Case Number: 3334925/2018

EMPLOYMENT TRIBUNALS

Claimant Mrs Maria Sandford

Respondent Harwood Hutton Limited

HEARD AT: AMERSHAM **ON**: 11 to 14 August 2020 and on 17 August 2020 (in Chambers)

BEFORE: Employment Judge J Lewis
Mrs J Smith
Mr S Bury

Representation

For the Claimant: In person (assisted by her husband Mr Sandford)

For the Respondent: Mr Perry (Counsel)

JUDGMENT

1. The claim of direct disability discrimination fails and is dismissed.

REASONS

1. This was a full merits hearing of the Claimant's claim of direct associative disability discrimination. The Tribunal heard evidence from the Claimant and, on behalf of the Respondent, from Andrew Parry (HR Manager), Jonny Hague (Associate Director), David Jones (Director) and, by Cloud Video Platform, John Brace (Managing Director). We also considered the witness statement of Nicola Davies, and a statement from the Claimant's husband, Mr Sandford, of 11 October 2019 (albeit this dealt with the issue of disability which was conceded. At the outset of the hearing Mr Perry for the Respondent made clear that no point was taken that less weight should be given to Ms Davies' statement by reason of the witness not being called to give oral evidence.

2. We also received and considered written closing submissions from both the Claimant and the Respondent. On 17 August 2018 we received a further email from the Respondent's counsel clarifying his submissions on the law, and we considered this, together with an email in reply from the Claimant.

The Issues

3. The issues to be determined were clarified and set out in the Record of a Preliminary Hearing ("**PH**") on 16 August 2019. The parties confirmed that this accurately set out the issues, save that since the PH the Respondent had conceded that the Claimant's husband was disabled at the relevant time.

4. There was some discussion at the outset as to the characteristics of a hypothetical comparator. For the Respondent it was said that the relevant comparator was someone with the Claimant's length of service, with the same performance record, but not married to someone who had a disability. On the issue of knowledge of disability it was clarified that the Respondent's case is that there must be knowledge of the three aspects of impairment; substantial impact on day to day activities, that the effect is long term or likely to be long term and connected to the impairment.

Material facts

5. The Respondent is a Chartered Accountancy business. The Claimant commenced employment with the Respondent on 12 September 2016. She was employed as a secretary providing administrative and secretarial services to the Respondent's Private Client Department ("**PCD**"). It was a job share role, with the Claimant working three days a week (on Mondays, Thursdays and Fridays) and Emma King working on Tuesdays and Wednesdays. Ms King was a long serving employee, having been with the Respondent for many years by the time of the Claimant's dismissal.

6. Initially the Claimant reported to Cathy Rouse and then, following Ms Rouse's departure in August 2017, Nicola Davies, manager of the PCD.

Probation period

7. There was a three month probationary period. This was extended to the end of January 2017, but the Claimant was informed in January 2017 that it had been successfully completed, as confirmed by a letter dated 19 January 2017.

8. There was some dispute as to the reason for extending the probation period and as to what the Claimant was told in relation to this. The Respondent's case was that it was extended due to poor performance and that the reasons were correctly evidenced by a letter on file from Ms Rouse to the Claimant of 15 December 2016, albeit that it was not clear that the letter had in fact been provided to the Claimant. The letter recorded that it had been discussed, at a meeting between the Claimant and Ms Rouse on 8 December 2018, that Ms Rouse was dissatisfied with certain areas of the Claimant's performance, that she was not fully conversant with all the tasks required of her, such as billing, and that the extension of time would give her the opportunity to address the issues in relation to performance.

9. The Claimant's contention was that she could not recall any mention of poor performance and that the discussion had only been that the extension would

afford additional time to look into whether Emma King would be willing to move the days on which she worked to enable the Claimant to work on consecutive days.

10. We find that it is likely that the letter of 15 December 2018 is an accurate reflection of the reasons for extending the probation. The Claimant was unable to explain in oral evidence why the possibility of Ms King changing the days on which she worked explained the extension of the probation period. The Claimant said that working consecutive days would have made it easier for the Claimant to master the demands of the job more quickly. That implies that there was indeed still a question at that stage as to whether the Claimant's performance merited treating the probation as successfully completed. We take into account also that the Claimant's terms and conditions provided (at para 10(b)) that probation may be extended in the event that the Respondent was dissatisfied with her performance [**220**][1]. This was also consistent with the view expressed in Ms Davies' statement that the Claimant needed support and time when learning new things and her comment, when interviewed on 9 August 2018, that she was surprised at the Claimant passing the probation due to the length of time it took her to learn tasks. We conclude that, whether or not the concerns as to performance were fully discussed with the Claimant, and whether or not the draft letter of 15 December 2016 was ultimately provided to the Claimant, it is likely that it provides a record of the underlying concerns which led to the decision to extend the probation period.

11. In the Claimant's written response to the Grounds of Resistance the explanation given for the extension of the probation period had instead been so that she could consider whether she wanted to remain with the Respondent, and that the extension would mean that she could still leave with just a week's notice. That was not an explanation provided when asked about this in oral evidence. It may well have been something that was also said in the context of extending the probation period. But given the terms of the letter on file of 15 December 2016 and the perceived connection between performance and whether the Claimant would be able to work on three consecutive days, we do not accept that it was the whole story.

Mr Sandford's stroke and disability

12. In April 2017 the Claimant's husband suffered a stroke which caused some damage to part of his brain and left him with impaired sight and with incidents of headaches and dizziness. He was not able to continue driving. The impact is more fully set out in his statement dated 11 October 2019. As noted above, the Respondent accepts that he was disabled within the meaning of the Equality Act 2010.

Working hours

13. Initially the Claimant's hours were from 8.30am to 5.30pm. After her husband's stroke she asked to be permitted to start work at 8am on the basis that she was arriving in earlier in any event because before work she would

[1] References in square brackets are to the Tribunal Bundle.

drive Mr Sandford to Hillingdon where he was working (unpaid) on management the work on a family property. With effect from 10 August 2017, she was permitted to start work at 8.00am, with the Claimant accruing time of in lieu for the extra half hour worked [**302**].

14. In relation to the change in August 2017, Ms Davies' evidence, which we accept, was that she had mentioned the proposed change in hours to Mr Brace at the end of a meeting when a number of things had been discussed and that he had not raised any concerns in relation to it. Indeed when she was interviewed following the Claimant's appeal against dismissal, she referred to this as supporting her belief that the allegation of discrimination was not well founded. There was a business logic for the Claimant coming in early to the PCD because the department was starting on its busy period in the lead up to tax return deadlines at the end of January. However in his evidence Mr Brace was adamant that he had not authorised the change. He said that he would not have done so as the office did not open until 8.30 and he would not have wanted staff to be paid for the period prior to this, explaining that it would be a question of supervision and contrary to policy. He did subsequently, in March 2018, authorise the Claimant taking time off in lieu which had been accumulated when she had worked the additional hours. But as he stated, he would have regarded that as appropriate irrespective of whether the additional hours of work had been properly authorised by Ms Davies because even if she did not have authority to permit this, that was not the Claimant's fault.

