CD

EMPLOYMENT TRIBUNALS

Claimant: **Miss Sirin Bullici**

Respondent: **Financial Ombudsman Service Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11, 12 and 13 November 2020**
14 January 2021

Before: **Employment Judge Barrowclough**

Members: **Mrs G McLaughlin**
Mr D Ross

Representation

Claimant: In Person

Respondent: Mr Richard Hignett (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that all the Claimant's complaints of disability discrimination, for pay in lieu of notice, and of unlawful deductions from her wages, fail and are themselves dismissed.

REASONS

Background

1 In her claim, presented to the Tribunal on 3 February 2020, the Claimant, Miss Sirin Ceyda Bullici, who was born on 26 November 1990, put forward complaints of (a) unfair dismissal; (b) disability discrimination; (c) unlawful deductions from wages, and (d)

unpaid notice pay. The Respondent accepts that it employed the Respondent as an investigator between 3 June and 14 October 2019 when, it is asserted, she resigned with immediate effect, and disputes and resists all the Claimant's complaints. At a Preliminary Hearing before Employment Judge Lewis on 29 June 2020, the Claimant's complaint of unfair dismissal was struck out, since she lacked a sufficient period of continuous employment with the Respondent, in accordance with s.108 Employment Rights Act 1996, to bring such a claim; and orders and directions were made for the future conduct of the claim until trial.

2 The Full Merits Hearing of the Claimant's claim took place before us between 11 and 13 November 2020, and subsequently at a resumed hearing on 14 January 2021, when the Tribunal reserved its judgment and took the opportunity to discuss and review the evidence and submissions we had heard and read. The first three days of the hearing proceeded by way of a remote hearing utilising the CVP platform; whilst on 14 January 2021 we heard the parties' closing submissions by way of a telephone hearing.

3 The Claimant represented herself and gave evidence in support of her claim. In addition, she called as a witness her former colleague Ms Rizpah Sasu, who is employed by the Respondent as an adjudicator. The Respondent was represented by Mr Richard Hignett of counsel who called as witnesses (a) Mr Gavin Cook, an ombudsman manager, (b) Miss Farzana Kamal, a senior employee relations partner, (c) Ms Ruth Hursey, another ombudsman manager, and (d) Mr Metkel Mussie, a senior investigator, all of whom remain employees of the Respondent. The Tribunal was provided with statements from all the witnesses from whom we heard, together with a chronology prepared by the Respondent (exhibit R-5), an agreed List of Issues (R-8), a copy of the Claimant's job application form (R-9), and finally two substantial volumes of an agreed trial bundle (R-6 & R-7). In advance of the last day of the hearing, the parties had prepared and exchanged written closing submissions, to which they spoke at the telephone hearing on 14 January 2021.

4 The disabilities relied upon by the Claimant were (a) Irritable Bowel Syndrome ("IBS"), (b) Chronic Fatigue Syndrome ("CFS"), (c) Fibromyalgia, and (d) Depression. The Respondent admits that the Claimant was disabled at the material time by reason of IBS and that it had knowledge of that condition in July 2019. In relation to the other disabilities alleged, the Respondent does not accept that the Claimant was disabled by reason of those conditions at the material time, and/or that the Respondent had actual or constructive knowledge of them. In relation to her disability complaints, the Claimant advances allegations of (a) direct discrimination, (b) discrimination arising from a disability, (c) a failure to make reasonable adjustments, and (d) disability related harassment. The Claimant's complaint of unlawful deductions from wages arises from three separate occasions where she claims to be entitled to paid leave whilst acting as a *'carer'* or *'companion'* for various members of her family. Finally, the Claimant claims four weeks' wages in relation to pay in lieu of notice following her resignation on 14 October 2019.

Findings of Fact

5 The Respondent provides an ombudsman service for the financial services industry. It currently employs approximately 3,000 individuals, most of whom are based at and work from premises in Harbour Exchange Square, London E14. Individuals who are employed as investigators (such as the Claimant) are placed on joining the Respondent in

its training *"Academy"*. That is essentially a six month course, initially of four weeks' classroom tuition and learning, followed by approximately five months "on the job" training, as well as further classroom tuition. Whilst in the Academy, and until confirmed as investigators at its conclusion, trainees are probationary employees, and their employment can be terminated (by either party) on notice. Additionally, and where deemed appropriate (for example due to ill-health absence), the probationary period can be extended.

6 The Claimant applied to join the Respondent by completing and submitting an online application form on 24 January 2019. That is a 51-page document which was produced during the course of the hearing and became Exhibit R-9. One of the questions raised in that form is whether the applicant considers himself/herself to have a disability or any long-term health conditions. In the application submitted by the Claimant, she answered that question in the negative. The Claimant was interviewed for an investigator role on 20 February 2019 and subsequently offered employment, which she accepted. The Claimant commenced employment with the Respondent as a trainee investigator on 3 June 2019 on a full-time basis, working a 7 hour day between 9am and 5pm. The Respondent's approach was that all trainees must attend the workplace, rather than work remotely from home, although in the case of one trainee (identified as 'Harry B', on whom the Claimant relies as a comparator) he was permitted to work from home on a limited number of occasions during his probationary period, as a result of a medical condition of chronic migraine syndrome which was disclosed in his application form.

7 The Claimant was one of eight new trainees who were in a group then led and line managed by Mr Gavin Cook. He has been employed by the Respondent for approximately 15 years, initially as an adjudicator (similar to the current investigator role), then as a team manager, and for the last three years as an ombudsman manager. For two of those years, Mr Cook worked in the Respondent's Academy, and had managed two groups or cohorts of new entrants through their probationary period prior to the Claimant and her colleagues joining the Respondent in June 2019.

8 As noted, new entrants with the Respondent spend their initial month in intensive classroom training on financial services and products in order to equip them with the skills required to determine the disputes which the Respondent receives. Once that classroom training has been completed, the trainee investigators must complete a further five months training in that role whilst remaining probationary employees. Trainees are allocated consumer complaints regarding financial services or products to determine, and to produce views or opinions on what the outcome should be. New entrants are introduced to complaints gradually, and are expected to build up to a case load of between 15 and 20 cases during their probationary period. The productivity objectives for trainees are to resolve one case per week from week 13, rising to three cases a week by week 22, and the Respondent's expectation is that an investigator will have resolved at lease 21 cases by the conclusion of his/her probationary period.

9 Each group in the Academy consists of one ombudsman manager/mentor (in this case Mr Cook), two experienced investigators who act as team mentors for the trainees, and normally between six and eight new entrants. The training provided to new entrants is most intensive in the first month of their probationary period, when the number of classroom style sessions is at its highest.

10 During the Claimant's first four weeks, a number of concerns and some negative feedback were raised about her behaviour during academy sessions. An example is the memorandum sent to Mr Cook concerning the Claimant by Ms Christina Taylor, a senior investigator and one of the mentors attached to the Claimant's group, at page 98. Matters of concern included suggestions that the Claimant was disruptive and shouted out during training sessions, used her mobile phone even when having been asked not to do so, and of poor time keeping.

11 Mr Cook as the group's ombudsman manager held regular review meetings with all members of his trainee team. His meeting with the Claimant took place on 1 July and is documented in Mr Cook's follow-up email of the following day (at page 95). That records the matters raised, including the Claimant's alleged behaviour during training sessions, at least some of which she disputed; and also that the Claimant had not apparently realised that the impression that she had been giving was a negative one. The Claimant shared some information about her personal circumstances with Mr Cook which he noted as adding some context and going some way to explaining some of the behavioural observations. Mr Cook believed that the Claimant then mentioned her condition of IBS and her need for toilet breaks; and that she may also have mentioned suffering from depression occasionally.

12 The Claimant was also attending regular medical appointments (e.g. 27 June on page 89). That led Mr Cook to contact the Respondent's HR on 5 July (page 97) to ask whether the Claimant should be making up the time involved when she was absent for such appointments. The advice Mr Cook received was that if an employee was attending frequent appointments, he could ask for evidence (by way of an appointment letter or card), and also seek further information about the condition giving rise to such appointments. Additionally, and if possible, medical appointments should be arranged by employees at times which caused the least disruption, and the individual's line manager should be kept informed.

