Case Number: 2205240/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Nomberg	**v**	**Benny P Limited**

Heard at: London Central

On: 21, 22, 23, 24 and 25 September 2020

Before: Employment Judge A James
Ms S Plummer, Mr R Pell

Representation

For the Claimant: Mrs M Smith, solicitor

For the Respondent: Mr L Wilson, counsel

JUDGMENT

1) The claim for unfair dismissal (section 95 Employment Rights Act 1996) does not succeed and is dismissed
2) The claim for breach of contract (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) does not succeed and is dismissed.
3) The claims for disability discrimination (sections 15, 20, and 26 Equality Act 2010) do not succeed and are dismissed.
4) The claim for unauthorised deductions of wages (section 23 Employment Rights Act 1996) and the employer's counterclaim (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) cannot be determined without hearing further evidence and are to be re-listed for hearing, together with any remedy issues which may subsequently arise.

REASONS

The issues

1. The claims were for unpaid wages, breach of contract, unfair dismissal and disability discrimination. The issues are set out in Annex A to this judgment. At

the outset of the hearing we asked the representatives if these were the issues we were being asked to decide. It was confirmed that they were.

The proceedings

2. The hearing took place over five days, with the parties attending on the first four days. We heard from the claimant and from a witness called on her behalf, Ms Hila Anav who worked as a bookkeeper/project manager for the respondent. For the respondent we heard from Mr Assaf Laznik, beneficial owner of Findon Homes (UK) Limited, Mr David Pollock, Director, Mr Benjamin Pollock, Director, Mr Marc Meltzer, a shareholder of one of the group companies, Mr Suresh Mupparthi, who worked as a Project Manager, and Ms Alona Balashova, who worked for Septentrium, a company that provided payroll and other services to Findon Homes UK Limited. There was a hearing bundle which ran to over 1800 pages.
3. An application was made for the tribunal to hear the evidence of Mr Laznik, Mr Mupparthi and Ms Balashova remotely. The application was granted.
4. There was also an application that Mr Laznik be allowed to join the whole of the proceedings remotely. That application was refused, on the basis that to allow that would slow down the proceedings significantly. The tribunal's practical experience of running hearings on a hybrid basis is that all those present in the tribunal room need to turn off their microphones and sound, apart from the person speaking. Then if another person intervenes, they need to turn on their microphone and speakers whilst the person who had been speaking turn off theirs. The time spent doing so soon adds up, which increases the length of the proceedings. Given the number of witnesses we needed to hear from, then in order to complete the hearing in time, it was not practical to allow Mr Laznik to join the proceedings the whole of the time. Further, the hearing had been arranged on dates when Mr Laznik had said he would be in the UK. We did however indicate to Mr Wilson that if he could take instructions overnight from Mr Laznik, on evidence presented by the claimant, an opportunity would be provided to recall her so further questions could be put in cross examination. In the end, that was not necessary.
5. On the third day an application was made by Mrs Smith to admit in evidence a letter from the claimant's counsellor dated 24 August 2020. Mr Wilson took a pragmatic view and did not oppose that but its relevance was questioned, and the weight we decided to attach to it was much reduced since it was not formally put to any relevant witnesses. Finally, an application was made to recall the Claimant to answer questions in cross examination about her Linked-In profile. That was not opposed by Mrs Smith and the tribunal agreed the application.
6. On the final day, the tribunal deliberated in chambers and reached its decision. Judgment was reserved.

Facts

<u>Commencement of employment – 10 March 2016</u>

7. The claimant commenced employment with the Respondent on 10 March 2016. She worked as an Office Administrator and Personal Assistant to the Directors on a salary of £30,000. Her salary was subsequently increased to £33,000.

8. The claimant's contract of employment states that her employer was Findon Homes (UK) Ltd. It was accepted by both parties that this was a typographical error and that the respondent is correctly identified in these proceedings as Benny P Limited. We have proceeded on that basis.

The terms of the claimant's contract

9. Under the terms of the written contract, the claimant is entitled to one months' written notice if her employment was terminated by the respondent.

10. Deductions are dealt with in clause 5 under the heading 'Salary' which reads:

The Company will make the statutory deductions from your salary in respect of income tax and national insurance contributions and other payments required or permitted by law. For the purposes of the Employment Rights Act 1996, Sections 13-27 you hereby authorize the Company to deduct from your salary (and/or other sums due under this contract), any sums due from you to the Company including without limitation, any overpayments, loans or advances made to you by the Company, a day's pay for each day of unauthorized absence from your employment; parking fines; the cost of personal calls on a Company telephone or mobile; the cost of repairing any damage or loss to the Company's property caused by you and any losses suffered by the Company as a direct result of wilful negligence or breach of duty on your behalf. …

The Company shall notify you in writing of the details of any such deduction and provide you with copies or any supporting documents reasonably requested in connection with the deduction.

11. The company handbook states under the heading Sick Pay:

We may offer Company sick pay to assist in minimising disadvantage if you are not able to work due to illness. Company sick pay is payable on a discretionary basis. Your previous absence record and length of service will be taken into account. Company sick pay is paid at a rate which tops up any Statutory Sick Pay entitlement to full basic pay.

The claimant's role

12. The claimant's duties included the following: welcoming business guests and taking them to the floor where the meeting was to take place; making tea and coffee for the directors and guests and taking it to the relevant floor where they were meeting; printing and scanning documents; myriad personal ad hoc personal duties for Mr Laznik including on occasions taking his luggage to and from the office to his hotel, organising dry cleaning and taking it up to his room, buying his breakfast and lunch, tidying up his room, and organising his diary; tracking his stays in the UK; booking meeting rooms; making travel arrangements for Mr Laznik and Mr David Pollock; general administrative tasks such as reporting absences, recording annual leave, ensuring documents were signed by the Company's officers, witnessing documents, posting letters, buying stationery, processing invoices for suppliers, typing and sending emails and assisting with IT support for the Directors; reconciling Company and personal credit cards; and ensuring that other employees carried out the directors' instructions.

13. Initially this work was mainly provided to Mr Laznik and on a more limited basis to David Pollock. Later it was also provided, on a limited basis, to Mr Meltzer and Benjamin Pollock. This support was provided in relation to all of the

companies working from the office, not just the respondent. The respondent only employed the claimant and one other person.

14. The Respondent's office is spread over four floors. There is no lift. Mr David Pollock was located on the fourth floor, Mr Laznik on the third floor, together with Mr Meltzer and Benjamin Pollock. Findon Homes (UK) Ltd staff were located on the second floor. The claimant's office was located on the first floor. The toilets and the main printer were located on the fourth floor. The kitchen and the second printer were located on the second floor.