15. It was not clear from the evidence before us, whether the difference as between Mr Brace and Ms Davies was due to a misunderstanding between them or due to an error in Mr Brace's recollection given in confusing the position that in February 2018 when the Claimant moved to reception. But in any event, given that the Claimant was permitted to start work at 8am during her remaining time in the PCD and the explanation as to why he believed it would have been refused, we do not consider that this provides any basis for an adverse inference in relation to discrimination.

Performance review

16. In a performance review conducted by Ms Davies on 23 November 2017, the Claimant was given an overall rating of acceptable (defined as "meets role requirements") [**244-246**]. However in seven of out nine criteria she was rated as "good" (being one level below the top rating of outstanding). She was rated as "acceptable" in relation to "Technical Skills" and "Communication skills". Whilst those were both important skills given the Claimant's role, and particularly when she moved to work in reception, there was nothing in the appraisal to indicate to the Claimant that her performance was regarded at this stage as poor.

Move to reception

17. As a result of the need for maternity cover, with effect from Monday 5 February 2018, the Claimant (and her job share partner, Emma King) were required to work in the reception area, combining reception duties with their

continuing responsibilities for the PCD (albeit the latter responsibilities were much diminished in the period after 31 January and continuing until the Claimant's dismissal). She was told that this would be a temporary arrangement, which reflected the fact that it was maternity cover. In the Claimant's performance review it had been noted that after January 2018 she was required to become familiar with the reception system [**246**], and in relation to this it was noted she would need some help/ training re the phone system, reception duties and any new systems/ work as required.

18. Even prior to the move in February 2018 the Claimant's role included some reception work, which might arise when providing lunch time cover. It also included some work sorting post, though prior to February 2018 only for the PCD. Both duties were reflected in the job description given to the Claimant around the start of her employment [**212**]. There was some discussion before us as to whether the Respondent was contractually entitled to require the Claimant to move to the reception to provide maternity cover. We are satisfied that nothing turns on this for present purposes.

19. Upon moving to reception the Claimant was required to revert to working from 8.30am. This reflected that the core of her work at this time was reception work, and the Respondent considered that there was generally no need for a receptionist to be at work before then (though there might be exceptions, such as when needed to help set up a room for a meeting). Although on moving to reception the Claimant still had some work to do for the PCD which was to be combined with the reception work, the move coincided with a much less busy time of the year for the PCD.

20. Prior to the move to reception Ms Davies had been the Claimant's line manager. After the move Mr Parry, the HR Manager, had some responsibility because he had been responsible for organising the maternity cover. However there was some lack of clarity in her reporting line after the move. Together with the fact that Mr Parry only worked two days a week, and only one day (Thursday) when the Claimant worked, and that he was very busy with GDPR implementation and hoped that the Claimant would improve over time, that is likely to have contributed to a situation where, in the period which followed, concerns built up about the Claimant's performance without the extent of those concerns being clearly brought to her attention.

21. The Respondent's expectation of the Claimant was that she would pick up the reception requirements on the job. She had a detailed set of instructions as to how post was to be dealt with. Other duties were set out in a spreadsheet entitled maternity cover arrangements which had been drawn up by Mr Parry in December 2017. We accept that the spreadsheet reflected the duties which the Respondent expected to be performed, although the spreadsheet itself was not provided to the Claimant.

22. The move to working on the reception took the Claimant far outside her comfort zone. There was also a mis-match of expectations in relation to the demands of the role and the nature of training required. The Claimant's view was that she was placed under a heavy burden because, in addition to taking

on the maternity leave cover on reception, she still had her existing duties with the PCD. In addition in contrast to the work in the PCD she had to cope with the constant interruptions that went along with working on reception including answering calls, people coming in and out, and a variety of people coming up to her on reception, and dealing with post. In addition she considered she was placed under pressure due to a large number of absences of other reception/ secretarial staff over the period. She also took the view that there were various tasks for which she considered she had not be trained or not had adequate training.

23. The Respondent's senior management saw things differently. Because of the drop off of work after 31 January, they did not regard it as problematic that the Claimant still had her responsibilities with the PCD. In any event they considered that in a small business it was necessary to make best use of available resources and for staff to be able to play their part in meeting the demands and to adapt. They considered that it ought to have been possible to pick up the requirements of the receptionist role quickly through on the job training. They came to the view that there were concerns as to Claimant being slow in picking up her responsibilities, and concerns as to her attitude and how she interacted with clients when on reception. Whilst the Claimant felt she needed to get her head down to make progress with her work, there was a perception that she needed to be more attentive with clients coming in and out of reception. The Claimant stated in her response to the Grounds of Resistance that she was sorry that she was not a "chatty" 30 year old blonde with the clients on the reception because, initially, she did not know them and she was always concerned about keeping on top of her work. But that mischaracterised the Respondent's concern. As Mr Jones explained, it was important to be attentive to the clients, to make eye contact with them and smile and to give them, as he put it, a "good feeling" when coming to or leaving the premises. On one occasion he did speak to her to explain this.

24. Prior to formally starting in reception, the Claimant spent some time working there on Thursday 1 February 2018. Later that day, Emily Larter (later Emily Hulkes)) sent an email to Andrew Parry asking for guidance on how to help the Claimant and Ms King with the transition. Ms Larter was an experienced receptionist who worked five days a week. There were two reception desks, facing each other. Subject to any absences, Ms Larter would therefore generally be present working on the other reception desk when the Claimant was at work. In her email of 1 February 2018 Ms Larter noted that whilst it was early days, the Claimant had been overwhelmed that day just doing the post and answering calls. In his response, Mr Parry identified two other secretaries who might be able to provide support. [**246(1)**] In replying on 5 February 2018, Ms Larter commented that "Friday wasn't that great" (indicating that the Claimant had also spent some time working on reception on 2 February 2018). This was very early in the Claimant's time based on the reception, and indeed before the planned start date in that role, but concerns about the Claimant's performance continued after this.

The Post

25. One particular concern was as to the length of time it took the Claimant to deal with the duties in relation to post. There were a series of detailed instructions as to what was to be done in relation to this. However it would take the Claimant sometimes up to three hours to deal with this, and she was perceived as taking a very long time to deal with it and Mr Brace believed the work was also not being done correctly.

