Case Number: 1806368/2019

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs L Hodgson**		
Respondent:	**Martin Design Associates Limited**		
Heard:	**By CVP**	**On**	**14 September 2020**
Continued:	**in Leeds**	**On:**	**16, 17 and 18 February 2021**

Before:	**Employment Judge Wade**	
Members:	**Ms H Brown**	
	Mrs S Robinson	
Representation		
Claimant:	Mr R Ryan	(counsel)
Respondent:	Mrs J Callan	(counsel)

RESERVED JUDGMENT

1. The claimant was not a disabled person at the material times and her complaints of Section 15 disability discrimination and failures to make reasonable adjustments fail.
2. The claimant's constructive unfair dismissal complaint is well founded and succeeds.
3. The claimant's complaint of disability related harassment succeeds in relation to allegation c) (suggesting that her role was redundant), and otherwise fails.
4. The claimant's complaint of direct sex discrimination in relation to remote working succeeds.
5. The Tribunal makes the following awards by way of remedy:

Unfair dismissal basic award	£ 8 186.58	
Compensatory award (loss of statutory rights)	£ 350	
Injury to feelings in respect of sex discrimination	£ 7 500	£1373
Aggravated damages sex discrimination	£ 5 000	£ 785
Injury to feelings harassment by association	£10 000	£1569
Financial Loss	£21 886	£2963
Total Interest (the second column)	£ 6 690	
Total sum payable by the respondent	**£59, 612.58**	

DRAFT REASONS

Introduction and hearing

1. The claimant was previously the office manager of the respondent, a firm of electrical and mechanical designers. She resigned in July 2019 after a period of absence arising from her son's diagnosis and treatment for an aggressive leukaemia in 2018. The claims to be decided in this hearing were constructive unfair dismissal, direct sex discrimination, harassment relying on conduct related to the claimant's son's disability, Section 15 disability discrimination and failures to make reasonable adjustments. Where appropriate we refer to the claimant's son as "A" in these reasons.
2. The respondent accepted A was a disabled person at all material times, but the claimant's alleged disability relying on the mental impairment of adjustment reaction, was in dispute. The claims have been subject to two case management hearings (April and July 2020) at which both parties were professionally represented, as they were at this final hearing.
3. The Tribunal started this case as a CVP hearing, having considered that it could proceed in that format. After the claimant had commenced her oral evidence in September 2020, connection difficulties resulted in the abandonment of CVP. An adjourned hearing in person was arranged for February 2021. The respondent's counsel conducted the first day of the adjourned hearing by remote video link, as, by then, she was required to isolate. No application was made to adjourn for that reason.

Evidence

4. The Tribunal heard only from the claimant and Mr Martin, the respondent's Managing Director, with whom all relevant communications had taken place over the material period. We had written statements, including a "disability impact" statement from the claimant. We had a contained file of the relevant documents. This included the claimant's GP notes and other related material and a transcript of a meeting on 7 March 2019, which the claimant had recorded without Mr Martin knowing that she was doing so. The Tribunal considered that much of the parties' oral evidence had the ring of truth about it, but nevertheless we looked for corroboration and placed greater weight on what was done and said at the time, than evidence given in hindsight. The interpretation of conduct and the application of the law to the facts was much disputed.

Findings of fact

5. The claimant began her employment with the respondent on 4 January 2007. The respondent is a mechanical and building services design business, working on projects including power stations, hotels, student accommodation, factories and large homes. The claimant and Mr Martin knew each other well and the claimant lived in the village in which the respondent was based. Her son had worked for the respondent for a year at some point.
6. By 2018 the claimant was Office and Marketing Manager, although the marketing related work took very little of her time. She signed a new contract in 2017 providing for thirty hours per week spread across Monday to Friday, with the claimant being able to decide whether she took a single day off, or spread her hours across five days.

7. The claimant's role included opening the respondent's post, checking and maintaining office supplies, dealing with paper expense forms and holiday requests, filing invoices, attending the weekly project meeting to keep abreast of projects, completing a spreadsheet to enable proper invoicing, distributing that around the engineers, invoicing at the end of each month; and taking incoming calls as appropriate, albeit a junior member of staff was first responder by the time of these events. She was also responsible for chasing payment of unpaid invoices and for arranging for the payment of invoices that came into the office. She acted as Mr Martin's personal assistant as required.

