition to the telephone call.

52. On 1 October 2018, the claimant spoke to Mrs Carswell by telephone. The claimant confirmed that she was to have surgery on 4 October 2018 and needed two weeks for recovery. The claimant asked the respondent to wait until the surgical procedure before giving her consent to access her medical records or to attend any occupational health appointments.

53. On 2 October 2018 the claimant provided the respondent with letter from Dr Connell of Babylon stating the claimant was unable to work from 2 to 5 October 2018 inclusive.

54. The claimant had a laparoscopy procedure on 4 October 2018. She was kept in overnight.

55. The claimant telephoned Mrs Carswell on 8 October 2018 to provide an update. She was taking strong pain relief. There was no endometriosis, but she had had two cysts removed. She had a follow up appointment in eight weeks. She had a sick line until 11 October 2018. However, she wanted to take two weeks leave to ensure that she was fully recovered. Her wound was bleeding, and it may take her longer to recover. Mrs Carswell asked for a fit note as the letter that had been provided would not be covered by statutory sick pay (SSP). The claimant asked if she was now on SSP. Mrs Carswell said that she would ask Mrs Maclean-Bristol to let her know.

56. Mrs Carswell raised the issue of paying SSP with Mrs Maclean-Bristol who told her to ask Mr Donald, but Mrs Maclean-Bristol felt that was appropriate.

57. The claimant provided the respondent with a letter from Dr Wilson of Babylon dated 15 October 2018 confirming that she was unable to work between 15 and 21 October 2018. Mrs Carswell asked for an NHS fit note. The claimant asked for confirmation of the dates that she would be on SSP.

58. The claimant messaged Mrs Maclean-Bristol on 22 October 2018 to say that she would be late into the office as she was going to see the nurse as he

stitches were infected. The claimant could not arrange an appointment until the afternoon.

59. The claimant telephoned on 23 October 2018 she was still sore and wanted to work from home. Mrs MacLean Bristol said that if she could not work at a desk the claimant was not fit to work. The claimant needed to decide. There was also the option of a phase return such as half day or a shorter week. The claimant later spoke to Mrs Carswell. The claimant said that she was taking antibiotics and had been unlucky with an infection. She had decided, having talked to her husband to wait until she was fully better before returning to work. The claimant said that she did not need a phased return. She would be back on Thursday (25 October 2018) when the antibiotics had kicked in. When asked about the medical consent form the claimant said that she had no objection but felt that it was counter-productive. There was also no longer a need for an occupational health meeting as the claimant considered that she should not have any problems.

60. The claimant telephoned Mrs Carswell on 25 October 2018 as she was concerned about working a full day. Mrs Carswell agreed that she claimant should come in for half a day to do a return to work interview.

61. The claimant returned to work on 25 October 2018 and attended a return to work interview with Mrs Carswell. They completed forms for absences in September and October 2018. Mrs Carswell then raised the claimant's failure to follow company procedures. Mrs Carswell said that while they may not be at the forefront of the claimant's mind when she was ill the procedures were important and it was disappointing that she had to be continually reminded. NHS fit notes were needed so that SSP could be paid. The claimant was told that a letter of concern was to be issued regarding her lack of communication and reporting procedure.

62. On 26 October 2018 there was a misunderstanding about the claimant's working arrangements. The claimant understood that she was working a half-day. Mrs Carswell understood that the claimant was working a full day. The claimant was concerned when Mrs Carswell contacted her. The claimant also

felt concerned that in the afternoon Mrs Maclean-Bristol's understanding was that the claimant was to be working a full day.

63. The claimant called Mrs Carswell on 29 October 2018 to say that she would not be in work that day or the following say as she was going to wait until she finished her antibiotics. The claimant said that there seemed to be an issue with her working half-days. Mrs Carswell said that was not the case it was a communication gap.

64. On 30 October 2018, the claimant wrote to Mr and Mrs Maclean-Bristol resigning from immediate effect. The letter of resignation letter stated:

"I feel that I am left with no choice but to resign in light of my recent experiences regarding both a fundamental breach of contract following repeated acts of discrimination as outlined in the Equality Act 2010 and another anticipated breach of contract following failure to adhere to absence management and fitness to work procedures of ACAS."

65. On 31 October 2018, Mrs Maclean-Bristol wrote to the claimant expressing surprise and disappointment by her decision to resign. Given the content of the resignation letter, the claimant was invited to attend a grievance meeting with a view to enabling the claimant to return to her role. The claimant was advised of her right to be accompanied.