26. Following a discussion with Mr Parry in relation to some of the concerns, including in relation to the post, on 16 February 2018 the Claimant sent him an email, attaching the list with guidance as what needed to be done in relation to opening and dealing with the post, and setting out her suggestions for how to deal with this [**247**]. The Claimant's suggestion was essentially that whilst it would be the receptionist's role to sort the post by reference to name of the responsible person's secretary, each secretary would then decide what to do with it [**247**]. Mr Parry was not impressed with this suggestion, which he regarded as essentially passing the work to others rather than dealing with the issue. Mr Brace similarly formed the view that the Claimant had been seeking to offload work. There was no response to the Claimant's suggestion, and as such that view of it was not relayed to her and she had no opportunity to respond to it. But we accept that it was their genuine belief.

Breakfast meeting and Emily Larter feedback

27. There was then an internal complaint about the Claimant on Thursday 22 February 2018 where it was felt she had failed to help out in setting up a breakfast meeting. Emily Larter had emailed the Claimant at 5.17pm on Tuesday 20 February 2018, telling her of a breakfast meeting starting at 8.30am and amongst other things, asking her to help if the food had not been set up before she got in [**248(5)**]. Jo Phillips forwarded this to Mr Parry noting that she assumed that Mr Brace would have told him about this. Since Ms Phillips was Mr Brace's PA, the matter would have been brought to Mr Brace's attention. The email had been sent on a non-working day for the Claimant. In that context Mr Parry replied asking whether she would have seen it. Ms Phillips replied that the Claimant would have received it that morning as she had been in at 8am. She said that when she saw her at 8.20am the Claimant's machine was on so she would have seen it and that even if she had not read the email:

> "her response and unhelpful attitude towards Andeep was terrible." [**248(5)**]

28. The Claimant's evidence was that in fact she had come early to a flurry of people setting up, and she had not known what was going on. Though the first thing she did was switch on her computer, she had not seen the email, which had been sent on a day when she had not been at work. She said that she had been reprimanded by another member of staff when she had been helping out at 8.15am in preparing for the breakfast meeting. However given the contemporaneous evidence in Ms Phillips' email, we consider it is

unlikely that the Claimant was helping out at the time she was reprimanded. Whilst the Claimant was upset at being reprimanded that morning, there was no formal follow up with her and she did not put forward her perspective on what had happened.

29. On the same morning, 22 February 2018, Emily Larter sent Mr Parry an email setting out comments on how the Claimant was performing more generally. She noted that the Claimant was becoming more confident dealing with the post but noted that it could be worth asking the other secretaries if what they were receiving was correct. However she also identified other respects in which the Claimant's performance was unsatisfactory. Amongst other matters, in relation to the headings of making drinks for clients and staff and welcoming clients, she commented "not making principle's drinks, not always offering". She also noted in relation to answering calls and taking messages that the "greeting could be friendlier, tends to not answer when doing the post." In relation to helping to organise rooms to be set up for internal meetings and events, the comment was, "not good".

30. At this stage therefore, two experienced members of the Respondent's secretarial/ reception staff had raised issues about the Claimant's attitude or performance, including the above damning comment by Ms Phillips about the Claimant's attitude on the morning of 22 February. We also accept Mr Parry's evidence that around a month or so later he had a meeting with Ms Larter in which she said that the problems were persisting.

31. Mr Brace had also heard comments from secretarial staff to the effect that the Claimant was not pulling her weight. This was consistent with the comments made by Ms Phillips and Ms Larter on 22 February. It was also consistent with comments made by Ms Larter when interviewed on 9 August 2018, following the Claimant's appeal hearing, which indicated that her concerns noted on 22 February had persisted. She commented that in her view the Claimant was not a good worker, that she became flustered easily and was short and unhelpful with clients over the phone, that she was unenthusiastic with clients and would not always offer them a drink when visiting reception [**284(2)**]. That is not to say that all the staff shared this view. Indeed following the Claimant's dismissal in July 2018, Ms King emailed her on 17 July 2018, expressing her outrage and saying that all the PCD were angry about it.

32. We add that in relation to making drinks, the Claimant noted that the coffee machine was often broken and that that indeed she had twice caused it to be repaired. We do not accept that this provides a full answer to the concerns that were raised. Mr Brace's perception was that even when (as he believed) the machine was working properly, the amount of time to produce a cup of coffee was excessive and embarrassing when in a meeting. Nor would it explain the criticism made by Ms Larter of not always offering drinks to clients when visiting reception.

26 February email

33. The Claimant's directors' held meetings once a month towards the end of the month. Although these were lengthy meetings (3 to 4 hours) no minutes were kept of them. It was left to individual directors to keep a record of their own action points. One of the regular agenda points was HR issues. The Claimant's performance came up in discussion in directors' meetings prior to June 2018. One of the directors who raised issues was Adam Stronach, a director and Head of the Forensic department. There was limited documentation before the Tribunal as to the basis of those concerns. But an email of 26 February 2018 from Emma Tredgett, who reported to Mr Stronach, provided an indication of some of the concerns. It was sent to the secretarial staff but copied to Mr Stronach, Mr Parry and Mr Brace. The email was sent in response to an email from Ms Phillips noting that Emma King now had a lot of time off until the end of March and that her work for Mr Tredgett and Mr Stronach would need covering and asking all to "muck in and help out when they ask" [**250**]. In her response Ms Tredgett reported that that morning she had asked for help getting a bill out, and noted that she had asked the Claimant for help. She said that she had just been to see the Claimant but that after looking at it a few times the Claimant had said she was struggling to raise the invoice and she also said that she would struggle to get it out by 2.30pm as she had the post to sort out.

34. In her evidence the Claimant said that she had also made the point to Ms Tredgett that she had not previously done work for Mr Stronach and had been left to cover the reception on her own due to unplanned absences. Only three out of seven secretarial staff were at work that day, and the other receptionist, Ms Larter, had been off work [**253**]. The Claimant also considered that the criticism was unfair because she had only finished the post at 3.15pm. She made a note to that effect on a copy of the email. She was not however asked about the matter at the time.

35. We accept that the email contributed to a negative impression of the Claimant's performance. Even if the Claimant had raised the point that she had not finished the post until 3.15pm, that would not have fully addressed the concern arising from her comment that she had been struggling to complete the invoice. Although in evidence the Claimant said that the invoice had a lot of handwriting, and was longer than invoices she did for the tax department, she also accepted that it involved using the same software and, indeed, she accepted that the process did not differ much from the process in dealing with invoices for the tax department. We accept Mr Jones' evidence that his view was that there should have been no difficulty completing the invoice relatively quickly given the available software. As he put it, it did not take a lot of time to do the invoices. It was a matter of a lack of willingness to be helpful; an attitude problem. We accept that it is likely that other directors, including Mr Stronach, regarded Mr Tredgett's comments as reflecting poorly on the Claimant and contributing to the perception that there was an attitude problem and, as Mr Brace put it, any request was "a bit too much".