8. Much of her work could have been completed remotely because of the respondent's VPN (virtual network) and modern connectivity generally. We accept the claimant's evidence on that. We consider that Mr Martin's evidence that the VPN was not effective in 2018 was not reliable – we considered he and/or his colleague were mistaken. He did not speak from his own memory (the claimant did) but had asked a colleague about the status of the VPN in 2018 for the purposes of these proceedings. As office manager the claimant often sorted these matters out, and she had better knowledge and recollection from the time of these events. Mr Martin was not the most frequent user of remote working arrangements (which is why he could not speak from his own knowledge), whereas other colleagues were.

9. The work that could be done remotely included invoicing, working with the SAGE accounting software, communications by phone and email to debt collect, saving documents to the respondent's server, and so on. There were some tasks which required presence in the office, such as attending the weekly project meeting, acting as Mr Martin's PA, keeping track of office stationery and sundry supplies and being another person to answer the landline.

10. The claimant did not work from home. There was an intangible value to Mr Martin in her presence in the office as the "oil" that kept everything running smoothly, including in the ease of communication face to face. The office was an effective and happy place to work with some staff remaining for many years.

11. At her annual review in 2018 the claimant had requested to work from home. She knew that working from home had been afforded to many of her male technical colleagues. Her reason was her adult son's mental health which was in crisis at that time. Mr Martin discussed that request with his wife, who was the company secretary, and declined the request. Mr Martin did not equate a request to be at home with adult offspring to be as compelling as requests from colleagues who had younger children. Furthermore, Mr Martin and his wife considered that it was not in the best interest of the claimant's son for her to be around all the time - we accepted the claimant's oral evidence that she was told this by Mr Martin.

12. The range of flexibility awarded to the claimant's colleagues, who lived further away than she did, included:

    PM, senior electrical engineer, compressed his hours into a four day week, and occasionally worked from home borrowing an office laptop and a company mobile phone;

    AW, senior mechanical engineer, worked from home on an ad hoc basis using a company mobile phone and tablet;

    JM, mechanical design engineer occasionally allowed to work from home when there was a childcare issue using an office mobile phone and borrowed laptop;

MC, building design services engineer – worked from home on paternity leave;

GK, trainee design engineer – in January 2017 had surgery as an out-patient and was advised not to drive and certified unfit to work. During that time he contacted the office and was permitted to work from home, having told Mr Martin he was bored. Mr Martin visited his house and took him some work to do and he continued working from home until he could drive;

PT, a senior mechanical engineer, permitted by Mr Martin in 2018 to work from home five days per week. PT had worked for the respondent since 2008 or 2009 and then left for a spell between 2012 and 2017. A year or so after return in 2018 he explained to Mr Martin that he simply wanted to be at home and was considering resigning. At that point he was working on a "mission critical" project and if he were to resign that would have put the business in difficulties. PT worked 100% from home for 2 or 3 months and then resigned. His company laptop and phone were on the claimant's desk by the first week of November 2018, having been returned by him;

PB, a senior electrical engineer, also left in 2018, and another colleague, used the respondent's VPN to connect to the respondent's servers; PB worked one day per week from home.

13. These colleagues created designs and drawings and advised on the projects on which the respondent was engaged.

14. On Thursday 1 November 2018 the claimant's son, then 21 years old, was admitted to hospital with possible sepsis after a routine blood test, and then diagnosed with an aggressive leukaemia. He was very unwell and may not have survived. The claimant left work around 4.15, heading straight to hospital, having to abandon an amateur dramatic production she was rehearsing in the evenings at that time.

15. The claimant telephoned the respondent on Friday 2 November to let a colleague know she would not be attending work that day. On Sunday 4 November she sent a text to Mr Martin citing unforeseen and unavoidable family matters arising that weekend with an expectation that she would be able to give more information in due course.

16. On Wednesday 7 November Mr Martin was in touch by text enquiring if things were "ok" and asking whether she had any idea when she might be back at work.