Cervical cancer diagnosis

15. Towards the end of 2017 the claimant started suffering serious health issues. The cause was initially unknwon. On 18 April 2018 she was diagnosed with cervical cancer. She notified Mr Laznik of that diagnosis the same day. Understandably, given the shocking and concerning nature of this news, he was sympathetic, as were other colleagues.

Recruitment of temps

16. Following her diagnosis, the claimant was asked to recruit somebody to assist her with her duties. Mr Laznik put her in charge of the recruitment process. Lauren Mulligan was subsequently recruited on 26 April 2018 and carried out a number of the claimant's duties whilst she was not well enough to carry them all out herself.

17. The claimant underwent day surgery on 26 April 2018. Notwithstanding that, she attended the office the next day with her mother. We were referred to WhatsApp messages between Mr Laznik and the claimant where she informed him that even though she had been advised not to come into work, she wanted to come in. She considered it would be better for her mental health for her to keep working when she could. Mr Laznik left it to the claimant to decide when she could and could not work and respected her wish to come into the office and work when she could. She did so at this stage on a voluntary basis for the good of her mental health.

Agreement regarding pay and hours

18. Mr Laznik and the claimant discussed the requirement for the claimant to work during this period. Both anticipated that the claimant would be able to get back to work within two months or so. Unfortunately, that is not what subsequently happened due to complications with the medical treatment. It is a crucial issue in the case, as to what was agreed between the two of them at this time in relation to pay.

19. It is the respondent's position that the claimant was told that she would continue to receive full pay, while she was undergoing treatment, and was not able to work her full hours. According to Mr Laznik, he also told the claimant that she would have to pay back the difference between the hours she was able to work from April onwards and the full salary paid to her, once she was better. We reject that contention for the following reasons.

20. Mr Laznik describes himself as an entrepreneur. He has been a businessman for many years. He is experienced in commercial affairs. There were regular communications between the claimant and Mr Laznik. As David Pollock stated in his evidence before the tribunal, "knowing Assaf, he would document whatever he agreed with her". The fact that there is no documentation of any

'agreement' is, we find, significant. If there had been an agreement to the effect claimed by Mr Laznik, we find that it would have been documented somewhere, in a message, email or subsequent loan agreement.

21. We were referred to a number of examples of loan agreements in the bundle. Some of the respondent's witnesses also referred to those and had enjoyed the benefit of loans from the respondent. It was argued before us on the respondent's behalf that there could not be a loan agreement for the claimant because it was not clear at the outset what she would be borrowing. However, Mr Laznik was very clear when he gave evidence before us, that the period between April and November 2018 when the claimant was not working her full hours, was covered by a loan agreement. Whereas the period from November 2018 onwards, which we will come onto in due course, was described by him as a period of overpayment, because the claimant should only have been paid for the hours that she worked for that period, not her full pay (unless she worked her full hours).

22. If that was indeed the case, then the amount of the loan would have been ascertainable from mid-November onwards, when the claimant began to work under the alleged new 'overpayment' arrangements. However, despite any 'loan' having crystallised in November 2018, no loan agreement was ever drafted for the claimant to sign.

23. Further, one of the adjustments which Mr Laznik stated was made for the claimant, as set out in paragraph 46 of his witness statement, was "*allowing her to attend work only when she felt well enough to do so and to take time off for medical appointments and treatment and to arrive late and early as needed (no requirement to be in the office at all for the whole day if she felt unwell)*".

24. For all of these reasons, we prefer the evidence of the claimant, that she was told that she should take as much time off as she needed and would continue to receive full pay. The claimant was expected to work only if and when she could, while she was undergoing treatment.

25. The terms of the contract relating to Company sick pay is set out above. Mr Laznik was adamant that the company had never paid anyone company sick pay. We accept that is the usual position. However, in the case of the claimant, in effect she was paid full pay during this period, when she was only able to work a limited number of hours. Whether this was because of the overt exercise of discretion to pay company sick pay or not, this was the effect of what was agreed.

26. Yet further, whatever Mr Laznik's later recollection, understanding or preference may have been, his suggestion that the pay given to the claimant during this period was under a loan arrangement, was never effectively communicated to her. The claimant's contract was not therefore varied as claimed and she remained entitled to full pay for this period.

Continuing treatment and absences

27. From week commencing 21 May 2018, the claimant commenced chemotherapy and radiotherapy; the former on Wednesdays, the latter every day. The claimant was advised by her consultant not to attend the office if colleagues were sick as her immune system was compromised and hence she did not do so at the end of May 2018, and during the period 11 to 13 June 2018.

28. The claimant suffered an allergic reaction to the medication given to her, so it had to be administered at half-speed. This meant she spent a longer period in hospital than would otherwise have been the case; and the internet connection and phone access in hospital was poor. This meant she was less contactable or able to carry out her duties whilst undergoing treatment.

29. Due to continuing difficulties with the chemotherapy treatment, the last dose was administered on 13 June 2018. The last radiotherapy treatment was given on 27 June 2018. A new treatment plan was agreed on 2 July 2018. We find that during this period, the claimant made every effort to attend work when she could. When for example the claimant attended appointments with her hospital consultant, and they lasted less than two hours, she attended the office afterwards and stayed late to try and make up the time she had missed. Even when she was at hospital, she tried to assist, despite the poor internet and phone connections.

30. As well as employing temps to help carry out some of the claimant's duties during this period, the claimant's mother was allowed to accompany her to work in order to provide moral support as well as to assist her with administrative tasks such as printing and photocopying. Mr Laznik generously agreed to loan money to her mother, which both paid for her airfare and enabled her to close her business in Israel for a temporary period whilst she came to the UK to care for her daughter.

31. Between 21 and 27 August 2018, the claimant was in hospital for major surgery. She underwent a full hysterectomy. Between 27 August and 20 September 2018, the claimant was recovering at home. She was again hospitalised between 20 September 2018 and 27 September 2018 due to a high temperature and then continued to recover at home between the end of September 2018 and November 2018. She remained on full pay during that time off and for the reasons given above, it was reasonable for her to assume, in the absence of any clear indication to the contrary, that she remained entitled to full pay.

Agreement about working hours and pay from November 2018 onwards

32. The situation changed in November 2018 when the claimant was able to work longer hours. The temp who was employed at the time, Natalya, ceased working for the company, and the claimant started working on a more regular basis. We find that it was agreed that the claimant would attend the office three to four days a week, with Wednesdays at home, when she was receiving ongoing treatment including counselling. This is consistent with the evidence of Mr Mupparthi who recalls that Mr Laznik told him that after her surgery, the claimant would "be coming to work after 2 months and also told us that she will be working initially 3 days a week and then for 4 days a week as she would be busy with attending her appointments and treatment for one day a week which was mostly Wednesdays. She had the flexibility in timings for other days and was able to come late or early if she had any other appointments or if she felt unwell".