66. The claimant accepted an offer of appointment as an Intelligence Officer with HMRC on 1 November 2018. Her first day of work was 26 November 2018.

67. A grievance hearing took place on 5 November 2018 and was conducted by Mr Donald. Ms Burke attended with as a notetaker as the claimant requested an independent HR adviser to ensure the correct procedures were followed. The claimant confirmed that she was happy to proceed without a companion. Mr Donald indicated that the resignation had not be accepted and he wanted to understand the issues. In concluding the grievance meeting, Ms Burke explained that a letter of concern is an informal action that documents the discussions and outlined any concerns that the company has and how to improve. She explained it was designed to help both the claimant and the

respondent improving conduct and avoiding the need for formal disciplinary action. The hope was that it would help the claimant to understand the absence reporting procedures to help her avoid formal disciplinary action in the future. The claimant confirmed that there was nothing the respondent could do to dissuade her from resigning. She did not mention that she had accepted other employment.

68. The claimant was advised of the outcome of her grievance by letter dated 9 November 2018. The claimant exercised her right of appeal. The claimant requested that an independent person conduct the appeal hearing rather than Mr Maclean-Bristol. Angela Black of Solve conducted the grievance appeal hearing on 21 November 2018.

69. The claimant received her final pay on 13 December 2018.

Observations on witnesses and conflict of evidence

70. The Tribunal considered that the claimant was an articulate witness who comfortable giving evidence. She genuinely believed what she said. However, with the passage of time the Tribunal felt that her evidence particularly in relation to her view about her ability undertake work at home was at times inconsistent with the contemporaneous evidence and findings of the earlier preliminary hearing in relation to disability. The Tribunal also felt that the claimant's recollection was influenced by the documents of which she was unaware at the time but had obtained after her resignation.

71. The Tribunal considered that Mrs Carswell gave her evidence honestly. Mrs Carswell had limited HR experience. She was not responsible for producing pay information or authorising payment. The Tribunal's impression was that she was out of her depth when dealing with two employees on long term sick absence. To her credit, Mrs Carswell acknowledged this; she sought and relied on advice provided by Solve, external HR advisors. The Tribunal did not consider that Mrs Carswell displayed any animosity towards the claimant and genuinely believed that she had done all that she could in the circumstances to assist the claimant.

72. Mrs Maclean-Bristol gave evidence in a candid and unembellished manner. During the relevant period Mrs Maclean-Bristol was travelling and working abroad. While Mr Maclean-Bristol is also a director of the respondent the Tribunal considered his focus was on sales and clients whereas Mrs MacLean-Bristol's responsibility included the financial and administrative side of the business including paying the employees. The Tribunal felt that she was credible and reliable. Mrs Maclean-Bristol made appropriate concessions. The Tribunal considered that Mrs Maclean-Bristow encouraged Mrs Carswell to obtain professional advice on which Mrs Maclean-Bristol relied. The Tribunal's impression was that she wanted to follow that advice.

73. The Tribunal did not hear evidence from Mr Donald who was the claimant's line manager and part of the management team. From his messages with the management team and correspondence with the claimant the Tribunal's impression was that his view was influential with the management team. Mr Donald considered that the claimant was a valued employee; was supportive of her and keen for her to remain in the business. Mr Donald agreed to many of the claimant's requests to work from home. His frustration related to the claimant's failure to follow procedures despite being asked to do so.

74. The claimant referred the Tribunal to messages sent around 19 September 2018 that she recovered under a subject access request which she said showed that the respondent was looking to replace her. While the Tribunal considered that Mrs Carswell's flippant remark was inappropriate the Tribunal had no doubt that the claimant was highly regarded especially by Mr Donald who was her line manager. To the extent that there was any frustration with the claimant it was in relation to the disruption to work. The management team acknowledged that it had to manage the claimant's absences and advice was being sought in relation to that.

75. The Tribunal did not understand the claimant to dispute that she did on several occasions fail to comply with the absence reporting procedures. What was more surprising was that the claimant appeared to place little significance on this and indeed was annoyed about a letter of concern being issued. While the Tribunal could understand that it was a difficult and worrying time for the

claimant, she appeared to have little or no insight into the impact of this on the respondent's business or the respondent's concern that she was soldiering on when she was sick.

76. The Tribunal considered at the time while neither the respondent or the claimant understood the cause of the claimant's condition, the respondent nonetheless genuinely tried to support the claimant and sought advice as to what action should be taken. The Tribunal took this view as the respondent remained willing to obtain occupational health and medical reports; there was surprise at the claimant's resignation; and a desire to go through a grievance procedure to find a way forward and resolve the issue amicably. This contrasted with the claimant who following the laparoscopy procedure seemed to dissuade the respondent from obtaining occupational or medical reports; accepted new employment but did not disclose this and had no intention of returning to the respondent regardless of the outcome of any grievance procedure.