13 On 15 July, the Claimant contacted the Respondent's facilities team to ask about workplace comfort adjustments that she would like. These included a footrest, keyboard and back rests, and a workplace assessment. The Claimant also completed a "*workplace adjustment passport*" on 17 July, a copy of which is at pages 114 – 116. In her disability passport, as it was referred to before us, the Claimant set out in detail her health conditions, barriers in her working environment that impacted her performance, and the adjustments she would like. In particular the Claimant mentioned that due to the various medications she was taking, she tended to feel very cold; that she suffered from pains, migraines and tiredness; and that her doctors were investigating her symptoms, as she might have chronic fatigue syndrome and fibromyalgia. In addition, the Claimant mentioned her IBS, depression, and insomnia; and that she suffered pains in her back, neck and shoulder and also in her feet/ankles from an earlier injury. The adjustments the Claimant sought included the ability to use a quiet room, adjustments to her desk together with a fan heater, and the ability to work from home on days when she was particularly unwell. The Claimant stated that she believed the adjustments required were of a permanent rather than a temporary nature; and asked that she not be questioned about her frequent need to leave her desk, which arose from her IBS.

14 . A copy of the Claimant's completed disability passport was sent by email to Mr Cook on 17 July, and he then sought assistance from colleagues including HR in advance

of his meeting with the Claimant on the following day. At their meeting on 18 July, the Claimant and Mr Cook duly discussed the document and the issues arising in consequence; and completed a referral form to be submitted to the Respondent's OH advisers. That completed form is at pages 140 – 145 in the bundle. It sets out details of the Claimant's medical conditions and of her work environment, the requirements of her role, and raises a number of issues or questions to be addressed. These included whether the Claimant was fit to be at work at all; whether any adjustments were required for her to undertake her role, and if so whether they were temporary or permanent; whether the Claimant was likely to be covered by the Equality Act; any underlying health concerns, and in what way any recommended adjustments might alleviate the disadvantages otherwise faced by the Claimant.

15 The Claimant alleges that at her meeting with Mr Cook on 18 July when the OH referral form was completed, he suggested that one of the reasons for the referral was to assess whether the job was too much for the Claimant and whether she was actually capable of working for the Respondent; and that he then said that there were other people who had missed out on the opportunity of employment with the Respondent, who would have been better suited to the role and who did not have any of the issues which disadvantaged the Claimant. Mr Cook disputes that he said that or anything like that, and we address this clear conflict of evidence hereafter.

16 A workplace assessment of the Claimant's workstation was in fact undertaken on 24 July which subsequently resulted in various items of equipment being provided to the Claimant to assist her. That also gave rise thereafter to further discussions in mid-August 2019 concerning alternative options in terms of an ergonomic chair (pages 153 – 155). The Claimant also met Manny Anjula, the Respondent's health and safety manager and diversity, inclusion and wellbeing adviser, to assess the provision of a work laptop for her: it appears from the undated email at page 125 that was at about the same time as other adjustments, including a work chair, were being agreed and ordered.

17 On 29 July the Claimant attended a one to one meeting with Mr Cook, addressing her progress to date. The form completed by both with their comments is at pages 122 – 124. No reference was then made to the medical matters giving rise to the Claimant's OH referral. In terms of her work performance, the Claimant stated that she had closed three cases and was currently working on a further twelve; that she seemed to be getting through her cases quite fast and would like to close at least six further cases in the current month. Mr Cook's comments were supportive of the pace at which the Claimant was working and the cases she had closed, but highlighted the importance of accuracy and of an appropriate style and tone in the work the Claimant produced. In relation to training sessions, Mr Cook records in summary the discussion he had had with the Claimant on 1 July concerning the negative impression she had given in some training sessions, but was pleased to say that no subsequent poor feedback had been received. The Claimant's goal was recorded as being to have closed a further six cases before their next meeting. Finally, Mr Cook commented that the Claimant appeared to be becoming "more remote" from team members and that her enthusiasm for the work could lead to her seeming to be combative, and that these were matters to be discussed at their next meeting.

18 More or less simultaneously, the Claimant had a meeting with one of the mentors of her training group to assess her progress and performance to date. That resulted in a two-page email dated 30 July at pages 126 – 127. The main focus for comment was once

again the variable content, accuracy, and quality of the submissions/reports provided by the Claimant.

19 On 1 August, the Claimant attended for her OH appointment, and the OH report prepared by Ms Beverley Gates and dated 7 August is at pages 137 – 139. In terms of conclusions and recommendations, Ms Gates' advice was that whilst the Claimant had several underlying health conditions which could already impact on her physical and psychological wellbeing, she was medically fit to be at work and to undertake her current role, with adjustments in place. Some of the adjustments requested by the Claimant had already been made whilst others, including a small heater, were recommended. In Ms Gates' opinion, the Equality Act was likely to apply to the Claimant's condition of depression since it had apparently been present for longer than twelve months, whilst confirmation of diagnoses of fibromyalgia and chronic fatigue syndrome was awaited, which were also likely to be covered by the Act. The report also clarified that the Claimant would benefit from regular breaks from her PC, especially if the onset of a migraine headache was anticipated; but stated (erroneously, and presumably on the basis of what the Claimant told her) that the Claimant was already working from home on one or two days a week. No further medical information or review was suggested.

20 On the following day, 8 August, the Claimant sent the Respondent's HR an email (page 151) informing them that her diagnosis of fibromyalgia had been confirmed that week by her GP (although in fact that seems not to have been the case), and that she still awaited a diagnosis in relation to chronic fatigue syndrome. During the following week, and as already noted, the Claimant was in discussions with the Respondent's facilities team concerning her recent workplace assessment and a possible alternative chair. That resulted in the provision of an adjustable chair for the Claimant on 21 August (page 170).

21 A further meeting took place on 21 August between the Claimant and Mr Cook, who had been absent on annual leave, in order to discuss the OH report of 7 August, at which a mental health first aider was arranged to accompany the Claimant.

22 There were further communications during the last week in August between the Claimant and the Respondent's health & safety manager concerning the Claimant's replacement work chair, and on 30 August Ms Anjula met Ms Kamal, the Respondent's employee relations partner in their HR team, to discuss the Claimant's recent Occupational Health report. The action points agreed at that meeting on 30 August are set out at page 176. These included that the Claimant should be asked to provide details of her medical appointments, as well as to complete time sheets given the amount of time spent away from her desk; and that OH should be asked how long the Claimant's suggested breaks at work should be, and whether the Claimant should be asked to 'make up' the time spent on her medical appointments. The stated intention was to assess how feasible and/or reasonable it was to ask the Claimant to return to work following an appointment, and to what extent such appointments could be arranged for either the beginning or the end of the working day. Access to Work would also be contacted to confirm that the Respondent agreed their assessment.

23 On 2 September Access to Work confirmed on behalf of the DWP that taxi fares and costs involved in the Claimant attending medical appointments would be covered and could be recouped, since the Claimant's GP had confirmed that she was unable to use public transport. On that same day, the Claimant called the Respondent's Helpline

concerning a personal complaint she wished to raise against a finance company arising out of her purchase of a mattress. The Claimant phoned the Helpline again on the following day, when she informed them that she was a member of the Respondent's staff. Also on 3 September, the Claimant sent Mr Cook confirmatory details of her recurring physiotherapy appointments on 22 and 29 August and 5 September.

24 Ruth Hersey, another ombudsman manager, emailed the Claimant on 4 September since she had become aware that the Claimant had brought her own personal complaint to the Respondent. In that email at page 199, Ms Hersey set out the appropriate procedure for such situations – essentially that an employee of the Respondent should not use their professional status or details in bringing and pursuing a complaint. The Claimant responded later that same day, apologising for any errors due to ignorance or misinformation, and confirming that in future she would follow the guidance contained in the Respondent's "*Discovery*" guidance concerning staff cases, of which she was now aware.

