



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107696/2019 (V)

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Held via Cloud Video Platform (CVP) on 12, 13 and 14 October 2020

Employment Judge: M A Macleod

Tribunal Member: J Anderson

Tribunal Member: A Grant

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Mrs P Devine

Claimant

Represented by

Mr R Clarke -

Solicitor

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Ferrari Packaging Limited

Respondent

Represented by

Ms F Gorry -

Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims

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all fail and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 12 July 2019 in which she complained that she was automatically unfairly dismissed and subjected to associative disability discrimination by the respondent.

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2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A hearing was listed to take place by CVP on 12 to 14 October 2020. The hearing proceeded, and the claimant appeared and was represented by her solicitor, Mr Clarke. The respondent was represented by their solicitor, Ms Gorry.

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4. Evidence was presented by way of witness statements, with each witness appearing in order to speak to and be cross-examined on their statements.
5. The claimant gave evidence on her own behalf; and the respondent called as witnesses Lindsay Mae Morrison, Branch Manager; Linda Hunter, Sales Co-ordinator and Tony Ferrari, Managing Director.
6. Parties presented a joint bundle of documents, to which was added a supplementary bundle.
7. The hearing proceeded without difficulty, and each party, representative and witness, as well as the Tribunal, was able to hear and see each other adequately throughout.
8. Based on the evidence led, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 28 February 1973, commenced employment with the respondent as a Sales Co-ordinator on 6 August 2018, based at their packaging plant at Peel Park Place, East Kilbride.
10. The respondent's business offers protective packaging solutions for a range of customers working in a variety of industries. They have three distribution centres, in East Kilbride, Dundee and Edinburgh. Lindsay Mae Morrison is the Branch Manager at the East Kilbride distribution centre, and was the claimant's line manager during her employment.
11. The claimant was part of the internal sales team, which was based on the first floor of the office in East Kilbride, in an open plan space with the other internal sales staff (a total of 4 including herself) and her line manager, Ms Morrison.
12. The claimant and Ms Morrison knew each other from previous employment together in a different company. Ms Morrison took over as her line manager from September 2018.
13. The claimant has a teenage daughter, Jodie, who became unwell in January 2019, which required the claimant to take time off work.

14. The respondent operates a policy in relation to time off for care of dependants (54/5). That policy provides, at paragraph 21.1, that employees were entitled to take time off work *“to take action which is necessary:*

- 5 *a. to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted; or*
- b. to make arrangements for the provision of care for a dependant who is ill or injured; or*
- c. in consequence of the death of a dependant; or*
- 10 *d. because of the unexpected disruption or termination of arrangements of the care of a dependant; or*
- e. to deal with an incident involving your child which occurs unexpectedly whilst your child is at school or nursery.”*

15. Paragraph 21.4 states that:

15 *“You are only entitled to time off in the circumstances listed above where you have notified the company of the reason for your absence as soon as reasonably practicable.*

Where you cannot notify the company of the reason for your absence until after you have returned to work, you must notify the company of the likely duration of any such absence.”

20 16. The policy went on to say that employees have no statutory right to payment for time off for any of these reasons.

17. Generally, the respondent requires staff to take time off under this policy as unpaid time off, or as holiday.

18. On 20 January 2019, the claimant texted Ms Morrison at 11.23pm (67) to say:

25 *“Hi Lindsay sorry it’s so late (I always seem to message you late on Sundays) I’m in wishaw general with Jodie took her to our of hours doc today as her skin and eyes had been yellow for a few days!! they send us up here said her liver not working properly and she is jaundiced – just*

5 *waiting on them doing her bloods then they will let us away to come back tomorrow for a detailed liver scan + I will be at work but will probably have to leave at some point to bring her to the hospital once I know what time they want us back + will I be able to take a half or quarter day once I know? I'll be in as normal in morning unless it's a morning appointment!! I just don't know what's happening till they do her bloods XX I think my family has the luck of the Irish recently xx"*

19. Ms Morrison replied at 7.11am the following day:

10 *"Morning Pauline, sorry just saw your text as was in bed early last night. Absolutely not a problem. See you shortly x"*

20. To this the claimant responded:

15 *"Hi Lindsay we got home from hospital after a barrage of blood tests etc Jodie not allowed to go to school and I have just to wait for a call to take her back for scans (sic) but they said it will probably be Wednesday or Thursday once they have her results – see you soon xx"*

21. During this period, the claimant would attend work on all occasions when she was able to. While she was in the office, the claimant discussed quite openly the progress of the investigations into her daughter's illness, and it was clear to all those concerned, and particularly Ms Morrison, that Jodie was suffering from a serious medical condition.

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22. The respondent's staff displayed concern to the claimant in these circumstances, and sought to be supportive of her. The claimant showed Linda Hunter, another sales co-ordinator with whom she worked, a video taken on her mobile phone, which showed Jodie coming round from an anaesthetic. She continued to be quite open about Jodie's condition and its progress.

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23. On 2 April 2019, the claimant had an exchange of text messages with Ms Morrison, who was aware that she had been at the hospital with Jodie to find out what the tests had shown. Ms Morrison texted at 5.34pm to ask how things were (71), and the claimant replied:

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5 *"Hi Lindsay that's us just home – they are pretty certain she has auto immune liver disease and Crohn's disease the specialist will call me when they get a slot to bring her to the sick kids hospital in Glasgow for a liver biopsy and an endoscopy both will be done under general anaesthetic so she has medication home with her more bloods to be taken Monday and jist wait for a call – so I will see you in the morning – thank for today xx"*

24. Ms Morrison responded:

"You must be exhausted. If you feel you need tomorrow off just let me know Pauline. X"

10 25. The claimant texted back to say:

"Thanks Lindsay but nothing I can do at the moment so better at work xx"

26. Ms Morrison replied:

"Go and try and rest. See you tomorrow Pauline x"

27. Some two hours later, the claimant texted Ms Morrison:

15 *"Hi Lindsay hospital just called we have to bring Jodie in tomorrow for pre med check blood test and scans in prep for operation xx"*

28. Ms Morrison texted back:

20 *"She is being looked after really well Pauline. That's good that they are organising things quickly. Just give me a call at some point to let me how she gets on (sic). Chat tomorrow xx"*

29. The claimant replied:

"I will do thanks Lindsay xx"

25 30. There was a further exchange of messages on 3 April (74) in which the claimant confirmed that she had come home from the hospital, and that they were awaiting confirmation of when Jodie would be given a slot for her operation, so she would be back to work the following day and waiting for the call.

31. On 4 April, the claimant herself experienced a seizure while at home having a cup of coffee before leaving for work. An ambulance was called and she was taken to Hairmyres Hospital, where she was treated and tests were carried out. The following day she was advised that she had suffered a seizure, and she texted Ms Morrison at 1.21pm to confirm (75), her partner having phoned Ms Morrison the previous day to let her know that she had suffered the seizure and would be unable to attend work. The text message sent by the claimant read:

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“Hi Lindsay that’s me been let out hospital now – confirmed just a seizure probably brought on by stress – I have to attend the seizure clinic next week just for a checkup and everything will be ok – hospital called this morning and confirmed Jodie’s diagnosis is definitely auto immune liver disease and also Crohn’s disease I have to expect a call early in the week from the sick kids hospital so go in as an emergency case with her to have liver biopsy and colonoscopy – I hope you are ok too? Xx”

32. Ms Morrison replied at 3.06pm:

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“Lovely to hear from you Pauline... so so glad your out of hospital. That’s great news that it wasn’t a stroke ... also good that they are referring you to the clinic. Please don’t worry about work next Pauline. Give yourself some rest for yourself and to help Jodie out. Chat next week take care xx”

33. The claimant regarded this message as supportive of her.

34. On 9 April 2019, the claimant took her daughter to hospital. She kept the respondent informed by texting Ms Morrison, in response to Ms Morrison’s text inquiring how her daughter was, later that day (79), to say that they were still at the hospital but that Jodie’s blood was not clotting. She mentioned the steps being taken to assist her to be ready for surgery the following day, and to say that they were doing a bowel biopsy at the same time. Ms Morrison replied to say *“Jodie’s in the best place Pauline. Let me know how she gets on. Take care xx”*

30 35. On 10 April, Jodie underwent surgery, and again the claimant exchanged text messages with Ms Morrison in which the latter remained supportive.