33. The claimant says that she worked long hours to make up for the time she was not working. If she knew she was only to be paid 80% of her salary because she was not to be paid at all for Wednesdays, she would work only work 80% of her time. That was not what was said to her. We accept her evidence in that regard.

34. An email sent by Mr Human in HR to the claimant dated 6 December 2018 states:

    Shirly, further to my email below please confirm that you are maintaining a timesheet and that from this month we will pay your salary in accordance with the days worked. The difference between the calculated salary (based on the timesheets) and the amount we normally pay into your account will be advanced as a staff loan. Please confirm this is the case and until when you expect this to be the case so we can prepare the paperwork.

35. Mr Laznik told us that, contrary to the suggestion above that a loan agreement would be entered into from this point onwards, the arrangement was that the claimant would be paid on a pro rata basis for the days worked. It is clear however from the 6 December 2018 email sent by Norman Human, and the email exchange in January 2019 between Ms Balashova, Mr Human and Mr Laznik (see below), that the situation was far from clear.

36. Mr Human and Ms Balashova thought that the claimant was to be paid on an hourly rate basis and indicated that to the claimant. Whilst not fully accepting or understanding the position, the claimant nevertheless provided timesheets for December and January 2018.

37. In an email dated 22 January 2019 Mr Laznik stated, in reply to an email suggesting the above:

    No. The arrangement of hourly rate was made when Shirly could not come to work few hours a day not whole days. The way this should be working is that she takes holiday days on the days she is not coming to work and if she exceeds the holiday allowance then she is paid pro rate. There is no additional time charges as her salary is global

38. Later that day, Ms Balashova emailed Mr Human to say:

    Norman,

    Today we had a brief discussion with Assaf regarding this matter. Please find the following details below. Shirly will be sending me completed Leave form every time she is off work.

    - *If she was working from home, she needs to send me Assaf's confirmation,*
    - *in case holiday allowances are exceeded, she will be paid pro rate.*

    Please review and confirm attachment with payroll calculation. I have included full salary and waiting completed leave forms from Shirly for January.

39. None of this was communicated to the claimant in writing, save for the email sent in December 2018 (which set out the position incorrectly in any event). In or around January 2019, the claimant asked Ms Balashova to speak to Mr Laznik and get back to her as she did not understand why she had to submit time sheets. Ms Balashova did not do so.

40. Equally however, from February 2019 onwards, Ms Balashova continued to chase the claimant for information about the days when she was not working. Those documents were not put to the claimant but there appears to be no dispute that the claimant did not respond. For example (on page 1127), Ms Balashova asked for 'leave form request for the days when you was absent in office as discussed for February (sic)'. On page 1130, she asked the claimant for a list of days when the claimant was 'off the office' as discussed. On page

1132 in an email dated 19 March 2019, Ms Balashova said to the claimant, 'kindly remind me list of the days when you was off the office, from January, as we discussed (sic)'.

41. On 2 April 2019, an email stated: 'Kindly ask you to send me your timesheets, for me to complete annual leave schedule, as discussed'. Then on 23 April 2019, page 1148 a further email stated, 'Please send me the information, regarding your days off from January 2019'. Finally, on page 1274, in emails dated 25 and 31 July, the claimant asked how many holidays she has and Ms Balashova in reply asked the claimant for confirmation of the days out of the office since the beginning of year so she can do a reconciliation. It was not until October 2019 that the claimant provided the information requested.

42. We agreed at the hearing to deal with remedy separately. However, during our deliberations on this aspect of the case, it became apparent to the tribunal that it is not possible to determine whether or not there has been an unauthorised deduction of wages and/or an overpayment for the period from 1 February 2019 onwards, without determining the amounts due to her for this period. Not enough evidence was lead on this issue to enable to us to make the necessary findings of fact in that regard.

43. If the amounts due to the claimant for this period exceed the amounts paid to her, there will have been no overpayment, and wages will be due to her. On the other hand, if the amount paid to the clamant in wages from February 2019 to the termination of her employment exceeds the amount that was actually due to her, there will have been an overpayment and no unauthorised deduction of wages. We will therefore list this element of the case for a further liability and remedy hearing, to deal with the wages and employer's contract claims.

44. However, we would have found the following facts in relation to that hearing. First, on page 1285 of the bundle is a spreadsheet. This suggests that the claimant was overpaid 82 days in 2018. We find that the claimant was not overpaid for 82 days at all. We have already dealt with the period between April and November 2018. We are also satisfied, on the basis of the timesheets that the claimant submitted for December 2018 and January 2019, that there was no overpayment for those months, because she more than made up her hours for that period.

45. The situation is not clear for the period after that, but again we make the following findings on the evidence that we do have before us. The third column of the spreadsheet on page 1285 purports to show the number of working days in those months. In January 2019, there are said to be 23 working days; but Tuesday 1 January is a bank holiday. In May 2019, there are again said to be 23 working days. That ignores the fact that in May 2019 there are two bank holidays. Similarly, in August 2019, there are said to be 22 working days but that ignores the bank holiday in August.

46. The leave days shown on the spreadsheet for each year are 20, so bank holidays must be allowed in addition, in order to satisfy the leave entitlement under the Working Time Regulations of 28 days per year. The schedule therefore overstates the number of working days and that needs to be taken into account in working out the total number of days that the claimant was overpaid, if at all. It is said to be 32 days in total but taking into account the bank holidays in January, May and August that she was alleged to be overpaid, the figure can be no more than 28.

47. Second, the respondent's position is that where the claimant is shown to have been on the server, she has been credited for a day's pay. That is how the case has been argued in relation to the alleged overpayment and employer's breach of contract claim and the respondent is estopped from resiling from that position at the forthcoming hearing. We set out in our conclusions below and separate case management orders, how we consider this matter should be taken forward.

48. Finally, in his submissions, Mr Wilson stated that during re-examination of the claimant by Mrs Smith, she referred to being paid on a day rate, or words to that effect. For the record, we confirm that none of the panel members have a note to that effect.