25 Also on 4 September, Mr Cook received advice from the Respondent's HR department that they believed that it was reasonable to expect the Claimant to return to work following medical appointments, particularly since her travel by taxi had now been authorised and there was a regular pattern of appointments, unless they were towards the end of the working day. In addition, Mr Cook exchanged emails with the Claimant, who confirmed that her regular physiotherapy appointments usually lasted between one and a half and two hours. Finally, on 3 September the Claimant had asked Mr Cook for "carer's leave" in relation to her father, who was due to attend hospital for an operation later that month, having recently been diagnosed with cancer: Mr Cook sought advice, and was told that if the Claimant's role was to be practical – driving her father to the hospital or caring for him after surgery, for example – then such leave might well be appropriate; but understood the Claimant to rather be proving moral support. In the event carer's leave was not granted, and the Claimant took the relevant day off.

26 On 5 September, the Claimant requested time off later that same day for an additional physiotherapy appointment, and there was a further exchange between the Claimant and Mr Cook about her providing details of forthcoming appointments, returning to work thereafter and the completion of a time sheet. The Claimant was upset as a result, and spoke to Ms Kamal of HR; and later in the day Mr Cook arranged a meeting for the following week with both the Claimant and Ms Kamal to discuss and try to progress the medical appointments issue. That meeting duly took place on 9 September, and the matters discussed and agreed were summarised by Ms Kamal in her email to the Claimant and Mr Cook of 12 September (pages 226 – 227). They included a further reference to Occupational Health concerning the Claimant's returning to work after medical appointments in the light of her potential diagnoses of fibromyalgia and chronic fatigue syndrome; confirmation of the Claimant's pattern of appointments relating to her various medical conditions; that the Claimant would provide as much notice as possible of forthcoming appointments, particularly when they were scheduled at short notice; and that the Claimant would complete a time sheet to capture her hours of work, at least on an interim basis.

27 Later that same day, however, the Claimant attended a medical appointment which had not been discussed with or disclosed to Mr Cook in advance. Accordingly, Mr Cook saw the Claimant on 13 September to discuss this. That was plainly a somewhat

stormy meeting. Mr Cook's summary is at pages 233 – 234. The Claimant apparently said that she did not agree with Ms Kamal's summary of what had been agreed on 9 September, and there was further discussion about the Claimant's poor time keeping, prior notification of appointments and related issues. At one point the Claimant is said to have raised her voice so that someone in an adjoining office intervened, and mid-way through the meeting the Claimant requested that a colleague be present as a witness, which was duly arranged.

28 A further disagreement arose on 16 September as to whether or not the Claimant was adopting a '*combative*' approach. That had been noted by the Claimant's group mentor, Ms Christina Taylor, although the Claimant disputed that was correct. The note from Ms Taylor to Mr Cook at pages 98 – 99 (which itself refers to an email from the Claimant of 17 September) sets out Ms Taylor's summary of the Claimant's general approach and behaviour.

29 Following her meeting with the Claimant on 9 September, Ms Kamal had drafted some additional questions for Occupational Health. Those are set out at pages 244 – 245. The questions included whether the Claimant was fit for her current role generally; whether she should be expected to return to work following her medical appointments, and/or was able to make up "lost" hours; whether it was unreasonable for the Claimant to be asked to complete a time sheet; and whether it was unreasonable not to allow the Claimant to work from home, as she had requested.

30 The Claimant consulted her GP on 17 September, resulting in a fitness for work certificate at page 451. That indicated that she would be fit for work for the following six months, with adjustments, due to her conditions of IBS, fibromyalgia, and a "depressive episode".

31 On 24 September, Ms Anjula wrote to the Claimant summarising the position in relation to adjustments which had or had not been made to date (page 263). Those made included anti-glare screens, a foot and leg rest, use of a quiet room, the provision of a fan and a different chair, and lighting being reduced above her desk. Additional adjustments, recommended by Access to Work, including equipment (keyboard, mouse, laptop, Read and Write programmes) could also be provided. However, working from home would not be considered until the Claimant had finished her Academy training; Dictaphones were not permitted by the Respondent due to the sensitivity of information being dealt with by staff; and no heater would be provided due to the potential trip hazard and also the impact on surrounding colleagues – it was suggested that the Claimant bring in blankets and a hot water bottle instead.

32 An updated Occupational Health Report was provided on 27 September (pages 331 – 335). Prior to that, the Respondent asserts there had been a continuation of the pattern of the Claimant's failing to return to work following a medical appointment (19 September), poor time keeping (on 20 September), and that the Claimant continued to email the Respondent concerning her own complaint using her work email address (23 September, page 260).

33 In her updated OH report, Ms Gates responded to the additional questions raised by Ms Kamal. The Claimant should be able to return to work after her medical appointments, unless those took place towards the end of her working day; and should be

able to make up any working hours taken up by such appointments. If she could not do so, then she should provide an appropriate fit note. It was not unreasonable to ask the Claimant to complete a time sheet, at least on an interim basis, and it might be appropriate to discuss a temporary reduction in contractual hours to accommodate appointment times until her formal diagnosis. The Claimant remained fit to work and fit for her particular role, a workplace stress risk assessment should be undertaken, and a strategy put in place to resolve ongoing issues; and after successful completion of Academy training, permanent consideration of flexible working from home could be considered. If the Claimant was unable to make up hours used for medical appointments, then consideration might be given to working from home on an ad hoc basis, if feasible and able to be accommodated by the Respondent; alternatively the Claimant's workload might be reduced whilst in training, or her time in Academy training extended.

34 On the same day, 27 September, the Claimant's interim three-month review meeting took place. Present were the Claimant, Mr Cook, and Mr Metkel Mussie, one of the Respondent's senior investigators and a mentor in the Academy. Additionally, Mr Mussie is an information consultation committee representative ("ICC rep" – the local equivalent of a union representative, we were told) and it was in that capacity of providing support for the Claimant that he attended the meeting on 27 September. Notes of the meeting are at pages 293 – 296. Broadly, in terms of productivity, knowledge and skills, it was felt that the Claimant was making reasonable progress, albeit with some areas where improvement could be made. In terms of employee behaviour, the Claimant was encouraged to accept the information and feedback with which she was provided by mentors and others, and that she needed to improve her time keeping. Mr Cook wrote to the Claimant following their meeting in an undated memorandum at pages 203 – 206. In that email, Mr Cook sets out in more detail her progress to date and the areas for improvement and development during the second half of the Claimant's Academy training, in order to meet the Respondent's expectations at the six-month conclusion of the programme.

35 On 1 October 2019, the Claimant sent a further email concerning her personal complaint arising out of her mattress purchase. That was to the investigator dealing with the matter (Mr Guy Wainwright) and a copy is at page 409. The Claimant appears to have followed that up with further emails to Mr Wainwright on 3 and 4 October (pages 412 and 413); and Mr Wainwright responded to the Claimant on 4 October at 15:37 hours (pages 411 – 412).

36 More or less simultaneously, the Claimant sought carer's leave on 1 October in order to assist her sister, who had gone into labour, by dropping off and collecting her children from school. Ms Kamal informed the Claimant on 2 October that whilst carer's leave did not cover the situation, she could use her annual leave entitlement if she wished (316 – 317). The Claimant clearly thought that was not right and sought advice from Mr Mussie on the issue, who confirmed to the Claimant on 4 October that he considered Ms Kamal's view to be correct (341).

37 Also on 3 October, Ms Kamal sent Mr Cook a 'workplace stress risk assessment and action plan', which had been recommended for completion with the Claimant in the updated OH report. In her covering email at 327, Ms Kamal recommends either that this be completed in a one to one with the Claimant, or alternatively sent to the Claimant for her input and a subsequent discussion.

38 As a result of concerns arising from the Claimant's submission of her own personal complaint to the Respondent, Mr Cook had started investigating those issues on about 7 September. As set out above, the Claimant had since then taken a number of steps to seek to pursue her complaint. Mr Cook's investigation report was finalised on 9 October and a copy is at pages 395 – 401. In the report, Mr Cook suggests that the Claimant was trying to influence the outcome of the investigation into her own case, and raises concerns not only about the Claimant's use of the Respondent's internal process, but also the aggressive manner in which she was dealing with the investigator. As a result, he recommends a probation review.