9 April email

36. On 9 April 2018 Adam Stronach copied in the Claimant on an email to Emily Lynn in which he stated that if it was necessary to process changes to an annual confirmation statement for one of his clients, Ms Lynn should let the Claimant know. [**253(5)**]. The Claimant replied stating that if she was required to do anything in respect of Companies House that Mr Stronach should be aware that she was not familiar with this and would not know what to do. [**253(5)**]. Mr Stronach forwarded this to Mr Parry and Mr Brace, asking whether the Claimant was "still not trained on basic company secretarial procedures". Whilst the email commented on lack of training, we infer that it may have reflected or contributed to a sense of frustration with the Claimant. Despite her many years of secretarial experience, she was seen as still not carrying out the functions expected of the role and, as noted above, it seemed that any request was "a bit too much". As Mr Parry put it in his oral evidence, it was viewed as part of a pattern of the Claimant saying "I can't do this and I can't do that."

13 June email

37. On 13 June 2018 Ms Sandford emailed Mr Parry noting that Ms King was going to be off work for a number of days in June. She commented that she would not be able to cope with her shared work load as well as reception duties and that combining secretarial work and reception work had always been difficult to deal with. Whilst it was put to the Claimant that the email was consistent with the view that she was struggling with her role, we heard no specific evidence as to this having been passed to the directors, or as to any reliance upon it, and in those circumstances we give it little weight.

Claimant's dissatisfaction with reception role

38. The Claimant had not wanted to move to the reception area. She felt that she was placed under an unreasonable burden in combining two roles with what she regarded as inadequate training, and struggled with the demands of the role. She was told that if she needed any further assistance she should ask for one of the tax accountants or one of the directors secretaries if available and she was expected to learn on the job. However, as she said in her own evidence, she felt uncomfortable asking for help from others. She found the environment challenging with the constant interruptions due to the location of the reception and the need to respond to telephone calls and the time she found it took to deal with the post. We infer that, whether consciously or not, the Claimant's dissatisfaction with the move, the working environment in reception, the demands of the role and her view as to lack of training, is likely to have transmitted itself to the directors.

28 June 2018 Directors' Meeting

39. The question of the Claimant's continued employment was discussed at a directors' meeting on Thursday 28 June 2018. We accept Mr Jones' evidence that, against the context that the two year period for qualifying service was coming up, it was decided that it was time to make a decision

about the Claimant's employment, given that concerns as to her performance had already been discussed at previous directors' meetings and were continuing. The issues included concerns as to her demeanour and attitude (including as above the sense that any request was "a bit too much") and not being friendly and welcoming.

40. The Claimant would not have acquired qualifying service until 12 September 2018. However directors' meetings did not take place until the end of the month, and by the end of August 2018 the two year period would be very close. Mr Brace was adamant that qualifying service was not a factor in the decision. We prefer Mr Jones' evidence in that respect. Mr Brace's evidence was also contrary to Mr Parry's evidence that he raised the two year period with Mr Brace, and that this explained the process (or lack of it) followed. There were also some aspects of Mr Brace's evidence in relation to which we considered his recollection to be unreliable. Notably he referred to a discussion of client complaints at the directors' meeting on 28 June 2018. However there was no evidence of any client complaint until 2 July 2018 and, had there been any such prior complaint, we consider it likely that there would have been some note kept in relation to it. We conclude that his recollection was incorrect in this respect. Whilst the dismissal was for performance reasons, we infer that it was the approaching qualifying service that provides the explanation for not embarking on a formal performance process at that point.

41. In concluding that we accepted the decision of Mr Jones and Mr Brace that the decision was made at the directors' meeting on 28 June 2018, we took into account that, as we accept (being supported by his contemporaneous note to which we refer below), the decision to dismiss was communicated to Mr Parry on his next working day, being 3 July 2018. It follows that the decision had been made prior to the events of 9 July 2018 on which the Claimant placed reliance to which we also refer below. Whilst there was a client complaint received on 2 July 2018 which provided an alternative explanation for the decision to have been made by 3 July, there was little advantage to the Respondent in asserting that the decision had been made at the 28 June directors' meeting rather than in response to that client complaint.

42. We also took into account that it might have been expected that, prior to the meeting on 28 June 2018, the directors would specifically have consulted with those thought to be responsible for line managing the Claimant, whether that was regarded as being Ms Davies or Mr Parry. That was not done. Whilst it was poor practice not to do so, we accept Mr Jones' evidence that this was not considered necessary given that matters discussed at previous directors' meetings and the view that, by the nature of the Claimant's work on reception, the directors were in a position to form a view. In any event, we do not consider that the failure to consult more widely prior to the decision shows that there was no such decision taken on 28 June.

43. There was no evidence before us of any similar concerns in relation to Ms King, who the Claimant identified as a comparator. Indeed the Claimant's own evidence was that because Ms King knew the clients having been there

for ten years, that she would be more confident with them. Equally in relation to the concerns expressed by Ms Larter from the start as to how the Claimant was coping, the Claimant's contention was that Ms Larter was expecting someone like Ms King who knew the clients.

Complaint of 2 July 2018

44. On 2 July 2018 the Respondent received a client complaint in relation to the Claimant. This was relayed in an email from David Jones (one of the Respondent's directors) to Mr Brace, and copied to Mr Parry, sent at 10.23am on 2 July 2018. Mr Jones stated that a long-standing client had said that the Claimant was "not good for your business" and should not be on reception. He complained that the Claimant had said that Mr Jones had just walked past his desk and would not have logged on and had asked if the client could call back later rather than taking a message, but the client had told her to leave a message which she did. The client had also expressed dissatisfaction with a previous occasion when the Claimant had answered the phone but had not said why.

45. We accept Mr Jones' evidence that he regarded the matter as all the more serious because the client in question had been a client for about 18 years and had never complained about another member of staff before or since. Although the decision had already been made to dismiss, it had been left to Mr Brace as to when that would be effected. Mr Jones' view was that this did not always lead to matters being attended to quickly. In the meantime, given what he had been told, the matters raised by the client were of substantial concern. He took the view that, given what was said by the client, if it had happened on this occasion then, as he said in his email to Mr Brace, it was probably not an isolated incident. His view was that reception is a key part of the business; it is the first voice that the client hears and this needed to be a professional and friendly voice. It reinforced the concerns he already had as to the Claimant's approach and as to not being sufficiently attentive to clients when they were leaving the building.