77. In relation to the telephone conversation on 27 September 2018 the claimant said Mrs Carswell accused her of being dishonest and accused her of being dishonest during a conversation on 25 October 2015 when the claimant said that Mrs Carswell told her she was a disappointment. Mrs Carswell denied accusing the claimant of lying or making a derogatory remark. Her evidence was that she said had read Mrs Maclean-Bristol's message to the claimant and did not understand it to mean what the claimant said. Mrs Carswell felt that the telephone discussion was not constructive and brought it to an end. Following the telephone conversation Mrs Carswell sent an email to claimant acknowledging that it was a difficult time for the claimant and setting out how the respondent intended to support her going forward. In relation to the conversation on 25 October 2018 about the claimant's absence on 3 September 2018, Mrs Carswell's understanding of the background differed from the claimant. Mrs Carswell amended the return to work note as the claimant was unhappy with what had been noted. Mrs Carswell said that she said that she was disappointed that the claimant failed to follow absence reporting despite repeated requests to do so.

78. The Tribunal considered that Mrs Carswell and the claimant had read the message sent to the claimant by Mrs Maclean-Bristol on 24 September 2018. They had different interpretations as to what was meant. Mrs Carswell was mindful that it was a difficult time for the claimant and did not pursue the matter preferring to bring the telephone conversation to an end. The Tribunal also considered that in relation to the absence on 3 September 2018 Mrs Carswell relented to amending the return to work document to reflect the claimant's position.

79. The telephone conversation took place when the claimant was feeling very unwell and was worried about her forthcoming procedure and work. The conversation on 25 October 2018 was at return to work interview. Mrs Carswell had prepared for the telephone call and return to work interview by taking advice from Solve. The Tribunal felt that it was more likely that that Mrs Carswell would keep to the script that was provided and recorded in the contemporaneous notes. The Tribunal therefore considered that it was more likely that Mrs Carswell's version of events were more accurate.

80. Turning to the claimant's evidence about the working pattern that had been agreed for 25 and 26 October 2018 the claimant said her understanding it had been agreed for her to work two half days and she thought that Mrs Carswell had deliberately confused the position to Mrs Maclean-Bristol. Mrs Carswell said that she understood that the claimant was coming in for a return to work meeting (a half-day) on Thursday but working a full day on a Friday. Again, from the contemporaneous email exchange with Solve and Mrs Maclean-Bristol, the Tribunal had no doubt that was Mrs Carswell's understanding. There may have been a breakdown in communication as the claimant thought she was working two half-days. However, the Tribunal considered that this was a misunderstanding and no more than that.

81. Turning to the payment of statutory sick pay, the Tribunal was satisfied that Mrs Carswell raised with Mrs Maclean-Bristol whether she was going to pay the claimant SSP. Mrs Maclean-Bristol indicated that was her view, but she wanted to know Mr Donald's view. It was not clear whether his view was obtained but Mr Donald and then Mrs Carswell were on leave. While the

Tribunal felt it was regrettable that the position was not confirmed, the inference was that SSP was being paid given the repeated requests for NHS fit notes which were required for this purpose. The Tribunal also considered that it was unacceptable that there was a delay in payment of final salary and confirmation of the amount that was being paid. The Tribunal did not consider this was done deliberately but rather than due the ongoing grievance and uncertainty as to which days the claimant had worked.

Submissions for the claimant

82. The claimant referred to the evidence about the respondent's constructive knowledge of her disability: her conversations with Mr Donald on 29 August 2018 and at her return to work meeting on 5 September 2018. The claimant said that applying the principles and guidance in *A Ltd v Z UKEAT/0273/18/BA* and The Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2011) the respondent had constructive knowledge of her disability. The substantial effect was also discussed, and subsequently noted as "affecting her work" and "regularly in pain" at the meeting on 5 September 2018 (p.102). The respondent was on notice of having a disability from 5 September 2018.

83. The respondent permitted Consultant A to work from home from September 2018 when not fully fit, whereas the claimant was not permitted to work if not in complete full health. The difference in treatment was because the claimant's symptoms varied and her had more ad hoc absences. The claimant's disability was more disruptive to the business.