39 On 10 October, an ombudsman manager called Sim Ozen wrote to the Claimant inviting her to a probation review hearing on the following day in the light of Mr Cook's investigation report, a copy of which, together with its various appendices including the various emails relating to the Claimant's complaint, was annexed in a hearing pack. The Claimant was informed that possible outcomes of the review hearing were that her probationary period could be extended, or that she could be dismissed before the end of that period. The hearing was to be conducted by Mr Ozen, accompanied by Mr John Upsdale, an employee relations partner, and the Claimant was reminded that she could attend with a trade union representative or work colleague if she wished. The probation review hearing was subsequently rescheduled to take place at the Respondent's premises at 9am on 15 October (pages 404 – 405).

40 However, on 14 October, the day before the postponed probation review hearing, the Claimant, although at work, did not undertake her 13:00 hours telephone shift. Instead, at 15:53 hours that day, the Claimant sent an email to Mr Upsdale tendering her resignation from the Respondent. The Claimant's email is at pages 366 – 368. In that email, the Claimant states that she feels she is being discriminated against by her manager who apparently did not *"understand what it means to have disabilities"*. The Claimant suggested that Mr Cook had been trying to find the means to *"get rid of her*". In addition, the Claimant provided what she describes as feedback in relation to the training provided by the Respondent, including the difficulties in getting help from mentors or any support whilst in the Academy, and also complained about the Respondent's refusal to allow her to work from home.

41 Mr Upsdale responded to the Claimant's resignation and attached feedback virtually simultaneously, his email to the Claimant being timed at 3:54pm. In his reply (page 366) Mr Upsdale first said that it was disappointing to learn that the Claimant had forwarded copies of her email to a number of colleagues; and that, as the Claimant had resigned on that day (14 October) with immediate effect and before a formal probation hearing could take place, she would be paid up to and including that date, together with any outstanding holiday pay due to her.

42 Finally, the Claimant sent the Respondent a further doctor's fit note dated 22 October, which signed her off work for a period of four weeks.

43 As noted, one of the adjustments which the Claimant had sought during July 2019 was to be allowed to work from home for at least one or two days per week whilst still in the Respondent's Academy. That is something which the Respondent ordinarily would not permit because of the impact on the training and knowledge tests provided, as well as trainee assessment and monitoring in an environment where high levels of support and

guidance are in place on 'live' cases involving members of the public. However, another trainee investigator, Harry B, had requested in his application for employment to be allowed to work from home occasionally (up to three or four times per year) due to his medical condition of chronic migraine syndrome; and that had been permitted by the Respondent. In fact, as Ms Kamal explained, Harry B had subsequently worked from home for seven days within a relatively short period of time and whilst still in the Academy. That had resulted in a review with him when it was stressed that homeworking should only occur when strictly necessary; and we were told that Harry B left the Respondent's employment at or shortly after his probationary period came to an end.

The applicable law

44 In terms of the applicable law, the Claimant's claim of unlawful deductions from wages relates to paid leave as a carer for respectively her father, sister, and mother. Whether or not the Claimant was entitled to any such payments is governed by the terms of the contract between the parties. Somewhat unusually, we were not taken to any such document, which is not included in the agreed trial bundle The Respondent relies upon the terms of the '*Carer's Leave Policy*' which forms part of their employee handbook, and a copy of which is at pages 430 to 432.

45 Whether or not the Claimant's resignation was on notice or with immediate effect is an issue of fact. If the Claimant's resignation was in fact on notice, then there seems to be no dispute between the parties, and in the absence of the Claimant's contract, that the relevant notice period was four weeks by either party during the probationary period.

46 The disability discrimination complaints advanced by the Claimant are of direct discrimination (s.13 Equality Act 2010), discrimination arising from a disability (s.15), failing to comply with a duty to make adjustments (s.21), and disability related harassment (s.26). A person has a disability if she has a physical or mental impairment which has a substantial and long-term adverse effect on her abilities to carry out normal day-to-day activities (s.6). In terms of the Respondent having actual or constructive knowledge of the Claimant's alleged disabilities (other than IBS, where knowledge from July 2019 is accepted), the Tribunal gratefully adopts the approach set out by the Court of Appeal in *Gallop v Newport City Council [2013] EWCA Civ 1583*. A responsible employer has to make his own judgment as to whether or not an employee is disabled within s.6, and will rightly want assistance and guidance from OH or other medical advisers, including if appropriate asking practical questions about the impact of the condition(s) in question.

47 Direct discrimination requires that an employer treat a claimant less favourably because of a protected characteristic (disability, in this case) than the employer treats or would treat an actual or hypothetical comparator. In this case, the Claimant relies on an actual comparator called Harry B, who was given limited permission to work from home whilst still in the Respondent's Academy. The approach which the Tribunal should adopt in relation to such a complaint was helpfully and definitively set out by the Court of Appeal in *Igen Ltd v Wong & others [2005] ICR 931*. The first question for us is whether the Claimant has established, on the balance of probabilities, facts from which we could reasonably conclude, in the absence of a satisfactory explanation, that the Respondent was guilty of the discriminatory act(s) alleged. If not, then the complaint fails and must be dismissed. It is important for the Tribunal to bear in mind that it is unusual to find direct evidence of discrimination, and few employers would be prepared to admit such

discrimination, even to themselves; so the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. If the Claimant has proved facts from which inferences could be drawn that the Respondent has treated her less favourably on a protected ground, then the burden of proof shifts to the Respondent employer to prove, once again on a balance of probabilities, that its treatment of the Claimant was in no way attributable to or infected by unlawful discrimination. If the Respondent can do so, then the complaint fails; if he cannot, then the claim succeeds.

48 Discrimination arising from a disability is established in the circumstances of this case if the Respondent treated the Claimant unfavourably because of something arising in consequence of her disability/disabilities, and could not show that such treatment was a proportionate means of achieving a legitimate aim. The unfavourable treatment alleged by the Claimant was the Respondent's requirement that the Claimant keep a time sheet recording the time she spent working, in the light of the extended breaks and time off involved in her attending medical appointments. In *Trustees of Swansea University Pension Scheme v Williams [2018] UKSC 65*, the Supreme Court endorsed the guidance provided in the statutory Code of Practice that there is a relatively low threshold of disadvantage which is sufficient to trigger the 'justification' requirement under the Equality Act. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*, the EAT set out that the Tribunal's task is to determine what caused the impugned treatment, or what was the reason for it, and whether that reason or cause is something arising in consequence of disability; if so, then it is for the employer to provide a defence of justification.

49 In relation to the duty to make reasonable adjustments, Mr Hignett helpfully directed us to the structured approach set out at paragraph 27 of the EAT's judgment in *Rowan v Environment Agency [2008] IRLR 20*. The Tribunal should identify the provision, criterion or practice ('PCP') applied by or on behalf of an employer, or the physical features of the employer's premises, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the employee. Identification of the substantial disadvantage alleged may involve consideration of the cumulative effect of both the PCP and the relevant premises physical features, so it will be necessary to look at the overall picture.

50 The Claimant makes a number of separate complaints of disability related harassment. Harassment consists of unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Discussion and Conclusions

51 We turn to the agreed List of Issues, commencing with whether or not the Claimant had any disabilities at the material time in addition to her accepted condition of IBS, and if so whether the Respondent had actual or constructive knowledge of it/them.

52 Following the preliminary hearing of her case on 29 June 2020, the Claimant was ordered to disclose all medical documents relating to all four alleged impairments; and the disclosure she provided is at pages 436 to 444. The Claimant blames the Respondent for the fact that such documentation is so limited, on the basis that the Respondent did not follow up its request for more documents, whilst the Respondent says it is for the

Claimant, rather than them, to provide relevant disclosure. Be that as it may, the only medical documentation relied upon in support of the Claimant's case was included in the bundle before us.

53 Looking first at CFS, the evidence before the Tribunal was that the Claimant was under investigation for that condition at the time of her employment with the Respondent, as she stated when completing the disability passport on 17 July 2019 (page 114) and at her OH meeting on 1 August that year (page 137). But the first diagnosis of that condition was on 29 April 2020, as her specialist's letter of that date at page 442 makes clear, and as the Claimant confirmed in her disability impact statement email of 9 September 2020 (page 76), by which time the Claimant's employment had terminated some six months earlier. Mr Hignett is correct in submitting that there are no medical documents detailing that condition, its effects or how long the Claimant might have been suffering from it, pre-diagnosis, in the evidence before the Tribunal. It follows that the Claimant has not proved that she was disabled by reason of CFS at the material time; and even if she was, in our view the Respondent could not have known that she was so disabled.