17. The following day the claimant sent Mr Martin a lengthy text setting out the devastating news that her son had leukaemia. He was in St James' Hospital and that she was with him and would remain so. He was due to start a course of chemotherapy which would be "a long and tough journey" and that she would be there to support him as much as possible. She referred to Mr Martin being a parent himself and how difficult she was finding things, but that she needed to look after her own well-being and would welcome "as much normality as possible" which would "include continuing with my work". She asked for Mr Martin's support to enable her to work flexibly and that they could speak in the coming days. She mentioned her 11 years' of service to the business.

18. On 10 November Mr Martin replied in these terms: "*Loraine very sorry to hear about A and sincerely hope that he responds well to treatment. We are sure that you will be getting lots of support from your family.*

We will of course do all we can to support you.

We understand that you need "normality" and hope that your work for MDA will be part of this. Whilst working from home on a temporary basis is something that we can arrange it must be integrated with some time in the office as this is a key part of the "normality". We suggest that a 50/50 split may work. Is it possible for you to come into the office on Monday morning to discuss the details or let's have a chat on the phone. All very best wishes to you all Chris and Ann." Virtually all Mr Martin's subsequent texts from November until January included similar words of concern for the claimant and her son (but we do not quote them on each occasion below).

19. The claimant then phoned Mr Martin on Monday 12 November 2018. Mr Martin and his wife were journeying to or from Leeds. Mr Martin was driving and the claimant explained that her son had started chemotherapy and his treatment regime. Mr Martin understood that it would involve 3 or 4 cycles of chemotherapy over five or six days with periods of 10 days in-between, which meant that the claimant would be supporting her son at hospital for many weeks and months. At that time the claimant was not necessarily clear about the type of leukaemia and Mr Martin did not fully grasp the potential longevity of the situation, having not experienced anything similar himself.

20. The claimant felt she had well explained why she could not leave her son, given he might deteriorate rapidly at any time, and could not therefore attend the office for two days a week because of her need to be at hospital with him during his treatment, but that she wanted to continue working. That conversation was supportive and the claimant believed Mr Martin would arrange that.

21. Mr Martin did accept the claimant was unable to come into work – she had been upset on that call - and so he took steps to ask the claimant's predecessor, his former secretary Mrs P, to work to cover some of the claimant's work, including dealing with emails and telephone and acting has his PA. Two days later, on 14 November Mr Martin called the claimant to tell her what he had arranged.

22. The claimant had not, at that stage, felt the need to consult her GP about her own state of health, albeit she was very distressed by the situation her son was facing. She was available for work and was very much hoping that Mr Martin was calling to let her know how he was going to enable her to work, knowing there was a spare laptop and phone available.

23. Mr Martin could not recall this conversation on 14 November, but he denied a particular allegation that he had said "I don't' have an open cheque book Lorraine"; he said he would have said something about his need to manage the company's finances to keep it running for everyone, or words to that effect. Two months later the claimant recorded this alleged comment in a letter as, "I know you said you were not made of money".

24. We do not accept that Mr Martin would have spoken in the formal terms that he described about the need to manage the finances of the business; given their long relationship and his wont to speak frankly, we find the conversation is much as the claimant recalled it in paragraph 14 of her particulars of claim and her statement. Mr Martin demonstrated his plain speaking in his evidence to the Tribunal.

25. Having been told that others were arranged to cover her work, the claimant asked why she could not continue with it and Mr Martin replied, "I can't ask you to do that, Lorraine". She then explained to Mr Martin that she needed to work to pay

her mortgage, and as something positive to do at hospital. His response then was that he "didn't have an open cheque book, Lorraine". Mr Martin explained that the claimant should take holiday for the first two weeks of her absence and then go on unpaid leave, and that her job would be there for her when her son was well again. The claimant was very distressed by this call - in her words: "it tipped me over the edge".

26. She then had a telephone consultation with her doctor. The notes recorded: "*son diagnosed leukaemia; upset and struggling, tearful; asking for time off work, boss not allowing flexible work"*.

27. Dr Saxby certified the claimant as unfit for work for a period of a month, advising she was not fit for work because of adjustment reaction. There was no treatment noted.

The medical evidence

28. It is convenient here to summarise the following further medical evidence. On a telephone review of the claimant's diagnosis on 28 November with Dr Matthews, the claimant was again very upset as "her son was having a torrid time of chemo in Leeds"; the notes recorded her boss was not being helpful; she was sleeping okay and eating and friends and family were supportive. A further fit note was issued for from 14 December to 11 January, again with the diagnosis adjustment reaction, and no treatment.