84. The claimant considered Consultant A to be a valid non-disabled comparator. If the Tribunal considered that Consultant A was disabled, she had a different disability from the claimant. See *Owen v Amec Foster Wheeler Energy Ltd and another* [CA 2019] and *Stockton-on-Tees Borough Council v Aylott* [2010] EWCA Civ 910. Although Consultant A was employed longer than the claimant, they were temporary Project Managers of each other's clients when the other was unavailable.

85. The claimant submitted that she was treated unfavourably treated by (a) being told not to attend work or allowed to work from home due to ill-health; and (b) being instructed not to complete client work

86. The respondent claims that its actions were a 'proportionate means of achieving a legitimate aim'. The claimant says that there were non-discriminatory alternatives available such as reasonable adjustments. The respondent was not acting in a proportionate manner. The respondent was in any event relying on mere generalisations as legitimate aims.

87. The respondent applied the following provision, criteria and/or practices: standard operating hours; home working; not allowing staff to work from home when not in full health.

88. The claimant said that she was at a substantial disadvantage in that she struggled to adhere to the standard timekeeping expected which resulted in her having a higher level of absences as she took days off 'sick' when she felt capable of working but had limitations as a result of her disability.

89. The claimant requested did request reasonable adjustments. Specifically; flexibility to working from home at short notice rather than providing the notice by the deadline of the team meeting on Fridays, flexible working (for example 10am - 6pm), changing roles with a colleague to an office-based role with no/minimal client facing duties. The respondent would not contemplate any reasonable adjustments until the claimant had provided a diagnosis.

90. The claimant said that she was harassed when she was accused of being dishonest on the 27 September and the 25 October 2018, a derogatory remark made about me on the 25 October 2018, information about pay was withheld, the October payslip was withheld, as was my final salary payment and related payslip in line with company procedure.

91. The Tribunal was referred to internal correspondence as evidence that the respondent was becoming irritated and frustrated at how the claimant's disability impacted work, combined with not being seen as a valuable member of staff, which the claimant said resulted in a preference by Mrs Carswell and Mrs Maclean-Bristol that the claimant leave.

92. The respondent states that the acts of harassment are not related to disability, but they are a reaction to the claimant's absences, her difficulty to adhere to company absence reporting procedures, a failure of the management team to understand her symptoms and raising a grievance citing discrimination, which are consequences of my disability.

93. The respondent's actions was contrary to its policies. The claimant said that she found the respondent's actions upsetting and stressful, and it was distressing having her integrity questioned without due cause.

94. The claimant referred to her schedule of loss in respect of her loss of earning until she started her new employment. In relation to injury to feelings the claimant considered that the middle band was the most appropriate. It is neither the most serious nor a one-off minor act of discrimination but rather, a series of multiple and continuing acts of discrimination. The claimant also asserted that a personal injury claim was appropriate as this would compensate me for additional and unnecessary stress which had a very real impact on my IBS and associated abdominal pain. The claim for personal injury compensation should not be double recovery. The influence of stress on IBS is medically indisputable and is an aggravating factor for many IBS suffers.

Submissions for the respondent

95. Of the four heads of claim in this case, the only one which expressly requires actual or constructive knowledge on the respondent's part that the claimant was disabled is discrimination by a failure to make reasonable adjustments. In practical terms, the respondent said that it is difficult to envisage a situation where the respondent could be found in breach of section 13, relating to direct discrimination, unless the Tribunal can be satisfied that the respondent at the relevant time, knew, or perceived, (in the sense of 'regarded') the claimant to be disabled. The same logic applies to the terms of section 26 (harassment). If the respondent acted, in this case as contended for by the claimant and did so because they knew or perceived that she was disabled by an impairment at the relevant time, then they have acted in breach of section 26 (see paras 7.9 to 7.12 of the EHRC Employment Code).

96. Knowledge or perception of disability means knowledge or perception that the claimant had a disability in terms of the EqA. See *Donelien v Liberata (UK) Ltd [2018]* EWCA Civ 129. The evidence of Mrs Carswell and Mrs Maclean-Bristol demonstrates the respondent's lack of knowledge or perception that the claimant was disabled at the relevant time. It is not clear from the evidence that, at the relevant time, the respondent's management appreciated the full extent of the claimant's impairment. The evidence shows no awareness or perception on the part of the management team that the claimant's impairment had a substantial adverse effect on her ability to carry out normal day-to-day duties, which was likely to last or had lasted for 12 months. The management team could not reasonably be expected to know that at the relevant time (September/October 2018). See *Wilcox v Birmingham Cab Services Ltd* UKEAT/0293/10/DM paras 33 and 34. In these circumstances, the claims under Sections 13, 21, and 26 must fail.