54 The first confirmed diagnosis of fibromyalgia in the bundle is in the statement of fitness for work provided by the Claimant's GP surgery on 17 September 2019 (page 451). Whilst the Claimant said in her disability impact statement of September 2020 that she had been diagnosed with that condition before her period of employment with the Respondent, that is undermined by what the Claimant stated in her disability or workplace adjustments passport dated 16 July 2019 (*'my doctors are investigating my symptoms as I may have CFS and fibromyalgia'*); which is what the Claimant repeated to OH in August that year (page 137). The only documents setting out the effect of that condition are the Claimant's disability impact statements of 22 August and 11 September 2020 (pages 74 and 76). In our judgment, the Claimant has not proved that she was disabled by reason of fibromyalgia before 17 September 2019, which was about four weeks before the Claimant's resignation on 14 October; and the Respondent could not be reasonably expected to have known of that disability until receipt of the 17 September fit note. The Claimant's suggestion that she had received confirmation of her condition of fibromyalgia from her GP in early August is not supported by any separate documentation.

55 In her disability impact statement of 11 September 2020, the Claimant says that she has suffered from depression since she was a teenager. There are references to 'depressive episodes' in the Claimant's book of GP appointments in November 2017 (page 438) and June 2019 (page 436 and also the fit note at page 451), but nothing else apart from the Claimant's generalised and non-specific statements on 22 August and 11 September 2020. We accept that there is little if any evidence before the Tribunal concerning the length of such episodes, their effects or the treatment(s) prescribed, or whether they relate to any condition that might recur. The Claimant has not established that she was disabled by reason of depression during the period of her employment with the Respondent, nor did the Respondent have actual or constructive knowledge of any such disability.

56 The first issue under the duty to make reasonable adjustments complaint relates to homeworking, and whether the Respondent's admitted PCP of requiring the Claimant to attend the office during her training period had a substantial adverse effect on her, placing her at a substantial disadvantage in comparison with non-disabled workers. We accept Mr Hignett's submission that it did not, and that even if it did, that the Respondent was

unaware of that. There was no medical evidence to suggest otherwise, the Claimant did not put forward that contention when requesting homeworking, and it was only during the Claimant's evidence to the Tribunal that she said that travelling to work 'stressed' her body and that such journeys caused pain nausea and dizziness. Additionally, from September 2019 onwards the Claimant travelled to and from work by taxi, rather than by public transport, which the Claimant agreed made such journeys easier and more comfortable. The Claimant said that she became anxious about having to visit the toilet frequently whilst at work; but confirmed in her evidence that she had not requested to be moved to a desk or workstation closer to those facilities.

57 As Mr Cook made clear to the Claimant when the issue was raised, the Respondent does not ordinarily permit trainees in their probationary period to work from home for the reasons of intensive learning and training, supervision and assessment he set out, albeit that such a request could be raised and considered on graduation from the Academy. The Claimant had been provided with a quiet room facility and took extended breaks, as well as being absent from the office whilst regularly attending medical appointments, so in our view it was reasonable for the Respondent to insist on the Claimant working from the office rather than her home during her probationary period, particularly since we accept the importance of the matters enumerated by Mr Cook in ensuring that investigators dealing with the public are fully trained and of an appropriate standard and competence. Finally, the OH adviser stated in her report of 27 September that it was not unreasonable for the Respondent not to allow the Claimant to work from home, and also that she was fit to attend the Respondent's office. No reasoned case to the contrary was ever put forward by the Claimant; and overall homeworking was not an adjustment which the Respondent should reasonably have allowed the Claimant to undertake, whether on one or two days a week or on days of her choosing.

58 The Claimant's case was that she suffered from the cold as a result of medication she was taking for fibromyalgia, as she set out in the disability passport she completed on 16 July 2019. As set out above, in our view the Claimant was not disabled by reason of that condition (and the Respondent could not reasonably have been expected to know that) before 17 September that year, some four weeks before the Claimant left. In relation to that four week period (and indeed earlier, if we were wrong in coming to that conclusion), was it unreasonable for the Respondent to refuse to allow the Claimant to have a small heater close to her workstation? The Respondent submits that the Claimant failed to investigate which medication was causing her to feel cold, or possible alternatives without that side effect; and that there is no medical evidence before the Tribunal linking the Claimant's symptoms to the medication she was taking. Whilst that may well be correct, it was a consistent theme of the Claimant's account that her medication for that condition was causing the problem, and there is no evidence that anyone during her employment (whether the Respondent or OH) disputed or cast doubt on that contention; and we are inclined to accept it. It is not disputed that the Claimant and Mr Cook had a meeting on 21 August at which OH's recommendation that a heater be provided to the Claimant was discussed, nor that the reasons given by Mr Cook for refusing it (a trip wire hazard, and the impact on the Claimant's colleagues nearby) were then put forward. In our judgment, it was not unreasonable for the Respondent to adopt that approach, particularly given the likely discomfort that would result for the Claimant's neighbours at work from a heater during the summer months, bearing in mind the suggested alternatives of a jumper or sweater, blankets and/or a hot water bottle. We find it to be significant that the Claimant raised no further complaint about not being allowed a heater following her meeting with Mr Cook, nor that the suggested alternatives were inadequate; and we place little weight on

the Claimant's oral evidence to the Tribunal that blankets 'didn't help'. This allegation of a failure to make reasonable adjustments is not made out.

59 The first time that the provision of a Dictaphone was raised or mentioned was on 16 September 2019 as a recommendation in an email from Access to Work to the Claimant (page 248), which she forwarded to Mr Cook three days later. We agree with Mr Hignett that the Claimant had not previously raised any inability on her part to concentrate during training sessions (which is the reason relied upon by the Claimant for this adjustment), and indeed there was little if any evidence that the Claimant did in fact suffer from impaired concentration. No such suggestion was raised in her review meetings with Mr Cook. The Claimant could not recall asking a colleague to borrow his/her notes following any training session. In any event, the recommendation was considered by the Respondent's diversity and inclusion adviser, who did not approve it on security grounds in relation to all recording devices in the current GDPR climate. Neither the Claimant nor any of the Respondent's witnesses could recall seeing anyone at the Respondent using such a device. Finally, we accept that there were other means available to the Claimant (and her colleagues) to assist with their work, including the Respondent's knowledge based online platform called 'Discovery', as well as the mentors attached to each training group. We find that the Claimant did not suffer from impaired concentration, whether because of her alleged disabilities or for any other reason, and that the Claimant was not placed at a substantial disadvantage in comparison to her colleagues in the non-provision of a Dictaphone.

60 The Claimant complains that she was not allowed to move to another team, one not managed by Mr Cook, and that the requirement that she remain in Mr Cook's team put her at a substantial disadvantage in comparison with other team members by reason of her depression and/or fibromyalgia. That allegation seems to us to be misconceived. As we have found, the Claimant was not disabled by reason of depression, and her disability of fibromyalgia was only operative for the last four weeks of her employment. The Claimant accepted that there was no written evidence concerning her request for a move, and that she had only ever discussed it with Mr Cook. It is not clear to us when that discussion took place, but it is likely to have been before September 17 2019. Even if the requirement that the Claimant remain in Mr Cook's team amounted to a PCP, which is far from certain, the disabilities she relies on did not place her at a substantial disadvantage when compared with other team members. The evidence was that trainees in the Academy remain in the same teams headed up by an ombudsman manager until graduation, when they will disperse to different groups with new managers, in order to ensure continuity and informed supervision, which we find to be a reasonable and indeed sensible approach. Once again, there was no failure to make reasonable adjustments.

61 Finally, the Claimant asserts that the Respondent's requirements for her to (a) make up 'lost' time due to the longer and more frequent breaks that she was allowed to take, and (b) to record her working time in a time sheet, placed her at a comparative and substantial disadvantage because she was fatigued, unable to make up that time, and shouldn't have been required to keep such a record; and that it would have been reasonable to waive those requirements in her case.