36. On 11 April, the claimant was given a confirmed diagnosis by the medical staff treating Jodie, and texted Ms Morrison at 10.10am to tell her (81):

5 *“Hi Lindsay just to let you know surgeons have been found this morning Jodie does have Autoimmune Liver disease haven’t had bowel biopsy results yet though – they have said it isn’t curable bit can be managed they have started treatment right away – we are hoping to bring her home tomorrow xx”*

37. Ms Morrison replied that day (82):

10 *“Hi Pauline.... although you suspected this, at least it’s now been confirmed so that treatment can begin... Jodie should hopefully start to feel bit better soon. Once you also get more information on what’s needing done going forward you will start to all feel better. Hopefully other results come back clear. Chat soon xx”*

- 15 38. There was a further exchange on 12 April when Ms Morrison contacted the claimant to ask how things were, and if Jodie was to be getting out that day. The claimant confirmed that they were just waiting but hopeful that she would (83).

39. Later that day, the claimant texted Ms Morrison again to provide her with more information following a meeting with the medical staff (85):

20 *“Hi Lindsay jist had a great meeting with the Liver team explaining everything and we are getting home now soon as jodies meds are here – she will be attending the Liver clinic every Monday morning for three weeks for blood tests and a scan to make sure the right amount of steroids being administered and then going forward it will be every three months – so I will be in straight after that xx”*

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40. Ms Morrison replied to this message (86):

“That’s sounding positive Pauline. it’s always good to start to Understand what’s happening. It takes the fear away. As long as you feel up to work .., we Look forward to seeing you Monday at one point (smiley face emoji) xx”

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41. The claimant replied simply to say *"Thanks Lindsay for everything xx"*, after a smiling emoji.

42. On 15 April 2019 (the Monday after Jodie was discharged home), the claimant attended the first of the Liver Clinic appointments with Jodie. At 11.24am, she
5 texted Ms Morrison to let her know what was happening (87)

"Hi Lindsay we still with the Liver team waiting on them taking bloods then a scan I don't know how long I'll be – they called her in for an MRI yesterday so looking at the images so probably best if I'm just in as of tomorrow morning xx"

10 43. Ms Morrison's reply was:

"No bother Pauline. Hope Jodie gets on okay today. See you tomorrow x"

44. At that meeting with the Liver team, the claimant was given a letter addressed "To Whom It May Concern" (Supplementary Bundle ("SB") 3), headed "Important Information for School for a Child with Autoimmune Liver Disease".

15 The letter was written by Claire Shannon and Jenny Cowieson, described as "CNS Liver Disease", from the Paediatric Liver Service at the Royal Hospital for Children, dated 15 April 2019.

45. The letter explained that Jodie had recently been diagnosed with autoimmune hepatitis, and explained what this meant and how it affected Jodie. It
20 confirmed that the main treatment for this condition was by immunosuppressive medicines, which she would be given at home.

46. The letter continued:

25 *"This treatment will need to be continued for a long time, often many years. Jodie will need clinic appointment every 3 to 6 months at the RHC, Glasgow, and also need annual ultrasounds to ensure that her liver function is not deteriorating. However we must mention that since Jodie has just been diagnosed with AIH she will require weekly bloods for the next few months until his (sic) condition has stabilised.*

At clinic appointments we will also be monitoring Jodie's bloods these include liver function tests and vitamin levels. If she becomes unwell parents will need to make visits to A&E for review and could possibly be admitted for days at a time which could have an effect on her school work."

5 47. The claimant gave evidence that she had received a letter for the respondent which had "very similar information" (paragraph 36, claimant's witness statement). She asserted, further, that she had given the copy of the letter to the respondent on 16 April 2019 when she returned to work. The witnesses for the respondent, namely Ms Morrison and Mr Ferrari, both denied that this
10 letter was passed to them. Ms Morrison explained that if she had received that letter, it would have made no difference to her treatment of the claimant, which continued to be supportive, but that if she had received it, she would have placed it in the claimant's personal file, held in Mr Ferrari's office. No copy of the letter was found when she checked that file before coming to give
15 evidence to the Tribunal. Similarly Mr Ferrari said that had such a letter been passed to the respondent, it would have been retained.

48. We have concluded that the claimant did not give a copy of this letter, whose terms are in any event uncertain, to the respondent on 16 April, nor on any other date. We were convinced that Ms Morrison, who was an entirely
20 credible and reliable witness in our view, was telling the truth when she said that had she received the letter she would have filed it carefully in the claimant's personal file, and that Mr Ferrari similarly would have taken the matter seriously had it been passed to him.

49. We expand upon this in our decision section below.

25 50. While the claimant asserted at paragraph 37 of her witness statement that she noticed that Ms Morrison's interactions with her changed at that point, and that she noticed that her responses were briefer and less supportive, she accepted in cross-examination, when the texts were put to her, that they were in fact no less supportive than they had before. We would agree with that
30 conclusion. The text messages do not change in tone or content following 15 April 2019, in our judgment. She asserted, however, that the interaction with

Ms Morrison and other staff became noticeably less supportive in person, when they were in the office together.

51. Up to 16 April 2019, the respondent had not deducted any pay from the claimant, nor required her to take annual leave, when she required to be absent to take Jodie to a clinic appointment or to attend the hospital with her.

52. On 16 April 2019, when the claimant returned to the office, she spoke both with Ms Morrison and Mr Ferrari. Ms Morrison assured her that she need not worry about taking as much paid time off as she needed. Mr Ferrari spoke with her to check on how she was doing, as he was concerned about her. The claimant made no mention of this meeting or discussion in her witness statement. Mr Ferrari wanted to assure the claimant that he was supporting her during a difficult time in her personal life, and that if she needed to take time off, she could, and she would be paid in full. The claimant expressed her gratitude for the supportive attitude demonstrated by her employers during this time.

53. From time to time Mr Ferrari would give the claimant a lift home, as the claimant did not drive and would sometimes need to call a taxi. In those conversations, Mr Ferrari would ask about her daughter and how matters were progressing. For some time she explained that there were tests being carried out but that the diagnosis was not clear, until April when the diagnosis of autoimmune hepatitis was made (though the claimant described it as autoimmune liver disease).

54. On 16 April 2019, Ms Morrison emailed the claimant (SB44) at 4.28pm to say:

“Hi Pauline... Attached are your updates sales sheets for last month. You will notice that I have adjusted your sales figures ... down. Just after looking at the 3 months and after talking with Tony we feel the forecast and the margin we set is just too high.