46. The Claimant contended that this criticism of her conduct was unfair and that, on the contrary, the blame lay in part with Mr Jones and in part with the Respondent for not training her or providing her with a script on what to say. Her evidence was that that when the client initially called she checked the system which showed that Mr Jones had not yet arrived or logged on to his computer. She told the client that the system showed he had not yet arrived, that she had offered to take a message in response to which the client had asked Mr Jones to call him back, and she had then sent an email to this effect to Mr Jones (sent at 9.12am [**257**]). She had then seen Mr Jones walking through reception and she relayed this to the client. She told the client that he was not yet logged on to receive calls and that she would pass a message to Mr Jones to call him back. The client wanted to be put on hold but the Claimant understood that it was not possible to put the client through until he was logged on, and she therefore kept the client on hold until he logged on.

47. We note that the Claimant's account was contrary to that set out in the 2 July email, which indicated that, rather than offering to take a message, she had asked the client to call back later, and had only taken a message when he asked her to do so. Given the contemporaneous account recorded in the email of 2 July 2018, and the Claimant's own assertion in her statement that she was never given a script, we consider it is likely that, although the Claimant did ultimately send an email asking Mr Jones to call the client (and a subsequent email at 10.32am), the Claimant did indeed initially ask the client to call back later rather than offering to take a message. We accept the Respondent's contention that, for an experienced secretary such as the Claimant, it should not have required training or a script to realise that it was appropriate to offer to take a message.

48. In any event the Claimant did not give her version of events. Mr Jones went to speak to the Claimant to express his displeasure as to what had happened. The Claimant felt she did not have the opportunity to put her version of events forward. From the Respondent's perspective however the email provided the clearest evidence confirming the correctness of the decision to dismiss.

Mr Jones' discussion with Ms Davies

49. Mr Jones also went to speak to Ms Davies. He did so as a matter of courtesy given that he understood her to be the Claimant's line manager, and because he had heard by that Ms Davies had a high opinion of the Claimant and he wanted to check this. Mr Jones raised with her that she apparently thought that the Claimant was very good, and she responded that she did not know where Mr Jones had got that from. We consider that it is likely that there was indeed a discussion along these lines. We note that in Ms Davies' witness statement, whilst commenting that the Claimant was reliable when she knew what to do, she needed support and time when learning new things. Further when interviewed immediately after the Claimant's appeal, she commented that she was surprised at the Claimant passing her probation given the length of time it took her to learn tasks, that she was aware of her limitations, and that she would struggle with work on reception given the length of time it took her to learn new tasks.

50. Mr Jones' take away from the discussion was that Ms Davies would not be particularly worried by the decision that had been made to dismiss. It may be that Mr Jones did not specifically refer to such a decision having been made, but Ms Davies understood from the line of questioning that this was going to occur.

Mr Parry's involvement prior to dismissal

51. As noted above, Mr Parry's first day in the office, following the directors' meeting on Thursday 28 June 2018 and the events of 2 July 2018, was on 3 July 2018. He made a note of discussions from 3 July in a notebook which he started on that day. We reject the Claimant's challenge to the authenticity of those notes. We note that they were set out in a notebook (the original of which we inspected) which also dealt with other discussions and indeed

continued with notes relating to subsequent dates not of direct relevant to the claim. Had the notes been created after the event to support the case it might have been expected that they would make reference to the directors' meeting on 28 June or contain an express reference to the instruction to dismiss in the meeting with Mr Brace. They did not do so.

52. Mr Parry met with Mr Brace and was given instructions to dismiss the Claimant. Mr Parry's note recorded: "Performance on reception. AP speak to David, Adam, Jo and action soon."

53. We accept, read in the context of other entries in the notebook, that the reference to "action soon", meant to dismiss. Mr Parry was uncomfortable with proceeding directly to do so because proper steps towards a performance based dismissal, with what he referred to as the appropriate paper trail, had not been put in place. He also felt at least partly to blame for the fact that this issue had arisen. He had been aware of performance concerns and had failed properly to document these or to put in place any warnings.

54. In those circumstances Mr Parry told Mr Brace that he wanted to make some further enquiries first. He discussed with Mr Brace that he would first discuss with Mr Jones, Adam Stronach and Jo Phillips and would then action the dismissal. Mr Brace agreed. In the event he did not speak to either Mr Stronach or Mr Phillips. He ultimately concluded he did not need to do so on the basis that he could deal with the matter on the basis of having seen the client complaint email of 2 July.

55. Mr Parry spoke to Mr Jones on the same day. Mr Jones relayed that the Claimant was not good at her job and that Ms Davies agreed, and he noted that Ms Davies had said she did not know where he had got the idea that she thought the Claimant was very good. He agreed with Mr Parry that notice could be given to the Claimant either that Thursday or the following Thursday, given that this was the only day when Mr Parry and the Claimant both worked, and authorised the Claimant's notice being served on garden leave. We note that whilst Mr Parry's note of his meeting with Mr Brace was somewhat ambiguous as to the dismissal decision having been made, it is given more clarity by the note of what was discuss with Mr Jones.

56. It was agreed on 8 July, in discussion with Mr Brace, that the dismissal would be effected in the following week and they would hold off on action to recruit another secretary until then. There was a further discussion between them on 10 July 2018 where it was agreed that Mr Parry would prepare a dismissal letter and there was agreement and approval on what it would cover. He also made a note on 8 July 2018 recording that he inferred that another of the directors, Keir Singleton, had told Jonny Hague of the dismissal. Mr Hague was an Associate Director, being the most senior director below board level, and who was selected by Mr Parry to hear the appeal.

57. In the course of the discussions with Mr Brace, Mr Parry raised his concerns about not following due process with the Claimant for a performance based

dismissal. However he concluded that there were legitimate concerns and the Claimant was coming up to two years' service. Whilst the Claimant had only been temporarily posted in the reception, the concern as to how she interacted with clients was seen as being of wider concern. Mr Parry was satisfied that due process could be cut short because the Claimant was approaching two years' service.

9 July permission to leave work

58. On Monday 9 July 2018 the Claimant received a call whilst at work from her husband asking if she would come to collect him. She was immediately concerned as he had not previously called her on her mobile at work and he had recently been having dizzy spells and severe headaches. She told Mr Brace of the call and he said that she should go. She then left. There was no mention of any requirement to come back in the afternoon and she did not do so.

59. Mr Brace was aware that the Claimant's husband had had a stroke over a year before and that as a result he was not permitted to drive and that the Claimant would take him to work, though she did not pick him up from work. He had on a couple of occasions, whilst the Claimant worked in reception, asked the Claimant about her husband's health.