97. For the direct discrimination claim to succeed, the Tribunal must be satisfied that because of a disability, the respondent treated the claimant less favourably than it treated or would treat her named comparator.

98. The claimant relies on Consultant A as a comparator. The Tribunal must ask was there any material difference between the circumstances of the claimant's case and the named comparator's case? One issue of fact for the Tribunal will be whether the named comparator in this case was in the same position in all material respects as the claimant save that the named comparator was not disabled.

99. The claimant considered that the named comparator was disabled, as she contends, she was, and so the named comparator is not an appropriate comparator in these proceedings. The claimant's complaint is not that the named comparator was treated differently although a non-disabled person. Rather, the complaint is that she was treated differently although she was in precisely the same position as the claimant. A further issue of fact will be whether the abilities of the named comparator in this case were comparable to the abilities of the claimant. The respondent did not consider that the named comparator was in precisely the same position as the claimant. The evidence

was to the effect that, in the context of working from home, the named comparator was a more experienced Consultant than the claimant, and her condition was such that her disabled condition, while restricting her ability to be in public places, did not adversely affect her ability to work from home (as it did for the claimant). This difference in abilities meant that a meaningful comparison between the circumstances of the claimant and those of the named comparator was not appropriate, even were the named comparator someone who was "*not a member of the protected class.*"

100. A second issue of fact for the Tribunal will be whether the respondent treated the named comparator differently from the claimant because of the claimant's disability. Motive is irrelevant, but in considering this issue, the Tribunal will require to focus on the reason why, in factual terms, the respondent acted as they did in not permitting the claimant to work from home while ill. (See *Amnesty International v Ahmed 2009 ICR 1450*, and *EHRC Employment Code, paras 3.13 and 3.14*.)

101. The evidence was that the respondent acted as it did, not because of her disability, but because the respondent did not consider it appropriate for sake of health and business efficiency that employees such as the claimant should be working from home while ill and thus unable to work safely or competently. In all these circumstances, the claim under section 13 must fail.

102. In respect of the claim under section 15 the Tribunal was referred to *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305**.**

103. There was no evidence that the claimant was treated unfavourably by the respondent instructing her not to complete client work. It conceded that the claimant was instructed not to attend work or was not allowed to work from home due to her ill-health. This did not amount to unfavourable treatment of the claimant. This instruction was favourable, rather than unfavourable to the claimant. She was not required to work while unwell. That cannot be considered, objectively, to be unfavourable to her.

104. It is for the Tribunal to identify the "something" which caused the claimant's alleged unfavourable treatment. Her illness caused that treatment. The

Tribunal have concluded (at the preliminary hearing) that the claimant's illness amounted to a disability. Accordingly, the "something" was the claimant's disability.

105. If the Tribunal identifies the instruction not to attend work or not to work from home due to her ill-health as unfavourable treatment arising in consequence of her disability, then the remaining issue is was that treatment of the claimant by the respondent a proportionate means of achieving a legitimate aim?

106. The instruction to the claimant not to attend work or to work from home due to ill-health was justified as a proportionate means of achieving two legitimate aims – protecting the health of an employee, and ensuring the quality of work produced by the organisation was not impaired by her ill health. In all these circumstances, I contend that the claim under section 15 must fail.

107. Subject to the over-riding issue of whether or not the respondent had actual or constructive knowledge of the claimant's disability at the relevant time, the issue of fact for the Tribunal will be to identify whether any provision, criterion or practice (or 'PCP') of the respondent contended for by the claimant put her at a substantial disadvantage in comparison to employees who were not disabled.

108. Given the uncertainty surrounding her condition during September and October 2018, and the medical investigation, which was being undertaken at that time, it was premature, and thus unreasonable, to make the adjustments contended for by the claimant at that time.

109. The evidence clearly demonstrates that certain 'adjustments' were being made on an ad hoc basis – permitting work from home when fit to do so, for example. In those circumstances, consideration of a formal adjustment plan was premature. That was the advice given to and followed by the respondent at the time. In all these circumstances, the claim under sections 20 and 21 must fail.

110. Turning to the section 26 claim subject to the over-riding issue of whether or not the respondent knew or perceived that the claimant was disabled by an

impairment at the relevant time, the issue for the Tribunal is whether the conduct described by her related to a disability.

111. The evidence suggests that the conduct attributed to Mrs Carswell on 27 September and 25 October (accusations of lying and a derogatory remark) is unfounded. As is clear from the evidence of Mrs Carswell, supported by her almost contemporaneous notes remarks made by Mrs Carswell during those discussions were innocuous and incapable of being taken as objectively offensive.