I'll go through it with you tomorrow Pauline (smiley face emoji)

Lindsay”

55. Ms Morrison had looked at the sales targets which had been set for the claimant and a colleague, Marco, and had decided that they were too high, and required to be adjusted, in order to be fairer to the claimant and Marco. The claimant took no issue with this decision.
- 5 56. On 16 April 2019, and indeed on other occasions, Ms Morrison and others, including Linda Hunter, asked the claimant how Jodie was. The claimant was open with her colleagues about her daughter's ongoing condition and treatment, and any questions which were asked were put in a supportive and appropriate manner.
- 10 57. The claimant was not ostracised nor excluded from workplace conversation by her colleagues from 22 April 2019.
58. The atmosphere within the office in which the claimant worked was friendly, supportive and informal. Staff would get together for social occasions, and the claimant was included in those. Ms Morrison and Mr Ferrari both offered and gave the claimant lifts home to relieve her of the need and expense of calling a taxi.
- 15 59. On 1 May 2019, the claimant and Ms Morrison were in the office working. Ms Morrison became aware that the claimant was on the phone sounding annoyed when speaking to the respondent's Transport Manager, James McNulty. She heard the claimant telling Mr McNulty that she had had an "earful" from a customer because he had not done something, and then put the phone down. Ms Morrison went to speak to the claimant to ask what this was about. The claimant said that she had had a "rollicking" from a customer, Booksource, because they had needed an order that morning which had been
- 20 ripped up by Mr McNulty. The claimant was explaining strongly that Mr McNulty was to blame for this.
- 25 60. The following day, 2 May 2019, Ms Morrison was concerned about the fact that Mr McNulty had ripped up an order, and wanted to understand more, so she spoke to Mr McNulty. He explained that the claimant had sent a line down, and then telephoned him to tell him to ignore that line because the
- 30 customer wanted to add on more goods to the order. She told him, he said,

that a new line would come down, so he ripped up the order and awaited the arrival of a new line. It did not arrive. Mr McNulty explained to Ms Morrison that he felt that because he had not chased the matter up it was perhaps his fault.

- 5 61. Ms Morrison was concerned about the way that the claimant had blamed Mr McNulty, and unsettled by the fact that the claimant had blamed him for something when it was not his fault. She decided to speak to the claimant about the matter, and sent her an email at 9.32am to ask her to meet with her (95):

10 *"Hi Pauline*

Can I have a chat to you about Booksource when you have a moment?

Many thanks

Lindsay"

- 15 62. Ms Morrison did not intend to take any disciplinary action against the claimant, nor did she intend the meeting to be formal in any way. She wished to speak to the claimant about what had happened and discuss the matter with her. They met in the boardroom on the ground floor, away from the open plan space where they worked, so that they could speak privately. Ms Morrison said that she had spoken with Mr McNulty, and that he had told her that the claimant had asked him to rip up the line, and that a new line had not been sent to him. She said to the claimant that everyone makes mistakes, and that it's better to acknowledge and "put our hand up" if a mistake is made. She went on to say that she had noticed that there were a few mistakes happening, and that it was important that they had a chat, not formally, but to see if there was anything which could be done to address them and stop them from happening.

- 20 25 30 63. The claimant responded by saying that she did not think things were working out for either her or the business, especially as this was not the first time that they had sat down to discuss her work performance. The claimant said that she wanted to resign with immediate effect, and that she wanted to leave right

then. Ms Morrison replied, taken aback, that she did not need to do that, but the claimant insisted that she wanted to leave then. Ms Morrison did not pressurise her nor mention her daughter's illness specifically to her. The meeting was calm and the claimant did not display signs of agitation or upset.

5 Ms Morrison confirmed that she needed to go and speak to Mr Ferrari to tell him her decision. She did so, going up to Mr Ferrari's office to tell him, and he responded by saying that this was okay, it was her decision, and suggested that she should call the claimant a taxi to allow her to leave and go home. He also asked Ms Morrison to ask the claimant to send an email confirming her
10 resignation.

64. Ms Morrison went to collect the claimant's bag and belongings, which were still on the first floor, and phoned for a taxi. She then went downstairs and gave the claimant her coat and bag, and stood chatting with her while awaiting the arrival of the taxi. The discussion was amicable and calm. Ms Morrison
15 said she was sorry that this was the way things had worked out, and assured the claimant that if she needed a reference she would provide one. When the taxi arrived they hugged (which Mr Ferrari observed), and she left.

65. At 5.23pm on that day, Ms Morrison texted the claimant (93), and the following exchange took place:

20 *Ms Morrison: "Sorry to bother you Pauline. I was wondering if you could check you (sic) hand bag. My credit cards are kept in my phone holder but are really loose and keep falling out. I'm wondering that when I was phoning taxi and picking up your bag if they've all fallen into it x"*

Claimant: "Your (sic) not bothering me – let me look xx"

25 *Ms Morrison: "Thanks Pauline. It's just a long shot x"*

Claimant: "Sorry Lindsay I emptied my bag they aren't there – please let me know when you find them x"

Ms Morrison: "Thanks so much for checking Pauline. Xx"

66. 2 May 2019 was a Thursday. The claimant did not attend work on Friday 3
30 May, nor Monday 6 May, which was a working day for the business, despite

being a public holiday. She did not contact the business either by phone or by text to confirm that she would not be in for any reason, on either of those dates. On Tuesday 7 May, the claimant did not attend for work, nor did she telephone or text the business to advise that she would not be in attendance at work.

67. On 7 May, however, the respondent received, by post, a copy of a Fit Note from the claimant's GP (96). The note was dated 3 May 2019, and said that the claimant had been assessed due to stress at work. The note advised that she was not fit for work, and that this would be the case for 28 days.

68. Both Ms Morrison and Mr Ferrari were surprised to receive this Fit Note. They considered it to be unnecessary as the claimant had resigned at the meeting of 2 May with immediate effect. Since she was no longer employed, she did not require to report to work or explain her absence after 2 May.

69. Mr Ferrari wrote to the claimant by letter dated 8 May 2019 (97) to say:

"Dear Pauline

Your Resignation

I write further to the events of Thursday, 2 May 2019 where you confirmed to Lindsay Morrison that you were resigning from your employment with Ferrari Packaging with immediate effect. You left the premises on this day and did not return to work.

Accordingly, I have taken it that it was your intention to resign from your employment with Ferrari Packaging with immediate effect from 2 May 2019 and have processed you as a leaver with effect from this date. Your P45 has been processed and will be issued to you shortly. You will be paid up to and including your last day of employment with the company of 2 May 2019 and will also be paid in respect of any accrued but untaken holiday entitlement as of this date.

I have since received a fit note, with no other accompanying documentation, dated 3 May 2019 and received at these offices via recorded delivery mail on 7 May 2019. As your employment with the

company has now terminated following your resignation, we do not require this fit note and accordingly I am returning it to you for your records.

5 *As you will recall, you had been absent from work from 2/4/2019 until 16/4/2019 due first to your daughter's illness and secondly your own ill health. The company were entirely supportive to you during this period, including paying you full pay throughout your period of absence, despite there being no obligation upon us to do so. After your return Lindsay Morrison did require to speak with you regarding a minor matter that had arisen in relation to your performance at work, and it was during this*

10 *conversation that you confirmed that you were resigning from your employment with immediate effect and thereafter left the premises, and did not return to work.*

Yours sincerely,

Tony Ferrari

15 *Managing Director"*

70. The claimant's P45 was prepared and issued to her on that date (98), together with her final payslip, which included payment for pro rata salary and accrued holiday pay, amounting to net pay of £512.39 (100).