Alleged harassment, January 2019

49. In January 2019 Mr Laznik was on a business trip to the Ukraine. The claimant arranged an international conference call for him. During the call, she had to leave her desk, to visit the toilet. When she returned, she was told to contact Mr Laznik urgently. On telephoning him, Mr Laznik expressed his displeasure and annoyance, that when he had been disconnected during the call, the claimant had not been available to reconnect him. The claimant explained that she had been to the toilet. Mr Laznik responded by making comments to the effect of, "Not all temps were that bad. Some of them were intelligent enough to know not to leave their desk while I am on a long- distance call". We find that during that conversation, Mr Laznik did raise his voice as alleged. We accept that he would reasonably have felt frustrated about being cut off and not being able to contact the claimant so he could be reconnected. As a consequence of that frustration, he raised his voice.

February 2019 – conversation about leaving?

50. In or about February 2019, the claimant had a conversation with David Pollock. The gist of the conversation was that the claimant was not satisfied with the work she was undertaking for the company and was hoping to develop her HR skills. Mr Pollock agreed to let Mr Laznik know.

51. Mr Laznik and the claimant subsequently had a discussion in February or March 2019. During their conversation, the claimant informed Mr Laznik about the difficulties she was having in carrying out her PA duties, and her desire to develop into a HR role. Mr Laznik expressed to the claimant his concern that the claimant could still not work on Wednesdays, and there was no indication as to when she would be able to. Either during that conversation or shortly afterwards, it was agreed that the claimant would advertise for her role, and assist with recruiting a replacement for her; in turn, Mr Laznik agreed that he would look into the possibility of the claimant carrying out a HR role for more of the other companies he was involved with.

Adjustments, March 2019 onwards

52. The claimant continued to struggle to carry out her full duties from March 2019 onwards. She found it difficult to go up and down the stairs particularly when carrying things. Few temps were employed during this period and she continued on occasion to make coffee for directors and staff, and print/copy papers upstairs. We accept that these duties were reduced but other staff were not always available to carry them out. Sometimes the claimant would ask

colleagues to help, they would continue completing their own tasks and by the time they had done so had forgotten to assist the claimant.

53. The claimant's evidence about the lack of temps during this period is consistent with the figures put forward by Mr Laznik in his witness statement which suggests the following. The only period temps were available in 2019 is for 3 days at the beginning of July and then from the end of July onwards.

Name of the PA	Location	Date of Joining	Date when PA left	Number of Working Da
Talia Reeves*	UK	03/04/2018	08/04/2018	3
Lauren Milligan (C&C)	UK	26/04/2018	12/07/2018	55
Alannah Gilders (C&C)	UK	30/05/2018	01/06/2018	2
Alyssa Danley (C&C)	UK	29/06/2018	29/06/2018	1
Rochelle Lovell (C&C)	UK	04/07/2018	17/07/2018	10
Shelley Emberson	UK	17/07/2018	26/10/2018	71
Simran Samra	UK	20/08/2018	14/09/2018	18
Maxine Weatherly*	UK	02/07/2019	05/07/2019	3
Stephanie Hoban	UK	30/07/2019	29/08/2019	20
Natalia Bills	UK	WC 22/10/18, WC 29/10/18, WC 12/11/18, WC 19/11/18		20
Total				203.00

54. As for the requirement to work on Wednesdays, as found above, there was an agreement between the claimant and Mr Laznik that she would not work in the office on Wednesdays. However, the claimant did agree to be available, in case any urgent work needed to be carried out, which she could carry out remotely. The claimant would work flexibly on other days as her health permitted. Further, she tried to make up her hours, so that the work the respondent required of her could be done, and she would still be entitled to her full salary. It is consistent with that case put forward by the claimant, that she would make herself available on Wednesdays and deal with work as and when required. We have found that is what had been agreed.

55. On occasions, during the claimant's therapy sessions on Wednesdays, the claimant interrupted the sessions to deal with work-related matters. We find however that there was no requirement for the claimant to interrupt her therapy sessions. We find it surprising that her therapist would allow her to do so. If she felt that was a requirement, it was not because Mr Laznik or others expected or required it.

56. As for her being redeployed, we have found that the agreement reached between Mr Laznik and the claimant was that she would try and recruit a replacement, and in turn, Mr Laznik would try to redeploy the claimant into more of a HR or similar role, if one was available.

57. The claimant states in her witness statement that other PAs in other companies were shuffled around and offered new positions; however, no detail was provided to us as to what positions, and when. The claimant also stated during cross examination that one of the potential PAs she had found to replace her, was appointed to another role at Stone Real Estate which was only 300 yards from where she lived and would have been ideal for her. Again, no further details were provided to us as to when that occurred and that was not put to Mr Laznik. All we are able to say with certainty was that by the time of the conversation on 25 July 2019, which we turn to below, no permanent replacement had been found for the claimant; likewise, no alternative role had been found for her either.

Carrying of Mr Laznik's luggage

58. There was some time spent at the hearing on this issue. We find that from about November or December 2018, when Mr Laznik started suffering back problems, he did ask for assistance with carrying his luggage. This was a relatively small trolley suitcase, weighing 5 to 6 kg. Mr Mupparthi told us that he did on occasion carry that upstairs for Mr Laznik and we accept his evidence. We find that occasionally, the claimant would also be asked to carry Mr Laznik's luggage from the office to his hotel, but that was only on an occasional basis.

Dry cleaning

59. The claimant was quite categorical in her evidence that Mr Laznik wanted her to sort his dry-cleaning out and that she continued to take it upstairs and hang it up in the cupboard in his office as he preferred. Again, this was occasional.

Adjustments that were made

60. A number of adjustments were made for the claimant. These included permitting her to work from home as and when needed, provision of a laptop to enable her to do so; employing temps to cover her workload; flexible working hours to allow for medical appointments/consultations and treatment; reducing her tasks and asking colleagues to assist her at times; and allowing her mother to accompany her to work.

61. Mr Laznik told Ms Balashova on 22 January 2019 that the claimant needed to agree with him if she wanted to work from home. That may have been his intention but he did not communicate to the Claimant and that his permission was required. It is also inconsistent with the list of adjustments set out in Mr Laznik's statement, which include allowing the claimant to work from home. It does not say in that statement that his permission was required.

62. It was also claimed by Mr Laznik, that one of the adjustments that was made was allowing her to use his room when he was not there. Again, we find that if that had been his intention it was never communicated to her. The claimant did not consider this was something she could do, because she believed that Mr Laznik was quite particular and did not want anybody going into his office whilst he was not there due to there being personal and private information in his office. We find that the possibility of Mr Laznik's office being used by the claimant when he was not there was not communicated to the claimant.

25 July 2019 meeting

63. On 25 July 2019, Mr Laznik called the claimant to his office. There is a dispute as to exactly what was said at that meeting. We have found this issue very finely

balanced due to the conflict of evidence on it. On the balance of probabilities, we conclude that the words used were to the effect of those alleged by the claimant, i.e. "it seems to me that it will be best if you were just to leave the company". At this stage, the claimant remained unhappy about the duties she was being asked to carry out, she was finding it all too much, and wanted to develop into another role. She therefore agreed to leave.