29. There was a further telephone consultation on 17 January 2020. Adjustment reaction was again the diagnosis. The claimant had said her son's treatment was due to complete in April and she needed to be with him; her boss was still not allowing flexible working but she was going to write to him for help with that. That fit note was for two months. There was no medication prescribed or other treatment for the condition.

30. On 8 March there was another fit note issued when the claimant telephoned to seek a further two months; again, the condition relied upon by the GP was adjustment reaction without treatment.

31. On 9 May there was a GP consultation concerning the claimant's eyes and the claimant suffering migraines; it was recorded that the claimant would like repeat migraine medication. The relevant notes recorded: *very upset…under a lot of stress..son in hospital with leukaemia. boss has told her she had lost her job".*

32. On 14 June 2019 the claimant was provided with a further fit note recording that she was not fit for work due to an adjustment reaction and that was to last until 14 July, again without treatment.

33. The claimant did not consult her GP further until January 2020, which was in relation to her migraines and to seek medical evidence for these proceedings. The consultation on migraines recorded: *son is having a bone marrow transplant so has had increased life stresses*". The notes in relation to adjustment reaction recorded "(new)(combined with adjustment reaction)..has had fit notes previously due to son being in hospital;…is taking them to a tribunal..works are saying that as she has a fit note she was incapable of working. Needed to be near her son while he was receiving rx in hospital. Solicitor is asking that we provide a letter outlining that she could have worked remotely at her sons bedside."

34. As a result of that January 2020 consultation a letter from Dr Travis, whose notes made up three of the consultations above, said this: *"I first consulted Mrs*

Hodgson via telephone on 17 January 2019. At that time her son was receiving inpatient chemotherapy in Leeds. Mrs Hodgson understandably needed to be with him at that time. I ***therefore*** *issued her with a fit note to support this. I issued a further fit note on 8 March for the same reason. Mrs Hodgson would like it clarifying that she could have performed work remotely while at the hospital with her son and that she was not incapable of performing any work related duties during these periods of work related absence*". A second, longer letter, was produced by Dr Stenton, on 29 June 2020. It said this*:*

"I enclose a copy of the relevant consultations that took place following the time that Mrs Hodgson's son was diagnosed with Leuk[a]emia. She appeared to be suffering with significant mental health difficulties and was diagnosed with Adjustment Disorder which is still ongoing. It could be anticipated from the onset of her son's illness that Mrs Hodgson would be suffering with such symptoms for at least the duration of his treatment which was 6 months initially and very likely beyond that. Her symptoms continue to have been present for more than a year and have had a significant impact on her day to day functioning.

From the record it is clear that Mrs Hodgson had reported to various GPs that she was not allowed to work flexibly by her organization; this would appear to have resulted in a number of consultations for acute physical symptoms such as severe migraine, which could conceivably have been part of her stress and adjustment reaction. She was admitted acutely to hospital in May 2019 as a result of her eye symptoms."

35. In her impact statement the claimant said this about her consultation with Dr Saxby on 14 November: *"The GP was very understanding and went to great lengths to help me understand for myself what had happened to be mentally speaking. In particular he explained that it was well known and recognised in mental health and psychological circles that certain events in life such as this ..can give rise to a mental reaction and someone within a relatively short timeframe (normally three months, I recall) and typically last no more than six months following the end of the relevant stressful event. However he did warn that persistent or chronic adjustment disorders could continue for more than six months, especially if stressful event is ongoing. Essentially the GP explained that my normal process for adapting and dealing with stressful situations had been disrupted by a particularly significant event – in my case a wretched and potentially terminal diagnosis of leukaemia for my young adult son. He offered me counselling and advised me to call at any time, if I wanted this arranging, or indeed if I felt I needed to medication. He explained what I was suffering was known as adjustment reaction*".

36. Returning to the events following the 14 November call. On 20 November Mr Martin messaged the claimant wishing her well and asking for an update and if she could drop in the company credit card. On 22 November the claimant's mother delivered the first of the fit notes recorded above and the credit card. Mr Martin thanked her and said he would process it.

37. The claimant sent an update on her son's condition on 23 November indicating he would be in hospital for another 14 days. On 26 November Mr Martin asked the claimant for her "Sage" log in because the end of month invoicing was to be done by Mrs P that week. He repeated that request on 28 November.