60. The Claimant's contention was that Mr Brace's statement that the Claimant should "go" was said in an angry tone. We reject that evidence. The statement that the Claimant should go was consistent with simply responding that the she could go to her husband straight away. That was indeed what the Claimant indicated Mr Brace had said in her appeal letter of 18 July 2018. She stated that:

> "As you know, after the phone call from my husband on Monday 9th July, I informed you that he was suffering from a dizzy spell and asked if I could take him home. You said that I could go to him straight away, which I did." [**264**]

61. Although there was an allegation of discrimination, there was therefore no suggestion that Mr Brace had reacted angrily or even inappropriately. Nor did the Claimant allege at any time prior to the Claim Form that the word had been uttered in an angry tone. It was not mentioned in her written submission for her appeal (which mentioned only that she had obtained permission to leave) [**265**], nor in the appeal itself, nor in her letters to Mr Brace or Mr Parry prior to dismissal where the allegation of discrimination was made. Indeed in the appeal hearing she said that she was not given the impression as to the alleged discriminatory reason for dismissal by any verbal communication by anyone within the firm [**284**]. It was suggested in closing submissions that the Claimant did not mention Mr Brace's alleged angry response because there was nothing to be gained from starting a "slanging match" in circumstances where she wanted her job back. We do not accept that explanation. Not only was it not an explanation provided by the Claimant when asked about this when she gave evidence, it carries little credibility when set against the fact that the Claimant made a clear allegation

of discrimination against Mr Brace. We also note that there was no suggestion, contrary to what might have been expected if Mr Brace was angry with the Claimant, of her being required to make up the time or have it removed from her TOIL allowance, and nor was there was any loss of pay, nor any requirement to return to the office that afternoon.

Dismissal

62. Mr Parry met the Claimant on 12 July 2018 and informed her of the dismissal. The decision to do so had already been made prior to 9 July 2018. He informed her that a partner was upset because there had been a client complaint, and he mentioned the way she had handled a telephone call, or possibly telephone calls. He did not name the partner or the client, although the Claimant might have guessed what this referred to given that Mr Jones had spoken to her on 2 July about the issue that day. Whilst there may have been some brief mention of performance issues more generally, the only instance given at that time was the reference to the way the telephone call or calls were handled and that a partner was upset about this.

63. Whilst the 2 July complaint post-dated the decision to dismiss, so far as Mr Parry was concerned, having been given the task of effecting the dismissal, it was convenient to refer to the client complaint as the clearest evidence to substantiate the dissatisfaction. He did not want to get into questions as to the performance concerns and did not consider there was a need to do so given that the Claimant did not have qualifying service.

64. The letter of dismissal made no reference to the reason for the dismissal. Indeed the contention that the dismissal was on grounds of poor performance was not set out in writing until the Grounds of Resistance. We accept Mr Parry's evidence that the reason he chose not to include the reasons in the dismissal letter was that he did not want to get into a discussion as to the performance reasons, so as to seek to avoid the time going through the basis for that conclusion in circumstances where, in order to effect a dismissal before the Claimant accrued qualifying service, there had been a failure to put in place an adequate paper trial such as to justify a fair dismissal.

Correspondence in advance of appeal hearing

65. By a letter to John Brace dated 18 July 2018 the Claimant stated her intention to appeal, stating that she believed that he had discriminated against her because of her husband's condition [**264**]. After some chasing correspondence, ultimately an appeal hearing was arranged which took place on 9 August 2018, chaired by Jonny Hague. He was selected as the most senior employee below the Board. There could not be a Board member deciding the appeal because they had been party to the decision to dismiss. No consideration was given to an external appointment.

66. The Claimant was informed by a letter of 31 July 2018 that the appeal would be conducted by Mr Hague, and of her right to be accompanied, and it was noted that the appeal would deal with the ground of appeal that the Claimant

had been discriminated against because of her husband. The appeal was originally set for 7 August 2018, but in response to the Claimant's objection (by emailed letter of 1 August 2018) that this was on a day when she did not work, it was moved to 9 August 2018. In response to a complaint in the 7 August 2018 letter that there had been no explanation of what was expected from the Claimant at the meeting, Mr Parry replied on 2 August 2018 explaining that the meeting was intended to allow her to detail the grounds of her appeal. He stated that the manager would consider what she presented and then be in a position to make a determination on the complaint that the Respondent had discriminated against her.

67. Despite having been told that the appeal would be heard by Mr Hague, the Claimant wrote on 2 August 2018 saying that she assumed that the appeal would be heard by Ms Davies and also stated that she assumed that the meeting would be an informal meeting on the basis that it was the first steps in the process. She also asked why the employment had been terminated without any warning and asked to be accompanied by a friend or family. Mr Parry replied on 7 August reiterating that he had already set out who was to hear the appeal and who could accompany her, and that it was the meeting to her hear the appeal, rather than merely being the informal stage.

68. By a letter to Mr Brace of 2 August 2018 the Claimant asked amongst other things to be told of the reason for her dismissal [**278**]. On advice from Mr Parry, Mr Brace replied by letter of 6 August 2018 saying he was not the person dealing with it and referred her to Mr Parry so as to avoid having two channels of communication [**282**]. The same question was asked in a letter to Mr Parry of 2 August 2018 [**281**]. Mr Parry replied saying he would not respond to the point as to whether he denied the Respondent had discriminated, on the basis that the manager hearing the appeal had to remain impartial and form an opinion after the appeal meeting. Essentially he took the approach that these were matters to be addressed in the appeal hearing. The approach of failing to provide reasons for dismissal in writing was unsatisfactory. We infer that it was influenced by wanting to focus on the narrow grounds of appeal in relation to alleged discrimination rather than having to deal with wider questions of justifying the decision in relation to performance that had been made by the directors, given the volume of correspondence he was receiving from the Claimant and where he was conscious that a proper paper trail evidencing the performance issues had not been put in place.

Appeal hearing

69. The appeal hearing took place on 9 August 2018 before Mr Hague. Ms Davies attended as the Claimant's companion. Mr Parry was also in attendance. It was part of the Claimant's complaint that Ms Davies was not permitted to speak. However the Claimant did not have a clear recollection of what was said and we accept that it was in fact said that Ms Davies could not answer for her.

70. At the appeal hearing the Claimant presented a written statement in support of the appeal. There were only a few follow up questions. The Claimant did

not expressly repeat the request to be told the reason for the appeal. Mr Hague had not seen the prior correspondence to Mr Parry and Mr Brace and was not aware that the Claimant had not been provided with the reasons. He had taken advice prior to the appeal from Mr Parry and his father (who he described as an HR directors with 40 years' experience). Mr Parry steered him towards focussing on the particular grounds of appeal advanced. Towards the end of the appeal hearing the Claimant did raise the point as to the lack of any explanation for her dismissal other than the discriminatory ground she alleged. That was not wholly correct given what had been said to the Claimant by Mr Parry on 12 July. Mr Parry considered interjecting in order to point this out, but hesitated in doing so given that his role was limited to being notetaker, and the meeting concluded soon after.