71. The claimant emailed Mr Ferrari on 9 May 2019 (101):

20 *"Dear Tony,*

It is with real sadness and disappointment that I find myself having to respond to a letter received from you entitled "Your Resignation". You refer to the events of Thursday 2 May 2019 and state that I 'confirmed to Lindsay Morrison' that I was 'resigning from employment with Ferrari Packaging with immediate effect'. I strongly refute this statement as it is a wholly untrue account of that date.

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When Lindsay Morrison invited me for a meeting it became clear very quickly to me what the agenda was and that my performance was in question. I felt very pressured and backed in to a corner due to the

confrontational nature of the meeting as without representation things could possibly be misconstrued. I asked Lindsay to please fetch my coat and hand bag, which she did and Lindsay asked that I put my intentions to her on E-Mail. At no point did the words resignation pass my lips as I was not resigning.

You have mentioned in your letter the period of time between 2/4/19 – 16/4/10 whereby I suffered a seizure requiring hospitalisation – and then my daughter being admitted to hospital for surgery which resulted with a formal diagnosis of Autoimmune Liver Disease. You indeed were supportive during this time for which I am very grateful but it is my opinion that since that time, my necessary weekly appointments at the hospital with my daughter have not been met with the same level of support.

I trust that when you speak to Lindsay once again, she will confirm that at no point did I say that I wished to resign.

Yours sincerely,

Pauline Devine”

72. Mr Ferrari received this email but did not reply to it, as she was no longer employed by his company.
73. Following the termination of the claimant’s employment, the claimant was able to secure alternative employment with Concrete Garages Scotland on 24 May 2019, for which she was paid weekly. She continued to work for Concrete Garages Scotland until 1 June 2020, and due to uncertainty as to her future caused by the effect on business of the lockdown due to the coronavirus pandemic, she found employment with WebHelpUK which commenced on 16 June 2020.

Submissions

74. For the claimant, Mr Clarke presented a written submission, to which he spoke, and which is summarised briefly below.

75. He commenced by arguing that the claimant's evidence should be preferred to that of the respondent's witnesses where there was any material difference between them. The evidence of the claimant, he said, was measured and reasonable, and she was doing what she could to assist the Tribunal. He contrasted this with the evidence of Ms Morrison and Mr Ferrari which was defensive and evasive.
76. In particular, he pointed to the key piece of evidence in the case, which was the failure of Ms Morrison to accept that the claimant handed the letter prepared by the Paediatric Liver Service (SB3 and SB4) to her on her return to work on 16 April 2019. He argued that given the extreme punctiliousness of the claimant in providing information and updates to Ms Morrison it was "simply inconceivable" that the claimant did not hand the letter to her on that date. Lindsay Morrison's failure, he submitted, was an egregious failure to assist the Tribunal so that her entire evidence should be treated as unreliable.
77. He then summarised the findings in fact which he argued the Tribunal should make in this case, and identified as another key point a finding that Ms Morrison told the claimant in the meeting of 2 May 2019 that she was "not coping with work or Jodie's illness". He also pointed out that in answer to questions from the Tribunal it emerged that Ms Morrison had never received any formal training in the respondent's Dignity at Work policy or any other equalities training.
78. Mr Clarke addressed the issues set out by Employment Judge McMahon in his Note following Preliminary Hearing dated 22 November 2019.
79. He noted that the respondent accepted that Jodie, the claimant's daughter, was at the material time a person disabled within the meaning of the Equality Act 2010, though it is not conceded that the respondent knew, or ought reasonably to have known, that she was so disabled at the time the alleged discrimination took place.
80. He submitted that the less favourable treatment the claimant suffered because of her association with her daughter comprised the following:
- Being dismissed by Mr Ferrari on 8 May 2019;

- Following the claimant's return to work on 16 April 2019, when the claimant requested time off to accompany Jodie to hospital, Ms Morrison said to the claimant "what exactly is wrong with Jodie", publicly in front of her colleagues;
- 5 • On or about 25 April 2019, Linda Hunter asked the claimant in a disbelieving tone "why is Jodie in pain";
- The claimant was ostracised and excluded from workplace conversation by her colleagues from 22 April 2019;
- Ms Morrison asked the claimant on 2 May 2019 if she was coping with work; and
- 10 • Ms Morrison stating to the claimant on 2 May 2019 that she did not think the claimant was coping with work or Jodie's illness.

81. With regard to the allegation that the claimant was ostracised and excluded from workplace conversation by her colleagues from 22 April 2019, Mr Clarke said that he did not abandon this allegation, but acknowledged that there was "not a huge amount of evidence in support of that". The allegation was made in good faith, he said.

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82. The relevant comparator for the claimant is a hypothetical employee who took, or wanted to take, time off work for a non-disabled child. He submitted that the claimant was treated less favourably on the grounds of her association with her disabled daughter due to stereotypical assumptions in relation to her daughter.

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83. The less favourable treatment took place from 16 April to 8 May 2019, and was witnessed by members of the claimant's team.

25 84. He argued that the evidence demonstrated that the respondent knew, or ought to have known, that the claimant's daughter was suffering from a disability from January 2019. In support of this proposition he pointed to the claimant's text message of 11 April 2019 informing Ms Morrison that Jodie had been diagnosed with Autoimmune Liver Disease, and to her handing the letter from Claire Shannon to Ms Morrison on 16 April 2019. He pointed to

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Ms Morrison's evidence under cross-examination where she accepted that she knew for some time that Jodie was ill, and that she knew it was serious.

5 85. Mr Clarke then argued that the termination of the claimant's employment was an act of direct discrimination under section 13 of the 2010 Act, and section 39(2)(c). He submitted that since the claimant had established that she was dismissed for her association with her disabled daughter, and that the respondent has been unable to provide any alternative explanation for the dismissal. The respondent's evidence was clearly to the effect that they did not intend to dismiss the claimant due to conduct, capability or any other reason. The Tribunal must therefore hold that the contravention occurred, the 10 presumption in section 136 not having been rebutted.

86. He went on to set out key facts which showed that, in the absence of an alternative explanation by the respondent, the respondent discriminated against the claimant due to her association with her disabled daughter.

15 87. Mr Clarke then submitted that the claimant did not resign, but was dismissed, and set out the basis upon which he argued that the evidence suggested that she was dismissed, rather than having resigned. Insofar as there was any confusion over these events, the claimant is entitled to receive the benefit of the doubt. When Mr Ferrari received her email of 9 May 2019, he should have 20 contacted the claimant to obtain clarification before making the decision to dismiss the claimant, and his failure to do so strongly supports the claimant's contention that the dismissal was automatically unfair.

88. He argued that the claimant had exercised her statutory right to take time off for dependants under section 57A(1) of the Employment Rights Act 1996, 25 under sub-sections (a) and (b), and did so in the period between 2 April and 2 May 2019.

89. Mr Clarke went on to submit that the claimant's employment was terminated due to her having exercised her right to take time off for a dependant under section 57A.

30 90. The claimant therefore says that she was automatically unfairly dismissed, he said.