112. Similarly the evidence of Mrs Carswell and Mrs Maclean-Bristol surrounding the allegations of withholding information concerning final pay, and failing to issue Mrs Wood's final pay and payslip – while demonstrating a certain lack of urgency on the part of Mrs Maclean-Bristol – does not amount to evidence that these failures related to any disability. The evidence of these witnesses went to demonstrate that these admitted failures resulted from the difficulties of managing a small business from afar. Mrs Maclean-Bristol was responsible for calculating pay. At the relevant time, Mrs Maclean-Bristol was travelling and working abroad on business. The responsibility for producing pay information and authorising pay promptly lay with her, and not with Mrs Carswell. While the delays complained of were not acceptable, the evidence does not suggest that these came about because of a perception that the claimant was disabled. The claim under section 26 must fail.

113. As to actual financial loss it is not demonstrated that the loss to the claimant arising from her resignation related to her disability. The evidence suggests that she was aware, when she resigned, that she was to be employed elsewhere shortly. Furthermore, she did not require to resign with immediate effect. By doing so, she deprived herself of one month's pay in lieu of notice.

114. As to injury to feelings, there is relevant law on how to assess an award for injury to feelings. An award may be made in respect of '*subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression*' (per Mummery LJ in Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318). The Vento

case also describes a scale for compensation. The EHRC publication, "How to work out the value of a discrimination claim" sets out the correct approach under the Heading, "Injury to Feelings".

115. Were the Tribunal to consider that the circumstances of this case demonstrate any breach of the EqA assessment of injury to feelings must be made at the date of such alleged breach. At that point, the claimant was able to move into alternative employment almost immediately. Her impairment improved. Any distress caused to her by sight of exchanges between members of the management team – not directed to her - occurred long after, and thus cannot be considered relevant to her subjective feelings at the relevant time.

116. In all these circumstances, the respondent's secondary contention is that any consideration of an award for injury to feelings thought appropriate should be limited to the lower levels of the lowest band on the Vento Scale.

117. The claimant insists upon her separate head of claim for personal injury. Such a separate head of claim is not the normal practice before the Employment Tribunal in Scotland. That said, there is no objective evidence before the Tribunal to permit an award under this head of claim.

118. Certain medical papers are among the production but have not been spoken to by any medical expert and they were not referred to in evidence. In any event the claimant agreed in cross examination that her condition was exacerbated by a relative's illness in addition to her perception of her work environment.

Discussion and deliberation

119. The claimant brought several types of discrimination claims but only one (discrimination by failure to make reasonable adjustments) required the respondent's actual or constructive knowledge that the claimant was disabled in terms of section 6 of the EqA. Nonetheless the Tribunal considered that in relation to the issues to be determined it should first consider did the respondent know, or could the respondent not reasonably be expected to know that the claimant had a disability?

120. While the Tribunal found at a preliminary hearing that the claimant had a disability, no decision had been made about the respondent's actual or constructive knowledge of the claimant's disability.

121. The Tribunal considered that in late August 2018 the respondent knew that the claimant had a physical impairment (lower abdominal pain). It had recurred since an absence in May 2018. The claimant was concerned that it could be "long-term" and had been referred to a specialist. The respondent knew that the claimant was taking medication for pain relief and that the intensity of the pain fluctuated; sometimes she could not work; sometimes the pain was too distracting for the claimant to drive; or she had side effects from the mediation; and other times it was it was at a level when she could carry out normal duties and activities. While the claimant referred to "long-term" and "adjustments" in early September 2018 the Tribunal did not consider that at that stage the respondent perceived that the claimant's physical impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities, which was likely to last or had lasted for 12 months. The claimant has further absences during September 2018 relating to her abdominal pain. In late September 2018 the respondent sought and was given advice about disabilities from Solve. The respondent asked for the claimant's consent for a medical report and was looking to involve occupational health in understanding the nature of the claimant's condition and supporting her return to work. By mid-October 2018 following her laparoscopy the claimant knew that she did not have endometriosis, but the claimant said it was too early to know if the impairment would abate. However, she continued with pain relief and was on a phased return. The claimant anticipated having further medical tests. The Tribunal considered that had the claimant not resigned it was likely that the respondent would have sought medical advice given that "tests" were on going. The Tribunal concluded from 25 September 2018 it would have been reasonable for the respondent to have known that the claimant was disabled.

122. The Tribunal then turned to consider the direct discrimination claim. For this claim to succeed the claimant must satisfy the Tribunal that because of her

disability she was treated less favourably than the respondent treats or would treat others.