64. We further find that the termination date was not agreed on 25 July. Mr Laznik said he would get back to the claimant about that. Benjamin Pollock subsequently sent an email to the claimant on 6 August 2019, referring to the discussion, and confirmed that her last day of employment would be 31 August 2019.

Notice pay

65. On 5 September 2019, the claimant emailed Ms Balashova to say that she had not received her salary for the month of August 2019. She asked to be paid for the days worked, sick days, a 'redundancy payment', and 11 days holiday.

66. Ms Balashova responded to the claimant's email on 6 September 2019 asking her to confirm the days she did not work. The claimant replied on 12 September 2019, to say that her last email contained all the details Ms Balashova needed.

67. Ms Balashova responded on 17 September, reiterating her request. On 13 October 2019, the claimant provided the following information:

> Apologies for the slow response
> Please see below the dates in which I have taken my annual leave since January 1st 2019
> February 22nd, 25th and 26th.
>
> Also, as per your request these are the sick leave which I have taken since January 1st 2019
> January 11th, 2019
> February 19th, 2019
> March 5th, 6th, 13th, 20th and 27th
> April 3rd, 10th, 17th and 24th
> May 1st, 8th and 15th
> June 5th, 12th, 19th and 26th
> July 3rd, 10th, 17th, 24th and 29th
> August 7th & 14th
>
> I trust you will find everything satisfactory to proceed with my last salary payment by this week end.
> As per my previous email from September 5th, my August salary should include
> 3 weeks of redundancy payment (one week pay for each full year of employment) - as per Ben Pollock's email from August 6th.
> And remaining annual leave allowance up to August 2019 (20 days a year ÷ 52 × 8 = 13.33 --> 14 days minus 3 holidays taken on 22nd, 25th and 26th of February) 11 days in total.
>
> Once finalised please ensure to email me with the relevant payslip, P45 form and P60 (at the end of this tax year).

68. Mr Laznik refused to provide the claimant's P45 & P60 until the alleged debt of £11,973 was paid. Mr Laznik told us he had informed the claimant that he would send her P45 when the claimant came back with her response to the spreadsheet. His recollection in that regard was not correct. In fact, the email he sent to the claimant on 25 October 2019 says:

You owe 11,973 pounds as an attachment in Excel. You need to repay the excess payment you received for 2018 and 2019. Attached to the accounting information. if you do not agree with the amount, you are invited to explain what amount you think you owe and why. You have ten days to pay the amount. if you do not pay the annual interest rate is 8% (interest arrears in the UK). After

you settle your debt or at the same time if you prefer you can get the documents you need. Regards Assaf.

69. The clear mismatch between what Mr Laznik told us about this matter and the written documentation is one of the reasons why we have preferred the evidence of the claimant in relation to a number (but by no means all) of the matters above.

The Law

Unfair dismissal

70. A dismissal occurs under the Employment Rights Act 1996 in the following situations:

(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . , only if)—

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),

(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

71. In order for an unfair dismissal claim to succeed, there must be a dismissal by the employer in the first place. In some circumstances an employer may put pressure upon an employee to resign. The pressure does not inevitably lead to the conclusion that there is a termination by the employer. Depending on the facts, a tribunal may be entitled to conclude that there is an agreed termination. In the case of *Sheffield v Oxford Controls Co Ltd [1979] IRLR 133***,** *[1979] ICR 396* the employee was told that if he did not resign voluntarily he would be dismissed. After some negotiations he signed an agreement to resign in return for certain financial benefits.

72. In *Sheffield*, the way to distinguish between a genuine resignation and a forced resignation, which constitutes a dismissal in law, was described as follows by Arnold J (at 135 and 402 respectively):

"It is plain, we think, that there must exist a principle … that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other

than dismissal. The cases do not in terms go further than that. We find the principle to be one of causation. In cases such as that we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation letter or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign'.'

73. This case was cited with approval by the Court of Appeal in *Jones v Mid Glamorgan County Council [1997] IRLR 685***,** *[1997] ICR 815*, when Waite LJ commented that it was for tribunals, applying their expertise, to distinguish between genuinely voluntary resignations and those made in response to a threat. The court rejected an argument that the threat must be the sole factor inducing the resignation.

Disability discrimination

Burden of proof (section 136)

74. Under s136 Equality Act 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

75. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

76. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

77. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Discrimination arising from disability (section 15)

78. Section 15 Equality Act 2010 reads:

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

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

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

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

79. Therefore, in a section 15 claim, a tribunal must make findings in relation to the following:

79.1. The contravention of section 39 of the Equality Act relied on – in this case either section 39(2)(c) – dismissal; or 39(2)(d) - detriment.

79.2. The contravention relied on by the employee must amount to unfavourable treatment.

79.3. It must be "something arising in consequence of disability"; for example, disability related sickness absence.

79.4. The unfavourable treatment must be <u>because</u> of something arising in consequence of disability.

79.5. If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

79.6. In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on. Knowledge that the something arising led to the unfavourable treatment is not however required.

See the decisions of the EAT in <u>*T-Systems Ltd v Lewis UKEAT0042/15*</u> and <u>*Pnaiser v NHS England [2016] IRLR 170 (EAT)*</u>.

80. According to Harvey's encyclopaedia of Employment Law [Division L.3.A(4)(d), at paragraph 377.01]: 'As stated expressly in the EAT judgment in <u>*City of York Council v Grosset UKEAT/0015/16 (1 November 2016, unreported)*</u>, the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* (<u>*[2018] EWCA Civ 1105*</u>**,** <u>*[2018] IRLR 746*</u>) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

<u>Reasonable adjustments (sections 20 and 21)</u>

81. Section 39(5) of the Equality Act 2010 imposes a duty on an employer to make reasonable adjustments.

82. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, and/or a physical feature of the workplace premises, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

83. Section 21 of the Equality Act provides that a person discriminates against a disabled person if they fail to comply with the duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

84. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4,* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

    (1) the PCP applied by or on behalf of the employer;

    (2) the identity of non-disabled comparators; and

    (3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

    Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The question is whether the PCP 'bites harder' on the claimant *(*See *Griffiths v Secretary of State for work and Pensions [2017] ICR 150 at #58)*. There just needs to be a prospect of the step alleviating the substantial disadvantage; there does not ned to be not a 'good' or a 'real prospect' of that - *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10 at #17.*

85. The test of reasonableness imports an objective standard. The Statutory Code of Practice on Employment 2011 published by the Equality and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

86. As to knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8).

87. During their employment, a claimant does not need to suggest any adjustments, for the duty to arise – see Royal Bank of Scotland plc v Ashton [2011] ICR 632. However, when it comes to the tribunal proceedings, a tribunal will only consider the reasonable adjustments that have been suggested by the claimant and which form part of an agreed list of issues - Newcastle City Council v Spires UKEAT/0334/10.