91. Mr Clarke then made brief submissions with regard to loss, referring the Tribunal to the Schedule of Loss presented. He argued for £8,800 to be awarded in respect of injury to feelings.
92. He concluded by reiterating that this case is “all about” the meeting of 2 May, and that it was self-evident that the claimant was greatly distressed by the comment made since she went to her GP the following day with work-related stress. This is not a claimant who felt a little aggrieved – she thought she was going to have another seizure. The consequences were very serious.
93. Mr Clarke invited the Tribunal to find in favour of the claimant on all heads of her claim.
94. Ms Gorry, for the respondent, also presented a written submission, to which she spoke. Again, what follows is a brief summary of that submission.
95. Ms Gorry invited the Tribunal to find that Ms Morrison was an entirely credible witness, and to prefer her version of events throughout; and that Ms Morrison, Mr Ferrari and Mrs Hunter were open and candid in their evidence.
96. She pointed to a number of inconsistencies in the evidence of the claimant. For example, the claimant failed to mention a key meeting with Mr Ferrari on 16 April 2019 in which he had reassured her that her job was safe, the day after the claimant alleges that everything changed at work for her. In her evidence, the claimant had accepted that this meeting had taken place but could not explain why it was not mentioned in her statement.
97. Ms Gorry submitted that although it is admitted by the respondent that the claimant’s daughter was disabled at the material time, they deny that they knew or ought to have known that this was the case at the time. Mr Ferrari and Mrs Hunter advised that while they knew that Jodie was sick they did not know precisely what the diagnosis or implications were, and that they understood that she was having tests to find out what was wrong.
98. Ms Morrison gave evidence that she knew that the claimant’s daughter was unwell and undergoing a lot of tests, and that although the claimant had confirmed the diagnosis to her, she did not appreciate that this meant that

Jodie was disabled as she was not fully aware of the condition nor of the effect upon her. Both Ms Morrison and Mr Ferrari say that they did not receive a copy of the letter which the claimant alleges she gave to Ms Morrison on 16 April 2019.

5 99. She argued that the respondent did not know nor could they reasonably be expected to have known that Jodie was disabled.

100. Ms Gorry then argued that there has been no less favourable treatment accorded to the claimant and that in fact she was treated more favourably than her comparator. Ms Morrison and Mrs Hunter denied that they behaved
10 towards the claimant in such a way as to undermine the seriousness of her daughter's illness or question its legitimacy. Mr Ferrari and Mrs Hunter gave evidence that Ms Morrison is a sensitive, professional, caring manager who never questioned the claimant's account of the illness or the amount of time off requested. Mrs Hunter denied that she would ever have questioned
15 Jodie's illness.

101. The claimant was provided with as much time off as she needed to look after her child, and was treated more favourably than other employees with non-disabled children.

102. The respondent's witnesses also confirmed, she said, that the claimant was
20 included in workplace conversations and nights out, and was often given lifts home by her colleagues. They did inquire about Jodie, but they said that that was out of concern for the claimant and for her daughter's wellbeing. They appreciated that the claimant was enduring a hard time.

103. With regard to the meeting of 2 May, Ms Morrison's evidence was that she
25 did not mention the claimant's absence nor her daughter's ill health during that meeting, since the meeting was about the issue raised in relation to the Booksource incident. The claimant told Ms Morrison that the job was not working out and that she wanted to resign from her employment. She denied that she had behaved in the manner alleged, and asserted that she was
30 professional, courteous and measured throughout.

104. Ms Gorry then submitted that the evidence did not support the allegation that the claimant was dismissed for having taken time off to care for her disabled child. She invited the Tribunal to find that the claimant's resignation was valid, and that she resigned freely, of her own volition. The respondent's evidence is that had she not resigned, they would have continued to support her.
105. She argued that if the Tribunal were to find that the claimant had been dismissed, we should not find that the claimant was automatically unfairly dismissed in terms of section 99(3) of the Employment Rights Act 1996 for taking time off to care for dependants under section 57A.
106. With regard to the claimant's second claim, Ms Gorry submitted that the respondent took a flexible approach to employees with childcare commitments, and that they allowed the claimant to take time off to attend hospital appointments and to be with her daughter when she was unwell.
107. The claimant resigned validly from her employment on 2 May 2019, and was not dismissed. There was no inappropriate conduct by Ms Morrison at that meeting, and no evidence to suggest that she behaved in such a way as to amount to a material breach of the claimant's contract of employment. It was reasonable for the respondent to conclude that the claimant had resigned on 2 May and to process her leaving thereafter.
108. Ms Gorry invited the Tribunal to dismiss the claimant's claims.

The Relevant Law

109. Section 57A(1) of the Employment Rights Act 1996 (ERA) provides:

(1) "An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary –

a. to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted;

b. to make arrangements for the provision of care for a dependant who is ill or injured..."

110. In section 57A(3), “dependant” is defined as including a child.

111. Section 99(1) of ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is “of a prescribed kind” or takes place “in prescribed circumstances”.

112. Section 99(3) of ERA sets out the reason or set of circumstances prescribed under that section to include, at sub-section (d), “time off under section 57A”.

113. Section 13(1) of the Equality Act 2010 (“the 2010 Act”) provides:

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

114. In this case, the claimant complains that because of “a protected characteristic” possessed by her daughter, she was discriminated against by the respondent, namely disability.

115. Section 39(2)(c) of the 2010 Act provides that an employer must not discriminate against an employee by dismissing them.

116. We were also referred to the burden of proof provisions of section 136 of the 2010 Act, and to authorities which we took into account.

Discussion and Decision

117. The Issues in this case were set out by Employment Judge McMahon in his Note and Orders following the Preliminary Hearing on 1 November 2019, a copy of which was produced at 32ff. Unfortunately, the copy produced in the joint bundle omitted the crucial pages on which the Issues were laid out in the Note, but having had access to the administration file, it is clear that the Issues were defined as follows (albeit renumbered for ease of reference here):

1. Direct Disability Discrimination

1.1 Was the claimant's daughter, Jodie Devine, at the material time a disabled person as defined by the Equality Act 2010?

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1.2 In relation to the complaint that the claimant was subject to direct discrimination contrary to the provisions of the Equality Act 2010, was the claimant treated less favourably than others on account of her daughter's disability? If so, what did the less favourable treatment consist of?

1.3 Who is the claimant's comparator?

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1.4 When did the less favourable treatment take place?

1.5 Who witnessed the less favourable treatment?

1.6 Did the respondent know, or could have been expected to know, that the claimant's daughter had a disability at the material time?

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1.7 Was the termination of the claimant's employment an act of discrimination contrary to section 13 of the Equality Act 2010?

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1.8 Are there any facts from which the Employment Tribunal could decide in the absence of any other explanation that the respondent contravened the act by discriminating against the claimant in consequence of the claimant's daughter's disability?

2. Unfair Dismissal

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2.1 Did the claimant resign, or was she dismissed, from her employment with the respondent on 2 May 2019?

2.2 Did the claimant exercise her statutory right to take time off for dependants under section 57A of the Employment Rights Act 1996?

2.3 When did the claimant exercise her statutory right to take time off for dependants under section 57A of the Employment Rights Act 1996?

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2.4 Was the claimant's employment terminated due to having exercised her statutory right to take time off for dependants under section 57A of the Employment Rights Act 1996?

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2.5 Was the claimant automatically unfairly dismissed in terms of section 99(3)(d) of the Employment Rights Act 1996?

3. Remedy and Quantum

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3.1 If the Employment Tribunal finds that the claimant was subject to an act or acts of direct discrimination on the grounds of disability contrary to section 13 of the Equality Act 2010, what, if any, compensation should be ordered to be paid by the respondent?