Post-appeal investigation and decision

71. Following the appeal, Mr Hague carried out interviews with Mr Brace, Ms Davies, Emily Hulks (née Larter), Mr Parry and Mr Jones. Mr Brace said that the Claimant's dismissal was due to unsatisfactory work, inability to grasp work and client complaints. In relation to unsatisfactory work he referred to an issue where a credit note was raised and sent to the wrong client for the wrong amount. There was no evidence of that credit note before us, and no explanation as to how it could have come about that it was sent out without the accountant concerned also being to blame given that the process was for the invoice or credit note to be sent back to the accountant for checking before being sent out. Further, as set out above, the only client complaint in evidence was made subsequent to the decision to dismiss. We infer that, whilst the performance issues largely centred on issues as to attitude, demeanour and attentiveness to clients and more generally that the Claimant was struggling in the role, it was more difficult to pick out specific errors, and hence the temptation to rely on the client complaint even though it post-dated the dismissal. There was also an element of misunderstanding in Mr Brace's comment that the same client had complained twice. In reality the client had not complained before, but had indicated that there had been a previous occasion when he was not happy with how the Claimant had answered the phone.

72. Mr Hague concluded that the decision had been made before 9 July and was not discriminatory. He referred to a pattern of poor performance. The appeal decision letter, dated 13 August 2018, rejected the appeal though it still did not state the reasons for dismissal, despite the fact that his own note of the appeal determination had recorded his finding based on the interviews he conducted that there was a pattern of poor performance by the Claimant. Instead the appeal letter focussed on rejection of the ground of appeal as to discrimination without any express reference to the performance issues. He referred only to having heard unspecified evidence from a number of (unidentified) sources which supported that the decision to dismiss had been made at a directors' meeting on 28 June 2018 [**285**] He had been minded to deal with the reasons more fully but was steered away from doing so by Mr Parry.

DSAR

73. On 20 August 2018, the Claimant made a data subject access request ("**DSAR**"), which Mr Parry acknowledged on 23 August 2018. Mr Parry then asked Mr Hague to anonymise his note of the appeal determination, which Mr Hague did on 24 August 2018 by deleting the Claimant's name. Given the coincidence of timing with the receipt of the DSAR request, we infer that he did this so as to avoid disclosing the appeal determination document (although in fact the document still contained the Claimant's initials), consistently with the approach of not providing more material than necessary in the belief that this would lead to fewer time-consuming questions. Mr Parry also asked Mr Hague to make an abbreviated file note, which he did omitting references to the reason for the dismissal. Mr Parry then sent a reply to the DSAR on 28 August 2018 disclosing the abbreviated file note. He also disclosed the email of 2 July 2018 described as being the only written communication relating to the Claimant and the decision to terminate the employment. Again, we infer that Mr Parry's objective in replying this way was to try to minimise further questions, by withholding the full appeal determination note and providing the 2 July 2018 email as the clearest written evidence relating to the performance concerns, and which was the matter he had alluded to when verbally communicating the reasons for dismissal.

Authenticity of appeal determination document

74. The Claimant challenged the authenticity of Mr Hague's document, headed "Determination", setting out his findings in relation to the appeal. We accept Mr Hague's evidence that the note was indeed made on 9 August 2018, with minor revisions on 10 August 2018, and then the further change on around 24 August when he was asked to anonymise the note. We accept that the document was kept on Mr Hague's own internal private drive. That might explain (though it does not excuse) the fact that the document was provided about a month after the initial list of documents was provided. Mr Hague's evidence about the document was consistent with the metadata, and we heard no evidence sufficient to persuade us that those detailed had been altered.

Relevant law

75. Section 13(1) of the Equality Act 2010 ("**EqA 2010**") sets out the following definition of direct discrimination:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

76. The provision therefore covers associative discrimination. It is sufficient if the protected characteristic was a significant influence in the less favourable treatment, in the sense of being an influence which is more than trivial: see **Villaba v Merrill Lynch & Co Inc** [2007] ICR 469 (EAT) at pars 78 to 82 (discussing the effect of the decision in **Nagarajan v London Regional**

Transport [1978] ICR 877 (HL) and **Igen v Wong** [2005] ICR 931 (CA)). In his email received on 17 August 2020 Mr Perry for the Respondent maintained, relying on the Court of Appeal's decision in **O'Neill v Governors of St More Roman Catholic Voluntary Aided Upper School** [1997] ICR 33 (CA), that the test to be applied is whether the protected characteristic was "an effective cause" of the discrimination. However nothing turns on this proposition in the light of his concession that any influence which was more than a trivial influence is to be regarded as an effective cause.

77. S.23(1) EqA 2010 provides that the comparison for the purposes of determining less favourable treatment must be such that there is no material difference between the circumstances relating to each case. The ACAS Code of Practice on Employment, at paragraph 3.23, states that it is not necessary for the circumstances of the Claimant and the comparator to be identical in every way (apart from the association with a disabled person). What matters is that the circumstances of the worker are the same or nearly the same for the worker and the comparator.

78. Section 136 EqA 2010 provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person has contravened (in this case) s.13 EqA 2010, the Tribunal must find that there has been such a breach unless the Respondent shows that it did not contravene that provision. Essentially this operates to shift the burden of proof if the Claimant establishes facts from which the Tribunal could infer that there has been discrimination.

79. However in some cases, particularly where reliance is placed on a hypothetical comparator, it may be appropriate to proceed directly with focussing on the reasons for the treatment provided that the burden is still placed on the Respondent to explain the treatment. That arises because it may not be possible to determine the issue of whether there was less favourable treatment without also dealing with the issue of the reason for the treatment, which may be necessary to determine how the hypothetical comparator would have been treated. See **Brown v Croydon LBC** [2007] ICR 909 (CA) at para 36. **Chief Constable of Kent Constabulary v Bowler** UKEAT/0216/16/RN, 22 March 2017 at para 23.

80. As explained in **Bowler** at para 97:

> "Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic. That does not mean that the fact of unreasonable treatment is irrelevant. As Elias P (as he then was) explained in **Bahl v the Law Society** [2003] IRLR 640 (at [101]).
>
> > 'The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given

> by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.'"