62 That issue arises from the recommendation in the first OH report dated 7 August that the Claimant would benefit from regular breaks from her PC and access to a quiet darkened room, which the Claimant discussed with Mr Cook at their meeting on 21

August. Mr Cook then told the Claimant that she could take breaks as required, but that she would still need to complete her contracted seven hours work per day. The Claimant did not agree with that requirement, and after the issue had been raised with her diversity champion on 30 August, it was referred to OH following the meeting on 9 September. Pending resolution, the Claimant was instructed to complete a timesheet so that her actual working hours could be monitored, as she was reminded on 12 September (page 226). On 27 September, OH further advised that it was appropriate to ask the Claimant to make up the time spent on medical appointments.

63 The Respondent accepts that it did apply requirements for the Claimant to both make up working time 'lost' as a result of her taking extended breaks, and also to record her working time by completing a time sheet. However there is no evidence that either requirement placed the Claimant at a substantial disadvantage when compared with her non-disabled colleagues, since both arose directly from adjustments made to assist and benefit the Claimant during the working day which were not available to her colleagues. We find that it was eminently reasonable for the Respondent to seek advice from OH as to whether the Claimant should be required to make up working time taken on her extended breaks and as noted above, it was confirmed on 27 September that it was reasonable and appropriate to do so. We also accept that it was reasonable for the Respondent to tell the Claimant to keep a time sheet recording her working hours. As the Respondent points out, not only was the Claimant taking ad hoc extended breaks, but she also had flexible start and finish times, worked away from her desk when making use of a quiet room, and attended a range of regular medical appointments, as well as taking time off to support family members. Given the importance of the training and assessment oversight whilst the Claimant was in the Respondent's Academy, it was appropriate that the Respondent should be able to monitor the Claimant's working hours; and we find that the Claimant did in fact agree to this step, at least on an interim basis pending receipt of OH's advice, at her meeting with Ms Kamal on 5 September. In our view, there is no reason or likelihood that the Claimant's agreement to that course should have been contemporaneously misreported. Accordingly and for these reasons, this allegation is unsuccessful.

64 The Respondent's requirement for the Claimant to make up time lost due to extended breaks and to complete a time sheet of her working hours forms the basis of the Claimant's complaint of s.15 discrimination arising from a disability, and to at least some extent the same matters addressed above arise in relation to issues 24 to 29. There is some evidence, particularly in the OH reports, that the Claimant's need for extended breaks and time off in order to attend medical appointments arose from her disabilities of IBS and, from 17 September 2019, fibromyalgia; and it is accepted that the Claimant was required to complete a time sheet. Does that amount to unfavourable treatment? We bear in mind that the required threshold of disadvantage is relatively low, and that we were not told of other trainees having to account for their working hours – indeed, that seems unlikely to have been the case. On balance however, we do not consider that having to complete a time sheet meets the required threshold, particularly since it was only as a result of the fact that the Claimant was permitted extended breaks and was not infrequently away from work attending medical appointments that the requirement arose. In our view, the Respondent was entitled to know how many of her contracted hours of work the Claimant was actually undertaking.

65 In case we were wrong in coming to that conclusion, we would in any event conclude that the requirement for the Claimant to complete a time sheet, itself not that

onerous a task, was a proportionate means of achieving the legitimate aim of not only ensuring that she fulfilled her contracted hours if possible, or at least of enabling the Respondent to assess how many of such hours she was working, but also of ensuring that investigators such as the Claimant were properly trained and had appropriate levels of experience. For these reasons, this complaint must be dismissed.

66 We turn next to the complaints of disability related harassment. The first is that at some point shortly after the Claimant commenced employment with the Respondent, Mr Cook said to her in one of the Respondent's meeting rooms *'why did you apply for this job in the first place, with all your health conditions? Because of you, there are people who missed out on the opportunity, who would have been better for the role as they could actually do the job without all these issues getting in the way'*. If we were satisfied that those words, or something like them, were said, then we would have no hesitation in accepting that they amounted to unwanted conduct, that they related at least in part to the Claimant's disability of IBS, and that they had the effect of both violating the Claimant's dignity and creating a hostile, degrading, and humiliating environment.

67 Whilst the Claimant in her oral evidence confirmed that that was what Mr Cook had said to her, Mr Cook denied that those words or anything like them had been uttered. In resolving that conflict of evidence, the two most significant points in our view are as follows. First, that the Claimant did not raise a complaint, either orally or in writing, to anyone at the time. Secondly, that this allegation was not in the Claimant's original claim form which she presented to the Tribunal, but was first raised by her in the 'Particulars of Harassment' on 24 July 2020, nearly six months thereafter. Our clear impression of the Claimant from the manner in which she gave her evidence is that she is someone who will stand up for herself, and is not afraid to *'fight her corner'*. In addition, the Respondent submits, the Claimant could not provide a date on which she says this incident occurred, nor in what context or how the alleged remark was made.

68 On balance, we prefer Mr Cook's account to that of the Claimant. Whilst it is correct to say that there was a meeting on 18 July 2019 between the Claimant and Mr Cook to complete the Claimant's OH referral form, and that one of the questions then drafted was whether the Claimant was fit to be at work, that was probably a necessary starting point in the light of all the various medical conditions that had very recently been put forward by the Claimant in her disability passport, and was we find a neutral rather than a loaded question, as the Claimant suggests or implies. Secondly, it seems to us unlikely or improbable that Mr Cook would have made obviously disparaging and offensive remarks to the Claimant at the same time that he was referring her to the Respondent's OH advisers, particularly since he had already sought and obtained HR advice on receiving the Claimant's disability passport. Finally, and as noted, the Claimant did not make any complaint to anyone or raise this allegation until approximately one year later, after she had left the Respondent's employment and commenced these proceedings. For these reasons, this complaint must be dismissed.

69 The Claimant next alleges that her being referred by the Respondent to its OH advisers on 16 July and 27 September 2019 amounts to unlawful harassment. That is an unusual contention, in our experience. The Claimant's case is essentially that she objected to the terms of the OH references, that the Respondent should simply have asked its disability adviser what adjustments the Claimant would need in the light of her stated conditions, and that referring instead her to OH was excessive and unreasonable.

But there was no evidence before the Tribunal that the Claimant queried or disputed the terms of either OH referral at the time, particularly where the additional questions for OH were copied to her simultaneously by Ms Kamal; and the Claimant could not identify which of the questions or issues raised with OH were objectionable or unwanted during her oral evidence. Additionally and as Mr Hignett points out in his closing submissions, the disability adviser had no medical qualifications, and would not have been able to help the Respondent understand what the Claimant's medical conditions and issues were, and how best she could be supported. It was only when the Claimant completed a disability passport on 16 July, shortly after commencing employment with the Respondent, in which for the first time she disclosed the existence of a number of complex medical problems, that the Respondent sought assistance from its OH advisers. In our judgment, that was self-evidently the right thing to do in those circumstances, and certainly does not amount to harassment. Had the Respondent not taken such a step, it would have been open to legitimate and justified criticism. We dismiss this complaint.

70 Did Mr Cook's requirement that the Claimant supply the Respondent with evidence of her medical appointments, which it is accepted he communicated to the Claimant on 5 September, amount to unlawful harassment? The background to that request is that on 5 July 2019 Mr Cook sought and received advice from HR about the Respondent's policy concerning medical appointments. He was told (at page 97) that the policy was that staff should try to arrange such appointments outside normal working hours; that if that was not possible, to speak to a manager to obtain approval and to try to fix appointments to cause the least disruption to their work; that any work time lost would usually need to be made up; and that if the staff member was having frequent appointments he could ask for evidence by way of an appointment letter or card. Then on 30 August it was agreed between Ms Kamal of HR and the Claimant's diversity champion that Mr Cook would ask the Claimant to provide letters for medical appointments that she had taken or booked, which would help him to understand whether or not the Claimant should be expected to return to work thereafter. The Claimant duly sent Mr Cook copies of her physiotherapy appointment reminders on 3 September (pages 187-190); but in his email of 5 September (page 217), Mr Cook asked the Claimant to provide more details – the duration, location and purpose of regular appointments, and how long they were expected to continue, what 'ad hoc' appointments the Claimant was likely to need in future, and to provide evidence of appointments already booked.