123. The claimant relied on an actual comparator Consultant A who the respondent allowed to work from home in September 2018 whilst she was not fully fit. The claimant said that she was treated less favourable than Consultant A as the claimant was not permitted to work from home unless in complete full health.

124. The Tribunal considered whether there were no material differences between the claimant and Consultant A including their abilities. Consultant A had longer service and more experience working independently for the respondent than the claimant. Consultant A was waiting for test results and until her medication took effect, her immunity was low. Consultant A's condition and medication in September 2018 restricted her ability to be in public places but did not adversely affect her ability to work from home within the prescribed hours and communicate by telephone. The respondent planned work to allow Consultant A to work from home in September 2018. The claimant had just completed her probationary period during which she had absences not all of which were related to her disability. The clamant was not giving independent delivery to clients. The claimant was waiting for test results. The nature of her condition was that her pain level fluctuated varied throughout the day. From the findings at the preliminary hearing the claimant's pain level was between level 5 and level 10. To manage the pain the claimant was taking pain relief which had side effects. The level 10 pain could last about three hours. At this level, the claimant could not function normally, concentrate or continue with normal activities and tasks. Level 4 was low grade discomfort which interfered with normal functioning but would not stop the claimant carrying out normal activities or duties. At level 6, the pain was too distracting for the claimant to drive to work.

125. The Tribunal did not consider that the claimant and Consultant A were in the same position in all material respects. A more appropriate comparator would have been a hypothetical comparator with the claimant's level of experience who did not have a disability but was experiencing serious fluctuating levels pain requiring them to take pain relief to the level that they were not fit to drive.

The Tribunal considered that if the hypothetical comparator was asked on an unplanned basis to work from home having experienced severe levels of pain and being unfit to drive the respondent would not agree to this for the sake of the hypothetical comparator's health and business efficiency. The Tribunal therefore concluded that any less favourable treatment was not because of the claimant's disability.

126. The Tribunal then turned to the discrimination claim under section 15 of the EqA and asked whether the claimant was treated unfavourably by telling her not to attend work or allowing her to work from home due to ill health; and instructing her not to complete client work?

127. The Tribunal did not find that the claimant was instructed not to complete client work. The Tribunal did find that the claimant was instructed not to attend work or work from home when she was ill.

128. The respondent argued that this was not unfavourable treatment but rather favourable as the claimant was not required to work while unwell. The Tribunal felt that the respondent had a point because if the respondent required the claimant to work while unwell that would be unfavourable.

129. It appeared to the Tribunal that the unfavourable treatment was being paid statutory sick pay in October 2018 because the claimant's absence was caused by her disability. This was not an argument pursued by the claimant.

130. Even if the Tribunal was wrong and it was unfavourable treatment to require the claimant not to work when unwell because of illness amounting to a disability the Tribunal considered that the protecting the health of an employee and ensuring the quality of work produced was not impaired by the claimant's health were legitimate aims.

131. As regards proportionality while the respondent could have supervised the claimant's work undertaken at home the Tribunal was mindful of the findings made at the preliminary hearing in relation to disability. The Tribunal appreciated that given the fluctuating pain experienced by the claimant and her inability to know what triggered the pain it would be difficult for the

respondent at short notice to manage what work the claimant would be undertaking from home. The Tribunal also considered that given the level of pain experience by the claimant and her mediation (causing lack of concentration; dizziness and difficulty driving) by allocating work to the claimant when she was ill risked placing her under pressure if her situation deteriorated during the day. The respondent did not insist that the claimant take sick leave but rather she was left to make an assessment about her health and fitness to drive. The Tribunal considered that it was understandable that if the claimant did not feel that she was able to drive then her ability to concentrate and carry out work at home for clients would also be affected. The Tribunal therefore concluded that it was a proportionate means of achieving a legitimate aim.

132. In the circumstances, The tribunal considered that the claim under section 15 of the EqA failed.

133. Next the Tribunal considered the claim of failure to make reasonable adjustments. The applicability of the duty to make reasonable adjustments is limited by the knowledge of the employer. The Tribunal had already concluded that the respondent had constructive knowledge of the claimant's disability around 26 September 2018. The Tribunal therefore focussed on the period between 26 September 2018 and the claimant's resignation on 30 October 2018.

134. The Tribunal referred to the PCPs relied on by the claimant of requiring to work standard operating hours; working from home; and not allowing staff to work from home when not in full health. The claimant argued that she was placed at a substantial disadvantage because she struggled to adhere to standard timekeeping expected and resulted in her having higher levels of absence as she had to take days off sick when she felt capable of working but had limitations because of her disability.