Harassment (section 26)

88. Section 26 Equality Act 2010 reads:

> *26 Harassment*
>
> *(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(2) A also harasses B if—*
> *(a) A engages in unwanted conduct of a sexual nature, and*
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b).*
>
> *(3) ……*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

89. A harassment case therefore involves five questions. First, did the conduct took place at all. Second, was the conduct unwanted? Third, was the conduct related to the protected characteristic (in this case, disability)? Fourth, did the person responsible for the conduct have the proscribed purpose. Fifth, if not, did the conduct have the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

90. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 Underhill J (as he then was) said at paragraph 15:

> *A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to … the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark*

may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.

Unauthorised deduction of wages

91. A worker is entitled to be paid the amounts payable to her, whether under the terms of her contract with her employer, 'or otherwise' (such as under statute, for example, statutory sick pay or holiday pay) - see S.23 Employment Rights Act 1996)). A worker's wages may include allowances, such as London-weighting and shift allowances (S.27 ERA).

Wrongful dismissal/breach of contract

92. An employee is entitled to be paid for the notice due under their contract when their employer dismisses them; but not where the employment terminates on mutually agreed terms. Agreement may be express or implied.

Conclusions

Unfair dismissal (sections 94, 95 & 98 ERA 1996)

93. The first issue we need to determine is whether the claimant was dismissed in accordance with section 95(1)(a) ERA? In coming to our conclusions on this issue, we bear in mind the words of Arnold J in the *Sheffield v Oxford Controls* case, quoted above. The claimant likened the situation to her being a guest in a house, who has been asked when they are going to leave - from which it is clear they are no longer welcome. She said it was obvious she was not welcome at Benny P anymore.

94. We accept that the claimant may well have felt unwelcome as a result of her conversation with Mr Laznik on 25 July. However, we conclude that the words used by Mr Laznik did not amount to a dismissal, within the terms of section 95 (1) (a) ERA 1996. That is how the case has been pleaded and the agreed issues have been defined before us. There was no attempt to amend the claim to include a constructive dismissal claim at any stage, even after the claimant had secured legal representation and no evidence has been lead on that issue. Therefore it would not be appropriate for us to consider the case under section 95(1)(c).

95. Since the claimant has failed to establish that there was a dismissal, we do not need to consider the other issues set out in the list of issues in Annex A. The claim falls at the first hurdle.

Disability (section 6 & Schedule 1 EQA)

96. It is not disputed that the claimant was a disabled person in accordance with the Equality Act 2010 at all relevant times following her cancer diagnosis.

Failure to make adjustments (sections 20 & 21 EQA)

97. The claimant complains about the following provision, criterion or practice ("PCP") / physical feature:

97.1. The PCP that she was required to work on Wednesdays from March 2019. The respondent says that to the extent that the claimant was required to work on Wednesdays these were very light duties in line with what she would have been required to do if she was on holiday.

97.2. The physical feature of her office set-up which was that because her desk was on the first floor of the building, the kitchen on the second floor, Mr Laznik on the third floor, and Mr Pollock and the toilet on the fourth floor, she was required to walk up and down several flights of stairs throughout the day.

98. We find in relation to the PCP, that the claimant did not have to attend the office on Wednesdays. We have found as a fact that from November 2018 onwards, the claimant agreed to make herself available on Wednesdays, and to make up her hours as much as possible, on other days, in the evenings, and at weekends. To that extent, there was a requirement to work on Wednesdays, as required, from home.

99. As for the physical feature, we do not consider this is a physical feature case at all. The location of the claimant's office on the first floor was due to the PCP that she work on the first floor. We accept that that is slightly different to the way it was put on the list of issues, but we do not consider that the respondent is under any disadvantage in relation to that, because the facts to be found and the arguments to be made are really no different whether it is characterised as a PCP or a physical feature.

Substantial disadvantage

100. In respect of the PCP, it is argued that this substantially disadvantaged her because (1) it impacted on the treatment and counselling provided to the claimant at home by Chai Cancer Care, every Wednesday; (2) it added to her stress as it prevented her from taking a physical and mental rest from work; (3) she was dismissed.

101. As for the substantial disadvantage alleged in relation to the first PCP, we conclude that to the extent that the claimant's treatment and counselling at home was interrupted by work calls or messages, that was because the claimant allowed herself to be interrupted during those sessions. We have found it surprising, as noted above, that the claimant's counsellor allowed those disturbances to continue, instead of ensuring that the claimant did not have her phone on during the counselling/treatment sessions.

102. As for her generally being available on Wednesdays from home, outside of such treatment, we accept that in principle, the claimant would have found that more difficult as she was still recovering from a major illness and from surgery. However, we have also found that is what had been agreed in order for the claimant to be able to make up her full hours if possible and so still be entitled to full pay. We consider that further below when considering the question as to whether the step would have been reasonable.

103. As for being dismissed, we have concluded that the claimant was not dismissed and so do not need to consider that alleged substantial disadvantage further.

104. In respect of the (alleged) physical feature (we say the PCP that she work on the first floor): it is alleged that it increased the claimant's pain and

fatigue and also impacted on her because of incontinence / urgency. We conclude that the claimant did struggle to walk up and down stairs and having to do so increased her pain and fatigue. Further, having to walk up three flights of stairs to get to the toilet, which she had to visit more regularly as a result of her disability, also substantially impacted on her. We find therefore that substantial disadvantage is made out in relation to this aspect of the case.

Reasonable steps

105. The claimant says that the respondent should have taken the followings steps:

105.1. In respect of the PCP: (1) not being required to work on Wednesdays – from March 2019; (2) being redeployed.

105.2. In respect of the physical feature: (1) to undertake PA duties only; (2) to relocate to a desk on the third or fourth floor of the building – from November 2018.

106. As for the first of the steps required, we consider that the claimant cannot on the one hand agree to a working pattern and payment structure whereby she will be available from home to carry out some work, on Wednesdays, and make up the hours at other times, in return for continuing to be paid full-time; and on the other hand, argue that she shouldn't have been required to work on Wednesdays at all. Had that been the arrangement, it may well have been the case that her wage was reduced to 80% of her full salary. The claimant was adamant that is not what had been agreed and there was never any such agreement. The position could no doubt have been made clearer on both sides; but in those circumstances (and see further our conclusions in relation to the pay issue below), we do not find that this would have been a reasonable adjustment.