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3.2 If the Employment Tribunal finds that the claimant was automatically unfairly dismissed due to having taken time off for dependants under section 57A of the Employment Rights Act 1996, contrary to section 99(3)(d) of the Employment Rights Act 1996, what, if any, compensation should be ordered to be paid by the respondent?

3.3 What is the extent of the claimant's loss?

3.4 Has the claimant mitigated her loss in whole or in part?

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3.5 Has the claimant taken all reasonable steps to mitigate her loss?

3.6 In respect of discrimination, what, if any, compensation for injury to feelings should be ordered to be paid by the respondent, with reference to the guidelines established in

**Vento v Chief Constable of West York Police (2) [2003] IRLR
102 and Da’Bell v NSPCC UK EAT/0227/09?**

- 5 118. Before addressing the issues specifically as they are laid out, it is appropriate for the Tribunal to set out a number of observations and conclusions on the evidence.
- 10 119. We found the evidence of Ms Morrison to be entirely credible and reliable, and were persuaded that her evidence should be preferred to that of the claimant where there was any conflict between them. It is plain to the Tribunal that Ms Morrison was a caring and compassionate manager, and when her actions towards the claimant are viewed as a whole as well as in detail, it was clear that she was supportive and sympathetic to the claimant throughout the period from January 2019 until her resignation when she was dealing with the illness suffered by her daughter.
- 15 120. In particular, we preferred Ms Morrison’s version of the meeting of 2 May to that of the claimant, for reasons which we set out in detail below.
- 20 121. The claimant’s evidence we found to be less convincing. Her claim form and her witness statement contained strong assertions of wrongdoing which could not be sustained, and which her evidence in cross-examination did not support. For example, the claimant asserted that the attitude of Ms Morrison changed after 16 April 2019 when she gave her the letter from the Paediatric Liver Service and she realised how much time off the claimant would need in future, and highlighted the change in the tone of her text messages. However, on reviewing the text messages in evidence, she accepted that reading them now, there was no change, and Ms Morrison’s replies and messages remained equally supportive as they had before the diagnosis was known.
- 25 While it was creditable for the claimant to make such a concession, we were troubled by the fact that she only did so at that stage, having set out in her claim and her witness statement with such insistence that Ms Morrison changed her attitude towards her at that point.
- 30 122. That rather undermined the claimant’s assertions about the change in tone which she believed or perceived she detected in the office, which were further

weakened by the clear evidence of Ms Morrison and Mrs Hunter that when discussions took place in the office about Jodie's condition they were often started by the claimant and were supportive and caring in their nature. There was another difficulty for the claimant in that there was no evidence in support of her assertion that she had been ostracised and excluded by the other staff after the diagnosis became apparent, and Mr Clarke, while not abandoning that averment, made no positive submission on it in acknowledgement of that.

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123. The Tribunal came reluctantly to the conclusion that the claimant was prepared to make strong assertions about the conduct of others in writing to the Tribunal which, when evidence was led, could not be sustained, and which were therefore without foundation. This led us to question the veracity of her version of other events which were disputed between the parties.

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124. Mrs Hunter and Mr Ferrari gave their evidence in an entirely straightforward manner and supported the position of Ms Morrison. We found no reason to doubt that their evidence was truthful and helpful.

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125. We rejected Mr Clarke's submission that Ms Morrison in particular was evasive in her responses. We considered that Ms Morrison did her best, under considerable pressure in cross-examination, to be truthful and to address the questions put. That she did not accept the premise being put to her did not mean, as was implied, that she was seeking to evade the question, but made clear to us that she was seeking to be accurate and truthful in her answers.

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126. Before addressing the issues, it is appropriate for us to set out how we resolved some of the conflicts in evidence in order to reach the factual conclusions which we have, in the following areas:

- Whether the claimant handed over the letter from the Paediatric Liver Service to Ms Morrison on 16 April 2019 or not;
- Whether the text messages demonstrate a change in tone after the diagnosis was made known to Ms Morrison;

- Whether the tone of the conversations within the office changed after 16 April 2019 or not; and
- What happened at the meeting of 2 May 2019?

- 5 127. The first issue relates to whether the claimant handed over the letter on 16 April 2019. Mr Clarke defined this as a key piece of evidence, and we understand why the claimant placed so much emphasis on it, as it did indicate that the number of appointments, and their frequency, was going to increase as a result of that diagnosis, thus placing further demands upon the claimant's time to be off work.
- 10 128. We concluded that the claimant did not hand over the letter to Ms Morrison on that date, nor on any other date. Ms Morrison demonstrated herself, throughout these events, to be supportive, open, warm and friendly to the claimant. It is plain that there was affection between the two of them, and it is impossible to read the text messages up to that point without seeing that Ms Morrison was showing an exemplary level of attention towards an anxious colleague, and seeking at all times to relieve her of the burden of anxiety about work. At no stage did Ms Morrison insist that the claimant take unpaid time off work, or take annual leave. She did not enforce the rules under the appropriate policy, and in our judgment, she did so out of sensitivity to the claimant and to help her at a time of need.
- 15 20
129. As a result, we were not prepared to accept that Ms Morrison was handed a letter detailing the diagnosis and the proposed course of treatment and did not take that seriously. No copy was retained on the file kept in the office for that purpose, and it was clear that Ms Morrison would have placed it on that file to ensure that the records were complete. Mr Ferrari also confirmed that no such letter was passed to him for filing.
- 25
130. The letter which we saw (SB3 and SB4) was not addressed to the respondent, and specifically made reference to Jodie's school, rather than to the employer. We have no evidence to demonstrate the terms of the letter which the claimant described as similar, nor to understand the differences between the two letters.
- 30

131. In any event, we are not persuaded that seeing that letter would have made any difference to Ms Morrison's attitude to the claimant's need for time off. We are fortified in that view by the fact, undisputed by the claimant, that at no stage did Ms Morrison refuse to allow the claimant time off to look after Jodie or attend a hospital appointment with her, nor even query such a request.
132. Ms Morrison was aware that the diagnosis had been reached, from the text message which she received shortly before that, and she understood that this would mean that ongoing treatment would be needed, and time off required as a result.
133. Mr Clarke pointed to the claimant's punctiliousness, which made it inconceivable that she would not have handed the letter to Ms Morrison. The evidence gave us cause to question the description of the claimant as punctilious – particularly in relation to the Booksource issue which was raised with her on 2 May, where her actions had given rise to concern about her truthfulness – but of itself, in the face of the denials of Ms Morrison and Mr Ferrari, this submission was insufficient to persuade us that there was a basis upon which we could find that she handed over the letter on that date.
134. Next, we considered the tone of the text messages. We acknowledge that the claimant did accept, in cross-examination, that the tone of the messages continued to be supportive after 16 April 2019.
135. However, in our judgment, it was distinctly unfair for the claimant to have made the allegation in the first place. The tone of the text messages continued to be supportive, friendly and helpful. There is no hint of any reserve in the responses to her requests for time off. None of the responses approach a refusal of the request, or even a query about them. She referred on a number of occasions to the way in which she felt or perceived herself to have been treated, and while she withdrew this, in the end, she was prepared to make the allegations in a claim to the Tribunal in the first place when they were unsupported by the evidence. We considered that the claimant was prepared to exaggerate her evidence in order to create a negative impression of Ms Morrison.