135. The Tribunal considered that the claimant's disability resulted in her having to take time off as sick leave because the respondent would not allow her to work from home when she was unfit. The Tribunal considered that from the

contemporaneous documentation the respondent was aware in September 2018 that the claimant might have a disability and of the requirement to make reasonable adjustments.

136. In late September/October 2018 there was uncertainty about the claimant's condition and how best to support her. The Tribunal's impression was that the respondent was open to consider adjustments and indeed did so. The respondent requested access to the claimant medical records and was planning to make a referral to occupational health.

137. Given that the claimant was undergoing a laparoscopy procedure in early October 2018 following which she had an infection the Tribunal did not consider that the delay in so doing was unreasonable particularly since the claimant was not at work. The respondent allowed the claimant to work from home when she was fit to do so and agreed to a phased to return to work. In view of the fluctuating nature of the claimant's pain the Tribunal was not convinced that working 10am to 6pm or allowing flexible working would have meant that the claimant did not need to take sick leave.

138. While the tests confirmed that the claimant did not have endometriosis when the returning to work in late October 2018, the claimant did not know if the abdominal pain was continuing as it was too early to say and that she was still taking pain relief. There was to be further medical investigation. It was the claimant who seemed at this stage to be reluctant to be referred to occupational health. The claimant had a phased return to work at the end of October 2018. There was no evidence to suggest the claimant was not able to drive albeit that she was still on medication. It was the respondent who proposed the phased return. No time restriction was imposed; the claimant also advised that she was planning on returning to work full time on 30 October 2018 although this did not happen as she resigned.

139. In the period from late September/October 2018, the Tribunal was not convinced that the PCPs upon which the claimant relied in fact placed her at a substantial disadvantage. The Tribunal considered that the claimant was unwell and did not know from hour to hour if her pain level would be such that

she was able to work. The proposed adjustments suggested by the claimant would not in the Tribunal's view allowed the claimant to work when she was not fit to do so.

140. The Tribunal therefore concluded that the claim under section 20 and 21 of the EqA must fail.

141. Turning to the claim under section 26 of the EqA, in order to succeed with this claim, the respondent had to engage in unwanted conduct and that conduct related to a disability.

142. The Tribunal did not find that the claimant was accused of lying in either of the telephone conversation on 27 September 2018 or the discussion on 25 October 2018. The Tribunal did not find that Mrs Carswell withheld the details surrounding pay; and did not provide the claimant with a payslip in October 2018. The Tribunal did not find that the claimant was moved as project manager in September 2018.

143. The Tribunal considered that Mrs Carswell did not say that the claimant was a disappointment on 25 October 2018 although it accepted that that was what the claimant believed was said. The Tribunal found that Mrs Maclean-Bristol did not issue the final payslip or pay in line with procedure.

144. The Tribunal accepted that the comments made by Mrs Carswell on 27 September 2018 and 25 October 2018 were unwanted. The Tribunal was not satisfied that they related to a disability. Rather, they were of Mrs Carswell's understanding and interpretation of what had happened and the claimant's failure to follow the process despite repeated requests to do so. The Tribunal had no hesitation in concluding that it was not Mrs Carswell's intention for the claimant to feel intimated or that there was a hostile degrading humiliating or offensive environment. The Tribunal appreciated that while the claimant was upset by the comments when viewed objectively, the Tribunal did not consider that it was reasonable for the claimant to feel that way. Although part of the management team Mrs Carswell was a fellow employee who doing her best to support the claimant at a time when the claimant was understandably worried and emotional. The claimant knew that Mrs Maclean-Bristol was not

office based. The claimant also knew that Mrs Carswell was seeking professional advice and the claimant was not the only employment with serious health issues.

145. In relation to the allegation of withholding information concerning final pay and failing to issue the final payslip, the Tribunal accepted that the lack of urgency on the respondent's part was unwanted conduct. The Tribunal did not consider that this related to any disability. It appeared to the Tribunal that much of the delay related to Mrs Maclean-Bristol being out of the country and Mr Donald being involved in the claimant's grievance where there was hope at least on his part that the claimant would reconsider her position and return to the business.

146. In all the circumstances, the Tribunal concluded that the claim under section 26 must fail.

147. Having reached the conclusion that it did, the tribunal did not consider it necessary to move onto consider the issue of remedy.

Employment Judge: S MacLean
Date of Judgement: 12 March 2020

Entered in Register,
Copied to Parties: 16 March 2020