71 In our judgment, that was a reasonable request. Whilst the Claimant plainly did not like being asked to provide those details, Mr Cook's request, which had been sanctioned by HR and apparently agreed with the Claimant's representative, does not meet the objective test of being conduct having the purpose or effect of violating the Claimant's dignity, or creating a hostile, intimidating, degrading, humiliating or offensive environment.

72 On 13 September, Mr Cook met the Claimant to discuss with her why she had left the Respondent's office at midday on the previous day for a medical appointment without prior notification, and had not returned to work thereafter, apparently in breach of the agreement which had been reached four days earlier that the Claimant would discuss her future medical appointments in advance with Mr Cook in order to determine whether it was possible for her to return work thereafter and whether she would need to make up the time involved. That agreement is set out in the note prepared by Ms Kamal, who had been in attendance, dated 12 September at pages 226/227. The Claimant asserts that at least part of what Mr Cook said or how he conducted himself at their meeting on 13 September

amounts to unlawful harassment.

73 Mr Cook's summary of his meeting with the Claimant was sent to her later that same day, at 3.23 pm (pages 233/234). In her response to Mr Cook, sent about twenty minutes later, the Claimant did not challenge his account, or raise any complaint concerning Mr Cook's conduct or the manner in which he had spoken to her, instead focussing on the backlog in obtaining assistance from mentors and feedback that had been provided about her performance. At one point in the meeting, the Claimant had asked for a work colleague to be present, which was arranged, and both the Claimant and Mr Cook apparently found that to be helpful. Whilst there was an issue about what had been agreed at the meeting documented by Ms Kamal, that was not a bone of contention in their correspondence; and in any event we accept that Ms Kamal's note is correct. Additionally, the Claimant accepted in her evidence to the Tribunal that Mr Cook's summary of their meeting was broadly accurate. In our view, there is simply no evidence of any conduct at the meeting which comes anywhere near meeting the threshold required for harassment to be established, and we dismiss this complaint.

74 We consider next the Claimant's complaints of direct discrimination. The first is that she was treated less favourably by the Respondent than they treated her chosen comparator Harry B, another trainee investigator in the Respondent's Academy, who was permitted to work from home whilst still in his probationary period. There are certainly some similarities between the Claimant's case and that of Harry B: both of them were trainees in the Academy, both had health problems (in Harry B's case, chronic migraine syndrome, a symptom of a mental health condition), and both requested to be allowed occasional homeworking. But, as Ms Kamal explained in her evidence, there were also a number of differences in their respective situations. Harry B had volunteered the existence of his medical condition in his application for employment, supported by medical evidence from his GP. He explained that he was able to manage his condition to avoid triggering migraines, and that it tended to be cyclical, recurring three or four times per year. He asked that he be permitted to work from home on up to three or four occasions during his Academy training, and that request was granted. In fact, Harry B worked from home on seven days within a short period of time during his Academy training. That resulted in a review, and Harry B left the Respondent's employment at the end of his training. There were no concerns about his performance, conduct and quality of work, and he did not take time off work to attend medical appointments or for extended breaks.

75 The Claimant on the other hand did not disclose any of her medical conditions when applying to the Respondent, and medical advice was only obtained after she had completed a disability passport on 17 July 2019. As noted, she did take time off work for extended breaks and a range of medical appointments, and a number of concerns were raised about her performance and work, and about her failing to return to work after medical appointments. The Claimant was seeking to be allowed to work from home on one or two days per week, on days of her choosing.

76 In our judgment, there are too many differences between the respective individuals' circumstances for Harry B to be a true comparator for the Claimant, the most significant being the frequency and length of time that either was or would be homeworking or otherwise absent from the Respondent's office. Harry B's absences were restricted to three or four days during the whole of his training period, and a review took place when that number was exceeded with apparently no further homeworking as far as

we were told. The Claimant was proposing that she be permitted to work from home for up to two days a week for the whole of her time in the Academy, in addition to her frequent medical appointments or other absences; and we bear in mind the table on page 14 of Mr Hignett's closing submissions, which shows that the Claimant took time off on ten separate days during the month from 3 September to 3 October 2019 for medical appointments, sickness and personal circumstances. No genuine comparison can be made between the Claimant and Harry B for the purposes of her direct discrimination complaint.

77 If we were wrong in coming to that conclusion, we would in any event determine that the reason for the difference in treatment of the Claimant and Harry B was not disability (and on the Claimant's case, both were disabled at the material time), rather than the very different consequences in terms of attendance at the Respondent's Academy of what each was requesting. As we have set out in the preceding paragraph, Harry B's absences were strictly limited, whereas had the Claimant's request for homeworking been allowed, her time in the Respondent's office, which was regarded as particularly important whilst training, supervision and assessment took place, would have been very significantly curtailed. Accordingly and for these reasons, this complaint must fail.

78 The Claimant's other direct discrimination complaint is that Mr Cook's decision to commence an investigation into her conduct (the bringing and pursuit of the Claimant's own personal complaint to the Respondent) amounted to less favourable treatment of her as against a hypothetical comparator, and that Mr Cook's decision was because of or attributable to her disabilities.

79 In early September 2019, the Claimant had repeatedly contacted the Respondent's helpline to bring a complaint as a member of the public about a mattress which she had brought from a third party who would not let her return it (see pages 406/407). As a result, the Claimant was contacted by Ms Hersey, who deals with '*restricted cases*', informing the Claimant that what she had done was wrong and in breach of the Respondent's conflict of interest policy, and providing a link to the appropriate guidance in such circumstances (pages 422/426). That provides, inter alia, that an employee should not seek to discuss their case with the investigator looking into the complaint or to influence how it is handled, that the employee should use his/her personal contact information rather than work details when communicating with the investigator, and that any breach of the guidance or conflict of interest policy would be treated as misconduct. The Claimant replied stating that she had previously been unaware of the guidance, but would follow it in future. However, she did not do so, but instead repeatedly contacted the investigator handling her complaint, making use of the fact that she was an employee of the Respondent and was aware of its processes and procedures in relation to complaints, and at times addressing the investigator in a hostile or derogatory manner in relation to steps which she thought he ought to be taking.

80 We have no doubt that it was this conduct by the Claimant which prompted Mr Cook's decision to commence an investigation, and which resulted in his report into her alleged misconduct (pages 395/401); nor that a non-disabled employee who had acted in such a manner would have been subjected to a similar investigation by the Respondent. In our judgment, the reason for Mr Cook's investigation was the Claimant's conduct, and it did not in any way relate to her disabilities. We dismiss this complaint.

81 The next complaint the Claimant brings relates to the termination of her employment. Did the Respondent commit an act of discrimination constituting a fundamental breach of the Claimant's contract of employment, entitling her to resign; and did the Claimant resign because of that discrimination, amounting to a constructive dismissal, or for other reasons? To a considerable extent this flows out of the Claimant's previous complaints, in that the Claimant's case is that it was the Respondent's, and in particular Mr Cook's, discriminatory approach to her over a period of months, in relation to matters including homeworking, making up working time, keeping a time sheet, and referring her to Occupational Health, culminating in the disciplinary enquiry into alleged misconduct, which caused her to resign. We have already addressed those issues individually, and we now focus on the events immediately before the Claimant resigned, and what we consider to be the real reason for her doing so.

82 The first letter inviting the Claimant to a probation review hearing was dated 10 October, proposing that it take place the next day at 10.00am (402/403). That didn't go ahead, and a replacement letter, in virtually identical terms, was sent to the Claimant on 11 October scheduling that meeting for 15 October at 9.00am (404/405). That was because the Claimant had requested that the hearing be postponed from 11 October and that she be allowed to attend hospital with her ill father on that day, to which Mr Cook did not object.

83 Both letters enclosed a copy of Mr Cook's investigation report and of the various appendices as listed; both set out that it was alleged that she had inappropriately tried to influence the outcome of her own complaint, and that her communication with the investigator of her complaint was disrespectful and below the standards expected; and both informed the Claimant that among the possible outcomes were an extension of her probationary period, or dismissal within the current period, if the Respondent was not happy with her conduct. Finally, the Claimant was told that she could be accompanied at the hearing by a work colleague or trade union representative, and asked to confirm that she would be attending.