136. Similarly, the claimant alleged that the way she was treated in the office after the diagnosis changed. The specific allegations about this, that Ms Morrison and Mrs Hunter questioned her in a hostile manner about Jodie's symptoms, emphasized the tone of what was said, rather than the content. It seemed to us that the questions of which she accused Ms Morrison and Mrs Hunter of asking were perfectly capable of being asked in a supportive and sympathetic way, but we were not prepared to find that they were asked at all in the way in which the claimant invited us to.
137. We were fortified in this belief by the fact that the claimant, again, made written allegations that she was ostracised and excluded by colleagues, which she could not support in evidence before us. In our judgment, this showed the claimant's disposition to overstate her sense of grievance in an attempt to damage the reputation of the respondent, and we were not prepared to accept her evidence about the way in which Ms Morrison and Mrs Hunter spoke to her. In any event, we accepted the evidence of the respondent's witnesses that they did not speak in the way alleged, nor act as had been suggested.
138. Finally, on this heading, the critical issue of what happened at the meeting of 2 May 2019. There is simply no middle ground in the two versions of events given by Ms Morrison and the claimant. It is not open to the Tribunal to find that there may have been some misunderstanding between them as to what was said or meant at that meeting. Ms Morrison gave very clear evidence that the claimant said that she felt that things were not working out for her or for the business, and that she wanted to resign with immediate effect. The claimant denies that she used those words.
139. We were invited by Mr Clarke to see that there was inconsistency in the position of the respondent in insisting that the claimant had resigned, and pointed to a number of key facts which showed that the claimant's version was correct.
140. He pointed to Ms Morrison's "inexplicable failure" to make reference to the resignation in the text message at 5.23pm on 2 May, and the fact that the claimant did not refer to it either. We found it quite understandable that, in an exchange about a set of keys, Ms Morrison would not wish to refer to the

resignation, and the fact that she did not does not in any way demonstrate that the claimant had not resigned earlier that day.

- 5 141. On the claimant's version of events, in which she was very upset at the way in which she had been treated by Ms Morrison at that meeting, the tone of her text messages, which were friendly and helpful, is difficult to reconcile. We found that her replies to Ms Morrison were inconsistent with her version of the meeting, not Ms Morrison's.
- 10 142. Mr Clarke pointed to the email of 9 May sent by the claimant to Mr Ferrari on 9 May, and the inexplicable failure of Mr Ferrari to reply to that email. He omitted to refer to Mr Ferrari's letter of 8 May, however, which was consistent with the claimant having resigned, and the fact that Mr Ferrari did not see the need to reply to that email of 9 May since the claimant was no longer an employee.
- 15 143. He suggested that the respondent's knowledge that the claimant had attended her GP to request a sick line on 3 May should have alerted them to the fact that she had not resigned. He also pressed Ms Morrison on the fact that the sick line referred to the claimant suffering from stress at work. Her response, which we found entirely credible, was that that was what the GP was recording as the claimant's version of events, rather than the GP's specific opinion, but
20 in any event, the claimant did not call the respondent to advise them that she was ill on the Friday, Monday or Tuesday mornings. This is not only inconsistent with Mr Clarke's description of his client as punctilious (since she always complied with that rule before), but also with the continued employment of the claimant after 2 May.
- 25 144. Mr Clarke observed that the claimant had been expected to confirm her resignation by email, but instead sent in a sick line. It was our view that the respondent's witnesses were puzzled by the claimant's actions here, since they were inconsistent with her clear statement on 2 May and her absence from work thereafter without explanation.
- 30 145. The fact that the claimant said that she could not afford to resign may be a token of her regret that she did rather than evidence that she did not.

146. All of these factors were considered by the Tribunal, but we were persuaded by Ms Morrison that the meeting of 2 May was a calm one in which she adopted a careful and non-confrontational tone in raising her concerns about the way in which she felt that the claimant had sought to evade responsibility for an error with an order the previous day; that the claimant herself remained calm and was not upset at any stage; that the claimant was clear and unambiguous in her statement that she wished to resign with immediate effect; that Ms Morrison immediately went to tell Mr Ferrari this; that they went to the door of the building together and hugged as they waited for the taxi to arrive, and were seen to do so by Mr Ferrari; and that they continued to communicate in a friendly manner after she left the building by text message.
147. We were drawn then to the conclusion that Ms Morrison was telling the truth about this meeting, and had no reason to make up a story that the claimant had resigned. She insisted that the meeting about the Booksource problem was entirely informal, and that neither she nor Mr Ferrari had any intention of taking the claimant to discipline or dismissing her as a result of this or other issues. We accepted Ms Morrison's evidence that she did not refer to Jodie's illness at all, but raised concerns about the claimant's ability to deal with the work she was being given. On the day of the claimant's return, her targets had been reduced to a level which was fairer to her.
148. The respondent's actions throughout are entirely consistent with an organisation which was seeking to retain the services of the claimant, and not to dispense with her. Mr Ferrari assured her on 16 April that she would continue to be supported, and she accepted and was grateful for that.
149. As a result, we concluded that the claimant did resign on 2 May, and was not dismissed by the respondent.
150. It is then appropriate to deal, perhaps more briefly, with the issues before us.

4. Direct Disability Discrimination

1.1 Was the claimant's daughter, Jodie Devine, at the material time a disabled person as defined by the Equality Act 2010?

1.2 In relation to the complaint that the claimant was subject to direct discrimination contrary to the provisions of the Equality Act 2010, was the claimant treated less favourably than others on account of her daughter's disability? If so, what did the less favourable treatment consist of?

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1.3 Who is the claimant's comparator?

1.4 When did the less favourable treatment take place?

1.5 Who witnessed the less favourable treatment?

1.6 Did the respondent know, or could have been expected to know, that the claimant's daughter had a disability at the material time?

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1.7 Was the termination of the claimant's employment an act of discrimination contrary to section 13 of the Equality Act 2010?

1.8 Are there any facts from which the Employment Tribunal could decide in the absence of any other explanation that the respondent contravened the act by discriminating against the claimant in consequence of the claimant's daughter's disability?

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20 151. We take these issues in turn.

152. It is admitted by the respondent that the claimant's daughter Jodie was a disabled person within the meaning of the 2010 Act at the material time.

153. The claimant's complaints are addressed individually:

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- Being dismissed by Tony Ferrari on 8 May 2019 – we have concluded that the claimant was not dismissed by the respondent but resigned on 2 May 2019. This complaint therefore falls.
- Ms Morrison said to the claimant “what exactly is wrong with Jodie?”, made publicly in front of the claimant's colleagues – we

are not persuaded that this question was asked by Ms Morrison at all, and certainly not in a way which amounted to less favourable treatment. We have concluded that Ms Morrison did not act in a hostile or inappropriate manner towards the claimant, and was entirely supportive when she asked for time off to look after her or attend a hospital appointment with her daughter. In submission, Mr Clarke clarified that it was “not necessarily the words used but the context”, which in our view, given the specific nature of the allegation, demonstrates that the claimant has failed to prove this allegation. This complaint therefore falls.

- On or about 25 April 2019, Mrs Hunter asked the claimant in a disbelieving tone, “why is Jodie in pain”? We do not accept that Mrs Hunter spoke to the claimant in anything other than a supportive and friendly way, and that any questions asked by her about Jodie’s treatment, which were plainly encouraged by the claimant’s openness about the situation, were asked out of concern rather than in a disbelieving tone. This complaint therefore falls.
- The claimant was ostracised and excluded from the workplace from 22 April 2019 – not only do we not accept that this was done by the respondent to the claimant, it is plain that the claimant did not present any substantive evidence to this effect during the hearing, and accordingly this complaint falls.
- Ms Morrison asked the claimant on 2 May 2019 if she was “coping with her job”. There is no basis, in this allegation, that even if this were an inappropriate question, it amounted to less favourable treatment on the grounds of associative discrimination. Ms Morrison’s evidence, that Jodie’s illness was never mentioned during that meeting, was credible, and we accepted it. Any reference to the claimant struggling with her work was related to the Booksource incident, and was unrelated to the illness of the claimant’s daughter. She did not say that “you’re not coping with the job” during that meeting. This complaint therefore falls.