107. As for the reasonable adjustment of being redeployed, we do not see how that would have alleviated the alleged disadvantage, since if the claimant had been redeployed, she would still have been required to make herself available on Wednesdays. Redeploying her would not therefore have alleviated any substantial disadvantage suffered in relation to this PCP. That would not therefore have been a reasonable adjustment.

108. As for the requirement to work on the first floor, we do not consider that the undertaking of PA duties only would alleviate the disadvantage. It may be that this aspect of the case has not been sufficiently well pleaded. If the claimant means that she should not be required to undertake certain of her duties, which are mentioned in our findings of fact above, then that should have been stated, so that the respondent could have properly responded to that case. That was not done and this aspect of the case therefore fails.

109. However, the movement of the claimant's desk to the third floor would have alleviated the disadvantage of the claimant having to walk up and down three flights of stairs, every time she needed to visit the toilet. It was claimed by Mr Laznik, that one of the adjustments that was made was allowing her to use his room when he was not there. We have accepted the claimant's argument that if this was indeed the case, it was never communicated to her. The claimant did not consider that was something she could do because she believed that Mr Laznik did not want generally want anybody going into his

office whilst he was not there. Without that possibility being clearly communicated to the claimant, the respondent cannot argue that this was an adjustment which it did in fact make.

110. On the other hand, the fact that the respondent sets it out as a reasonable adjustment that was made, demonstrates that it was indeed, in the respondent's view, an adjustment which could have been made. In addition, we find that it would have been possible to allow the claimant to work from the office used by Mr Benjamin Pollock and Mr Meltzer, either by moving one of them to another floor, or by allowing her to use a desk of one of those; or by sharing the office of Mr David Pollock. Those potential solutions simply were not explored with the claimant in or about November 2018, when they should have been. We therefore find this claim proved. We go onto consider the question of time limits below.

Discrimination arising from disability (section 15 EQA)

111. In view of our conclusion that the claimant was not dismissed, this claim necessarily fails.

Harassment (section 26 EQA)

112. The first issue we need to determine is whether the respondent engaged in the unwanted conduct as alleged. As will be clear from the findings of fact above, we conclude that the alleged treatment did occur in January 2019. Further, it was unwanted conduct.

113. The next question we turn to is whether or not the January 2019 conduct was related to disability. We conclude that it was not, in the sense meant by the Equality Act, in the context of the harassment provisions. It was related indirectly, in that the claimant needed to attend the toilet more regularly and for a longer period. It was that which led to her being absent from her desk on the day in question. However, Mr Laznik's annoyance was due to her not being available to reconnect him. His annoyance in the heat of the moment, and the language used no doubt upset the claimant; but it was due to her unavailability, not to her disability; and it not related to it in the sense required by section 26. For example, there was no disability-related language used in the comments made by Mr Laznik and we find that it was not her disability which Mr Laznik had in mind, whether consciously or unconsciously, when the comments were made.

114. As to the allegation that the respondent repeatedly demanded that the claimant worked on Wednesdays from March 2019, we find that did not occur. Mr Laznik would have preferred the claimant to work on Wednesdays, because the claimant was good at her job and it would have made his job easier. That is not the same as repeatedly demanding that she work on Wednesdays in such a way as to amount to harassment.

115. In any event, had it been necessary to consider the point, we would again have found that the alleged treatment was not related to the claimant's disability in the sense required by the harassment provisions. Again, it could be said to be indirectly related because the claimant's not being able to work in the office on Wednesdays was because of something arising from the disability. But that is not sufficient to succeed in relation to the harassment provisions. There is an insufficient causal connection between the alleged treatment and the claimant's disability for a harassment claim to succeed.

116. On the basis of the above conclusions we do not need to decide whether the alleged conduct had the prohibited purpose or effect.

Pay

117. It is agreed that the claimant received no pay in respect of the period 25 July – 31 August 2019. She has not been paid any accrued holiday pay either. The respondent says that it withheld this pay because the claimant had been overpaid in the amount of £15,602.51.

118. We refer to our findings of fact above in relation to the contractual position from November 2018 onwards. In the absence of any clear agreement on these matters, the default position in relation to an employee's contract, including the claimant's, is that the employee is entitled to be paid for the days worked. On days that they are not able to work, for example when they are sick, they are entitled to sick pay. If they are on authorised absence, there will be deducted from their salary a proportion of the day not worked. Under the terms of the claimant's contract, as discussed, discretionary sick pay was available but the default position was that statutory sick pay only would be paid on days taken as sick leave and that was the point in November 2018 when she returned to work from sick leave. We conclude that this default position applied to the claimant from November 2018 onwards.

119. We note from page 1292 of the bundle, which is the claimant's email to Ms Balashova dated 13 October 2019, that the claimant accepts that between February and August 2019, she took 24 days sick leave between February and August. She is of course entitled to SSP for those days and none has been credited to her so far. On the other hand, on the respondent's figures (as corrected by us above, to take into account actual working days in January, May and August 2019), the claimant was potentially overpaid 28 days, less any accrued holiday not taken. It therefore appears to us that when the calculations are done, there will either be a small overpayment due to the respondent, or a small amount of wages still due to the claimant. It is a matter for the parties as to whether or not they wish to incur further legal costs, in arguing over what is likely to be, when SSP and accrued holiday pay is considered, a few days' pay either way. We would hope that they would be able to agree a figure. A short telephone preliminary hearing will be listed so that a hearing date can be set and appropriate directions made, if that is what is required.

Breach of contract (notice pay)

120. In the light of our finding of fact that there was not a dismissal but a mutually agreed termination of the claimant's contract, the claim for notice pay necessarily fails. Th breach of contract claim is in effect a wrongful dismissal claim, which can only succeed if there was a dismissal. On receiving the email of 6 August 2019, the claimant did not argue that she should be entitled to more notice and in effect accepted (in the legal sense of the word, as a result of her acquiescence) that her employment would end on 31 August 2019. She was only entitled to pay up to that date. This claim therefore fails.

Time limits / limitation issues

121. The respondent has taken a time point in relation to the claimant's discrimination claims. Given the date the claim form was presented and the

dates of early conciliation, any complaint about something that happened before 30 July 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

122. The only disability discrimination claim which we have found proven is the reasonable adjustments claim in relation to the relocation of the claimant's office from the first to the third floor, from November 2018 onwards. Assuming we take the date that this adjustment should have been made as being 30 November 2018, the claim was submitted eight months later than it should have been. There are no other acts of discrimination that we have found proven; in any event, in a reasonable adjustments claim, the time limit runs from the date of the omission.