84 So far as we are aware, the Claimant did not respond to that second letter, and did not confirm whether or not she would attend the probation review hearing on 15 October. She did however attend work on the morning of 14 October, although not undertaking the phone shift allocated to her at 1.00pm that day; and at 3.53pm that afternoon she emailed her letter of resignation (pages 366/368) to Mr Upsdale, the employee relations partner who had been due to attend the Claimant's hearing on the following day, which did not go ahead.

85 In her evidence to the Tribunal, the Claimant stated that she had not been planning to resign prior to 14 October, but that during the course of that day she had spoken both to a union representative and to Mr Mussie, her ICC representative, both of whom had advised the Claimant on the perceived strength of the misconduct charges she was facing, and that the likely outcome of the hearing would be her dismissal. In addition, Mr Mussie had spoken to Mr Upsdale (with the Claimant's permission), who had confirmed that whilst a 'neutral' reference could be provided on resignation by her before 4pm that day, it could not be thereafter or following dismissal at a probation review hearing, which information Mr Mussie had relayed back to the Claimant. Thereafter, the Claimant had sent Mr Upsdale her resignation email, forwarding copies to some of her colleagues in the Academy. Mr Mussie had met up with the Claimant immediately after

she submitted her resignation, and had accompanied her whilst she said goodbye to her colleagues, also receiving the Claimant's security pass from her to be handed over to the office reception. So far as Mr Mussie was aware, nothing had been said and no agreement reached between the Claimant and HR on the subject of notice pay.

86 In relation to this issue, we reach the following conclusions. First, that for the reasons already given, the Respondent generally and Mr Cook in particular did not discriminate against the Claimant because of or on the grounds of the Claimant's disabilities, and that no fundamental breach of contract (which any such discrimination would certainly amount to) has been established. Secondly, that the reason why the Claimant resigned and walked out of the Respondent's office on 14 October was in order to avoid her probation review hearing on the following day and the likely termination of her employment that would then occur and in order to obtain a neutral reference from the Respondent, rather than because of any perceived discrimination on the Respondent's part. For these reasons, this complaint fails and is dismissed.

87 We can now turn to the Claimant's claim for pay in lieu of notice. Whist this was not listed as an issue for determination, it does form part of the Claimant's ET1 originating application, we heard evidence concerning it, and both the Claimant and Mr Hignett on behalf of the Respondent addressed us in relation to that claim.

88 Essentially, the Claimant's claim is that it was a contractual right that termination by either party during her initial probationary period would normally be on four weeks' notice, and that whilst she left the Respondent's office on the afternoon of 14 October, she was unable to attend her probation review hearing on the following day because she had surrendered her security pass, thereby preventing her accessing the building. As we have already noted, there is no copy of any contract between the parties in the agreed bundle, but Mr Hignett did not dispute the alleged contractual right as advanced by the Claimant, and we proceed on that basis.

89 The Claimant does not assert that there was any specific or separate agreement between her and the Respondent concerning notice pay, but rather that she was prevented from working out her notice by being unable to access the Respondent's office having surrendered her pass. The Respondent says that the Claimant was processed as a leaver on 15 October, that she had left their office on 14 October and did not return thereafter, and that it is clear that she was then resigning with immediate effect. They further contend that had the Claimant wished to attend her review hearing on the morning of 15 October she could have done so, since it was being held in a part of the building where no pass is required.

90 We are satisfied that the Claimant resigned with immediate effect on the afternoon of 14 October, and the clearest evidence of that is that she did not attempt to return to the Respondent's office on the following day or at any time thereafter. Had the Claimant resigned giving one month's notice, or believed or intended that she had done so, then we would expect her to have retained her security pass, rather than surrender it; and also that we would have been shown subsequent correspondence or at least contact between the parties concerning her intention to return to work. No such evidence was provided to us. The claim for pay in lieu of notice must be dismissed.

91 The Claimant's last complaint is for unlawful deductions from wages in respect of six separate days in September or October 2019 when she was absent from work and assisting members of her family, either accompanying one or other of her parents to hospital or delivering and fetching her sister's children to and from school. The Claimant contends that on those occasions she was undertaking caring responsibilities, and entitled to take paid time off in accordance with the Respondent's carer's leave policy. The Respondent disputes and resists any such alleged entitlement.

92 A copy of the Respondent's apparently current carer's leave policy is at pages 430/432 in the bundle. It should be noted that the document is dated 8 July 2020, headed *'welcome John'*, and plainly it was not directed to the Claimant. Additionally, the first page of the document makes reference to *'Coronavirus guidance',* and it is therefore obvious that the policy document in the bundle has been amended since the Claimant left the Respondent's employment in October 2019. Nevertheless, neither the Claimant nor the Respondent contended that a substantially different policy was in place at the material time, and once again we will proceed on the basis that these are the applicable contractual provisions.

93 A carer is defined as being *'anyone who cares, normally unpaid, for a friend, their child or other family member or neighbour, who due to a serious or long term health condition, disability, a mental health problem, old age or an addiction, cannot cope without their support'*. In addition, *'care responsibilities can exist on a short-term or long-term basis, and requirements can change over time'*. A carer's passport can be completed by an employee and his/her manager , in which the employee's caring responsibilities are set out on a confidential basis, and carers are actively encouraged to inform their line managers of their caring responsibilities, so that the Respondent can understand the support that might be needed. Carers are eligible to take paid time off of up to five days in one leave year, which can be taken in full or half days, and is in addition to time-off for dependants. Finally, before carer's leave is granted, the manager will make sure that they have a good understanding of the caring responsibilities.

94 No carer's passport was completed by the Claimant and her manager, so no caring responsibilities had been set out in advance of the Claimant's requests; and therefore it was not known in advance that she had any such responsibilities. The Claimant made four requests for carer's leave for different members of her family.

95 The first was on 3 September, when she asked to accompany her father, who had recently been diagnosed with cancer, at a hospital operation. That was understood by the Respondent to provide support, rather than transportation or actual care. Mr Hignett suggests that the Claimant was asked to supply more details (at page 215, although there is no evidence there of any such a request) but failed to do so. In any event, it is clear from page 257 that the request was refused, but that the Claimant had taken a day off in mid-September for that purpose.

96 The Claimant's second request was on 2 October, for that day and the next. She explained that her sister had gone into labour the previous day, and needed her three children to be delivered to and fetched from school, and that there wasn't anyone else who could help. Ms Kamal of HR advised that the request be refused, since the Claimant was neither her sister nor her children's carer, and that helping with childcare arrangements fell outside the carer's policy.

97 The third request was made on the morning of 8 October. The Claimant asked for carer's leave at 8.17am to take her mother to an appointment later that day. Mr Cook responded twenty minutes later, saying that he couldn't agree without more details, and that he hadn't been previously told that the Claimant was her mother's carer, or what her medical condition was. The Claimant didn't supply any further details, but was absent from the office for the day, and leave was refused.

98 The Claimant's last request was on 10 October, when she asked for leave to accompany her father on an unspecified hospital appointment on the following day, on which her probation review hearing had originally been scheduled. Mr Cook agreed to postpone the review hearing until 15 October, without allowing the Claimant to take the day as carer's leave, since he wished to discuss whether the request fell within the policy with a colleague. In the event, it was not ultimately allowed as paid time-off.

99 It is clear to us that the Claimant's request to provide childcare for her sister on 2 October cannot come within the definition of carer in the policy, since having a baby does not fall within any of the various scenarios mentioned. Additionally, by that time the Claimant would have been well aware of the terms of the Respondent's carer policy, since it was the second time that she had attempted to activate it. Insufficient information of the particular circumstances of both the third and fourth requests were provided by the Claimant, we consider, for either of them to qualify as properly amounting to carer's leave. The only request which might possibly succeed is the first, when the Claimant accompanied her father to hospital in mid-September 2019 to undergo an operation. But since the only evidence before the Tribunal was that the Claimant then wanted, perfectly understandably, to be with and provide support for her father, rather than that she was needed in order to provide transport or post-operative care for him, we find that even on that occasion she did not qualify for carer's leave under the terms of the Respondent's policy.

100 It follows that for these reasons, all the Claimant's complaints fail and must be dismissed.

Employment Judge Barrowclough

19 February 2021