- Ms Morrison said to the claimant on 2 May 2019 that she did not think the claimant was “coping with work or Jodie’s illness”. Again, the Tribunal did not find that this was said by Ms Morrison during that meeting, and accepted that there was no mention of Jodie’s illness during the meeting. This complaint falls.

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154. The claimant’s comparator is a hypothetical colleague who required to take time off to look after a non-disabled dependant.

155. The next issue asks when the less favourable treatment took place. We have concluded that no less favourable treatment took place, and accordingly no finding is made under this heading. The allegations set out when the treatment was alleged to have taken place.

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156. In asking who witnessed the less favourable treatment, an issue is raised about the evidential support for the claimant’s complaints. There were no witnesses to the alleged treatment other than the claimant and Ms Morrison, as well as Mrs Hunter. No other witnesses were named or called before us to support the claimant’s contention that other staff saw and heard the claimant being spoken to or treated in a discriminatory manner. We have not found that she was treated in a discriminatory manner, and therefore the issue of witnesses is dealt with.

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157. On the evidence, we find it difficult to conclude that the respondent knew or ought reasonably to have known at the time that Jodie was suffering from a disability. Until the diagnosis of autoimmune liver disease was conveyed to them, by the claimant’s text message on 11 April 2019 (81), the respondent was aware that the claimant’s daughter was unwell, but the extent of the illness and her prognosis was at that point unknown. However, that text message then confirmed that the disease was one which was not curable, and therefore it may be taken to have been understood by the respondent that Jodie would be suffering from that condition for more than a year, and that it would affect her to a more than trivial degree. Both Mr Ferrari and Ms Morrison accepted that they knew that Jodie was suffering from an illness which was serious.

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158. Given that the respondent now admits that the condition amounts to a disability within the meaning of the 2010 Act, it is our conclusion that the respondent ought reasonably to have known that Jodie was suffering from that disability by 11 April 2019.

5 159. In our judgment, the termination of the claimant's employment did not amount to an act of discrimination contrary to section 13 of the 2010 Act. The claimant's case was predicated on a finding that she was dismissed: our finding is that she was not dismissed by the respondent, but that she resigned unilaterally. In any event, we have not heard any evidence which persuaded
10 us that the respondent took any action which could amount to less favourable treatment than that accorded to a hypothetical comparator on the grounds of Jodie's disability. The evidence has convinced us that the opposite was true: that the claimant was treated very favourably by the respondent and was given every support and encouragement in taking time off and dealing with
15 Jodie's illness.

160. We agree that had the claimant's employment been terminated, the respondent put up no alternative explanation for doing so. We were not persuaded that the claimant would have been dismissed in any event. Indeed, Ms Morrison and Mr Ferrari made it abundantly clear that they had no
20 intention of dismissing her or even taking her to discipline over any issue. The Booksource matter was to be dealt with by Ms Morrison in an informal manner, and would not have led to any formal action, on the evidence led. However, the fact that the claimant was not dismissed by the respondent means that no inference adverse to the respondent can be drawn, on the
25 claimant's case, which addresses issue 1.8 under this heading..

161. The claimant's claim of discrimination on the grounds of disability therefore fails, and is dismissed.

5. Unfair Dismissal

2.1 Did the claimant resign, or was she dismissed, from her employment with the respondent on 2 May 2019?

2.2 Did the claimant exercise her statutory right to take time off for dependants under section 57A of the Employment Rights Act 1996?

5 **2.3 When did the claimant exercise her statutory right to take time off for dependants under section 57A of the Employment Rights Act 1996?**

10 **2.4 Was the claimant's employment terminated due to having exercised her statutory right to take time off for dependants under section 57A of the Employment Rights Act 1996?**

2.5 Was the claimant automatically unfairly dismissed in terms of section 99(3)(d) of the Employment Rights Act 1996?

6. Remedy and Quantum

15 **3.7 If the Employment Tribunal finds that the claimant was subject to an act or acts of direct discrimination on the grounds of disability contrary to section 13 of the Equality Act 2010, what, if any, compensation should be ordered to be paid by the respondent?**

20 **3.8 If the Employment Tribunal finds that the claimant was automatically unfairly dismissed due to having taken time off for dependants under section 57A of the Employment Rights Act 1996, contrary to section 99(3)(d) of the Employment Rights Act 1996, what, if any, compensation should be ordered to be paid by the respondent?**

25

3.9 What is the extent of the claimant's loss?

3.10 Has the claimant mitigated her loss in whole or in part?

3.11 Has the claimant taken all reasonable steps to mitigate her loss?

3.12 In respect of discrimination, what, if any, compensation for injury to feelings should be ordered to be paid by the respondent, with reference to the guidelines established in *Vento v Chief Constable of West York Police (2)* [2003] IRLR 102 and *Da’Bell v NSPCC UK EAT/0227/09*?

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162. We have concluded that the claimant resigned, and was not dismissed, from her employment with the respondent on 2 May 2019, for the reasons set out in paragraphs 138 to 149 above.

163. We did accept that the claimant exercised her statutory right to take time off for Jodie, her dependant, under section 57A of ERA, on 8 occasions between 2 April and 29 April 2019.

164. However, we have concluded that the claimant’s employment was not terminated by the respondent, nor was it terminated for having exercised her statutory right to take time off for Jodie, her dependant, under section 57A. There is no evidence, other than the claimant’s allegations, to allow us to draw any connection between the claimant’s exercise of her statutory right to time off and the termination of her employment, and in any event, that termination of her employment arose due to her unilateral resignation. The respondent could not have made clearer their ongoing support for the claimant in her need to take time off. They gave her time off when she needed it, reassured her that this was not a problem and that she could continue to do so into the future, responded quickly and positively to requests for time off and supported her throughout. We found that there was no basis for the claimant’s complaint that she was dismissed, or that she was dismissed because of exercising this right. There was no negative response taken by the respondent to these requests, and accordingly we dismiss this claim.

165. It follows, then, that the claimant was not automatically unfairly dismissed by the respondent in terms of section 99(3)(d) of ERA.

166. The claimant's claim that she was automatically unfairly dismissed by the respondent for having exercised her right to time off under section 57A of ERA therefore fails, and is dismissed.

5 167. That being the case, there is no need for the Tribunal to address the remaining issues, which arise only if remedy is to be considered.

168. The claimant's claims therefore fail, and are dismissed.

169. One final point arises. This Tribunal has heard a great deal of evidence about the condition of a young person from whom it did not hear, and could not fail to be moved by her plight. While the claimant's claims have not succeeded,
10 it would not be invidious for us to assure her daughter of our best wishes for her ongoing treatment and for her future, and to wish her parents well as they seek to support her.

170. We thank the representatives of each party, Mr Clarke and Ms Gorry, for their helpful and concise presentation of their respective cases, which were of great
15 assistance to the Tribunal.

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Employment Judge: M MacLeod
Date of Judgement: 23 December 2020
Entered in register: 25 January 2021
And copied to parties