81. There was also an issue as to whether the Respondent could not be said to have subjected the Claimant to direct disability discrimination on that basis that it was not accepted that those who made the decision to dismiss had sufficient knowledge of dismissal. We were referred to the decisions in **Urso v Department of Work and Pensions** [2017] IRLR 304 (EAT) and **Gallop v Newport City Council** [2014] IRLR 211 (CA). In **Urso**, in the context of claims including direct disability discrimination, it was said that the focus should be on whether there was sufficient knowledge of the symptoms and effects of the impairment rather than its cause. In his further submissions received on 17 August 2020, Mr Perry for the Respondent accepted that it would be sufficient if knowledge was constructive rather than actual (referring to **Gallop v Newport City Council** [2014] IRLR 211 (CA) at paras 6, 41).

Discussion

82. We are satisfied that there are no circumstances from which it is open to us to find that the burden of proof shifts. As to this:

82.1 We do not regard Emma King as an exact comparator and nor do we gain assistance by comparison with her situation as an evidential comparator. Whilst her circumstances were similar in the sense that she was carrying out the same job (as a job share), there were important and material differences in that (a) she had qualifying service and (b) there was no evidence of any performance concerns in Ms King's case. (The Respondent did not advance a case that the hypothetical comparator must be one who might also need to take time off or to do so at short notice but not because of a disabled dependent, but nothing turns on this on our factual findings.)

82.2 Whilst the decision to dismiss was communicated on the working day following the Claimant leaving when her husband called, the decision had already been made prior to this.

82.3 We have given careful consideration to the failure to set out in writing prior to the Grounds of Resistance that the dismissal was performance related. We do not accept that any adverse inference can be drawn from this in the light of our positive findings of fact set out above as to

the reasons for dismissal. Although not communicated to the Claimant, the performance basis for the decision was evidenced in the interviews conducted for the appeal and the record of the appeal determination. It was also consistent with Mr Parry's contemporaneous note which made reference to the "performance on reception" and the discussion with Mr Jones that the Claimant was not good at her job. We conclude that the reason for not providing a written explanation of the reasons for dismissal was because Mr Parry wished to avoid getting into the need to justify the performance reasons in circumstances where there had not been an adequate paper trail in place and then saw the opportunity to maintain that line by responding the narrow grounds on which the appeal against dismissal was advanced.

82.4 Equally we have considered whether it is open to us to draw an adverse inference from the failure to follow a fair process in relation to the dismissal on grounds of performance, not only by not putting in place a system of warnings but also not putting the substance of the allegations to the Claimant and giving her an opportunity to answer them. We have concluded that no such inference can be drawn. We accept that the Respondent genuinely considered that there were performance concerns as set out in our findings of fact, and that the failure to do more to address this was first because of some confusion as to line responsibility and limits on Mr Parry's time, and then due to the Claimant approaching qualifying service. Nor do we consider that any failings in process at the appeal stage, including that the appeal was heard by someone more junior than those who had made the decision to dismiss, provides any basis for an adverse inference. We accept that in a small firm there was no one more senior to hear the appeal, that no consideration was given to an external appointment, and that there was a genuine investigation carried out by Mr Hague in relation to the ground of appeal advanced. Even if we had considered that lack of process had been sufficient to shift the burden of proof, we would have been satisfied that the treatment was explained for non-discriminatory reasons.

82.5 The Claimant invited us to draw an adverse inference on the basis that she said that the criticisms of performance were not justified and that she was put under unnecessary pressure due to staff shortages. We reject that contention. We have found that the Respondent's view of the Claimant's performance was genuine. Whether or not the concerns were well founded, we see no basis for any inference that this was connected in any way to the Claimant's husband's disability.

82.6 The Claimant also invited us to draw inferences from the fact that other witnesses who might have been called to substantiate some of the allegations, such as other directors or other secretarial staff, were not called. We reject that contention. The witnesses called were appropriate, and it is a matter for the Respondent to assess the witnesses required to establish its case.

82.7 The Claimant also invited us to draw an inference on the basis that she said that the Respondent had refused to go to conciliation. Whether or not that was the case, we see no proper basis on which it could found an adverse inference as to discrimination.

83. In those circumstances we are not particularly assisted by seeking to construct a hypothetical comparator. We have been able to make positive findings that the reason for dismissal was the belief that the Claimant was performing poorly and that it was not to influenced at all by the fact that the Claimant's husband was disabled or any factors related to this. We also reject the Claimant's case that she was subjected to unfavourable treatment (or less favourable treatment than any hypothetical comparator) by Mr Brace on 9 July. He did not react angrily; he immediately permitted the Claimant to leave and did not require her to return that afternoon.

84. We therefore conclude that the Claimant was not treated less favourably in any of the respects alleged by reason of her husband's disability. Her husband's situation played no part in the reason for the notice of dismissal or dismissal and was only relevant on 9 July in the Claimant's favour in that it was a reason for the agreement to her request to leave.

85. In the Claimant's email of 17 August 2020 she sought to advance further assertions as to what had been discussed with Ms Rouse relevant to her husband's condition, including some matters that had not been raised in the Claimant's evidence. She also said that she would need further time to take advice on the legal points made by Mr Perry if they are significant enough to affect the outcome of her claim. They are not. There were two legal points made in Mr Perry's email. One related to the test of causation, and in particular whether it could be framed on the basis on an effective cause test. Nothing turns on this given that we have found that the dismissal was not influenced at all by anything to do with the Claimant's husband. Mr Perry's other submission related to knowledge of disability. However it follows from our conclusion as to causation that the issue as to whether the Respondent had actual or constructive knowledge of disability does not arise.

Conclusion

86. Accordingly the Claimant's claim of disability discrimination fails and is dismissed.

87. Whilst we therefore reject the Claimant's claim, we would add that the way in which the Respondent dealt with the matter, particularly, once the Claimant pressed for an explanation for the dismissal, does it no credit. So far as concerns the process (or lack of it) leading up to dismissal, we accept that it is not uncommon for an employer to choose not to follow full procedures where an employee lacks qualifying service. However there was a lack of clarity in warning the Claimant of the serious concerns as to her performance and what was required of her, and in implementing appropriate performance management. The Respondent itself raised the point in evidence as to not wanting to lose trained staff, yet contributed to this by these failings. Further, once the Claimant had raised the allegation of discrimination, and in the light

of the proximity of the events of 9 July and the dismissal, the matter cried out for a proper explanation of the reasons for dismissal. By persistently refusing to offer an explanation, despite the express requests, the Respondent unnecessarily gave the impression that there was something to hide, which may have gone some way towards inviting the present claim.

_____20/8/2020___

Employment Judge J Lewis

JUDGMENT SENT TO THE PARTIES ON

07/09/2020

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J Moossavi

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FOR THE SECRETARY TO THE TRIBUNALS

Notes

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.