123. We accept that the claimant was not fully aware of her employment rights. However, the claimant is clearly an intelligent person, with access to the Internet. She was interested in developing into HR work. We conclude that it would have been possible for her to find out her employment rights sooner. Time limits are meant to be strictly observed. Granting an extension of time is still the exception, rather than the rule, even in an Equality Act claim. Bearing in mind all these factors, we consider that it would not be just and equitable to extend the time within which this reasonable adjustments claim should have been submitted. The claim therefore fails because we do not have jurisdiction to hear it.

Concluding remarks

124. We conclude by making one further observation. This is that much of the dispute between the parties could have been avoided, had there been proper record keeping at the time, and better communication between the parties as to what they understood had been agreed. The employer must take most of the responsibility for this, it being in a more powerful position in the employment relationship. We also conclude however that the claimant could have made her position clearer, for example in relation to the enquiries made of her by Ms Balashova from January 2019 onwards; and in relation to the specific tasks which she was finding difficult to carry out from November 2018 onwards and adjustments required. Much of the dispute that played out before us, could have been avoided if the parties intentions had been properly communicated and subsequently recorded in writing. All those involved might want to consider what they might learn from what has happened for the future.

_____

Employment Judge A James
London Central Region

Dated …20 October 2020…

Sent to the parties on:

20/10/2020

.....

For the Tribunals Office

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.

ANNEX A - LIST OF ISSUES

Time limits / limitation issues

1. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")?
2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 July 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Unfair dismissal (sections 94, 95 & 98 of the Employment Rights Act 1996 (ERA")

3. Was the claimant dismissed in accordance with section 95(1)(a) ERA?
4. It is agreed that the claimant's employment terminated on 31 August 2019.
   4.1. The claimant says that she was dismissed as follows: on 25 July 2019 Assaf Laznik told her "It seems to me that it will be best if you would just leave the company"; she said "OK"; he told her that he would confirm her termination date; she received an email dated 6 August 2019 confirming that her employment would end on 31 August 2019.
   4.2. The respondent says that the claimant resigned as follows: on/around 25 July 2019 Mr Laznik told her "It sounds to me that you are unhappy working here, perhaps you should consider if you want to stay"; the claimant said "No, I want to leave"; Mr Laznik replied "That is very sad, are you confident you do want to leave?; the claimant said "Yes"; it was agreed that the clamant would work her notice until the end of August 2019.
5. If so, what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) & (2) of the Employment Rights Act 1996 ("ERA")?
6. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the respondent in all respects act within the band of reasonable responses?

Disability (section 6 & Schedule 1 EQA)

7. The claimant is deemed automatically to be a disabled person in accordance with the EQA at all relevant times by reference to cancer.

Failure to make adjustments (sections 20 & 21 EQA)

8. The claimant complains about the following provision, criterion or practice ("PCP") / physical feature:
   8.1. The PCP that she was required to work on Wednesdays from March 2019. The respondent says that to the extent that the claimant was

required to work on Wednesdays these were very light duties in line with what she would have been required to do if she was on holiday.

8.2. The physical feature of her office set-up which was that because her desk was on the first floor of the building, the kitchen on the second floor, Mr Laznik on the third floor, Mr David Pollock and the toilet on the fourth floor, she was required to walk up and down several flights of stairs throughout the day.

9. Did any such PCP / physical feature put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any time?

9.1. In respect of the PCP: (1) it impacted on the treatment and counselling provided to her at home by CHAI Cancer Care, every Wednesday; (2) it added to her stress as it prevented her from taking a physical and mental rest from work; (3) she was dismissed.

9.2. In respect of the physical feature: it increased her pain and fatigue and also impacted on her because of incontinence / urgency.

10. If so, were there steps that were not taken which could have been taken by the respondent to avoid any such disadvantage and if so, would it have been reasonable for the respondent to have taken those steps at any relevant time? The claimant says that the respondent should have taken the followings steps:

10.1. In respect of the PCP: (1) not being required to work on Wednesdays – from March 2019; (2) being redeployed.

10.2. In respect of the physical feature: (1) to undertake PA duties only; (2) to relocate to a desk on the third or fourth floor of the building – from November 2018.

Discrimination arising from disability (section 15 EQA)

11. If the claimant was dismissed, was this because of something arising from her disability? The claimant says that she was dismissed because: (1) she was unable / refused to work on Wednesdays; (2) she was struggling to work / slower in carrying out her work,

12. If so, has the has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent to confirm the aim(s) relied on.

Harassment (section 26 EQA)

13. Did the respondent engage in unwanted conduct as follows?

13.1. In January 2019 when Mr Laznik allegedly screamed at the claimant for leaving her desk unattended when she went to the toilet; and when she tried to explain, he refused to listen and said that not all the temps were that bad and some of them were even intelligent enough not to leave their desk while he was on a conference call.

13.2. When the respondent allegedly demanded repeatedly that she worked on Wednesdays, from March 2018 until her employment terminated.

14. If so, did this conduct relate to the claimant's disability?

15. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect)?

Pay

16. It is agreed that the claimant received no pay in respect of the period 25 July – 31 August 2019.

17. The claimant says that she was given notice of dismissal on 6 August 2019 and that she was entitled to wages for the period from 25 July – 5 August 2019; notice pay from 6 August – 6 September 2019; and a payment in lieu of accrued holiday on termination.

18. The respondent says that it withheld this notice pay and holiday pay because the claimant had been overpaid in the amount of £15,602.51. Was this an authorised deduction?

Unauthorised deductions (section 13 ERA)

19. Was the claimant entitled to be paid wages in respect of the period 25 July – 5 August 2019?

20. Was the claimant entitled to receive a payment in lieu of holiday accrued on termination?

21. If so, to how much was she entitled to be paid?

Breach of contract (notice pay)

22. Was the claimant entitled under her contract to receive notice pay from 6 August – 6 September 2019?

23. If so, to how much was she entitled to be paid?

Counterclaim

24. Did the claimant breach her contract in (1) failing to report her hours correctly to HR; and (2) not repaying money paid to her as a loan, equivalent to salary, during periods of unpaid leave? The claimant denies that there was a loan nor any overpayment.

Remedy

25. If either party succeeds, in whole or in part, the tribunal will be concerned with issues of remedy and in particular, if either party is awarded

compensation, it will decide how much to be awarded. This will also include, if it is found that there was a dismissal, whether the respondent failed unreasonably to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, whether it would be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%.