38. On 27 November, without consultation with the claimant about pay arrangements, Mr Martin set out the following "we got the doctor's note and are

putting the following in place. From 1 November to 13 November you will be on full pay. From 14 November to 14 December you will be on statutory sickness benefit and from 15 December to the end of year you will be on full pay. This will use up your holiday and we will cover the shortfall. Hopefully by the Christmas break things will be a bit more settled and we can have a get together to put something in place for January. Please do let us know if there is anything we can do to help.

39. On 28 November the claimant replied that she had messaged Mrs P to do her own link/password on Sage. On 17 December Mr Martin sent a text message explaining that Mrs P was not able to work after Christmas, and he was giving that some thought.

40. On 19 December the claimant sent a letter protesting the respondent's treatment of her pay and that it was not in accordance with her contract. She was entitled to full pay for one month and further at the director's discretion in circumstances of ill health. She wrote: "I *am also surprised and disappointed that you have taken it upon yourself to look to alter my contractual entitlement to sick pay and then to go on without a consultation with me use my holiday for the period of sickness after 14 December 2018. I am still not well and despite my personal problems at this time cannot be helped by what is going on at work…after almost 12 years of loyal service I had expected to be treated with a little more respect and dignity."*

41. The claimant's fit note was due to expire on 14 January and on 29 December Mr Martin enquired in a text message (page 150) if she was intending to return to work from 2 January. If he had not heard back from her he would assume she needed more time with Henry and can make arrangements for temporary cover. His focus was on 2 January rather than 14 January because that was the office return to work.

42. He was then in touch to wish the claimant a happy new year and say a large box had been delivered and would she like to collect it.

43. Mr Martin wrote to the claimant on 2 January replying to her about pay and explaining that the second fit note had been received on 27 December, declaring her unfit until 14 January 2019. He confirmed that holiday from 2018 would be able to be carried over into 2019. He identified the pay issues as a miscommunication.

44. He also wrote: "it *would greatly assist us if you could provide some indication as to your anticipated return to work as at present we are arranging temporary cover - we hope that you will be able to return shortly and confirm that could be accommodated on a part time basis while also providing support to A. We are also able to offer the option for you to take un-paid leave for a mutually agreeable period of time*."

45. On Wednesday 9 January Mr Martin sent another text confirming that as the claimant knew the respondent had temporary cover and that person needed an indication of their time with the respondent, if the claimant could provide an update.

46. On Friday 11 January Mr Martin asked the claimant by text to get in touch "*as I need to know your plans for next week."*

47. On 17 January the claimant wrote to Mr Martin asking him to reconsider her request to work from hospital. She mentioned his previous comment saying he was not made of money and her own position that she needed to "keep a roof over their heads". She said that Mr Martin was aware treatment would continue until April but then there would be regular visits to hospital for at least two years. She referred to her annual review and request to work from home and Mr Martin's comment then to the effect that he understood the motivation of male members of staff to work from home because they had children, but she didn't and he didn't understand. She set out that her role was primarily administrative and she could co-ordinate activity with colleagues in York and Stockton. She said, "electronic files are served on the server" and she could liaise and communicate with personnel, customers and suppliers effectively with a laptop and a mobile phone. She hoped to hear from him. She did not mention the availability of separate facilities at the hospital for parents or relatives with similar difficulties, to enable them to continue working.

48. We find that such arrangements were present. The claimant's evidence was corroborated by a letter from the hospital's Cancer Trust youth support coordinator who said this:

49. "*I spoke to Lorraine numerous times about seeing her GP to discuss how she was feeling as she was clearly struggling from the outset. She was understandably reluctant to take medication for fear of its impact on her ability to care for Henry and so found support in talking therapies. She would often speak with me, other staff on the ward, and other parents. Lorraine also accessed support at the Maggies Centre. …Lorraine also spent a lot of time on the ward involving herself in the activities that were going on (arts/crafts etc) as she liked to keep busy. Had she been granted permission she would have been fully able to work from the ward, as many parents do while they are here. We have lots of quiet spaces on the ward where she would have been able to base herself. We have fully wifi access and printers etc. As I say, we have many parents who continue to work from the ward so they are able to be with their child.*" This letter was not available to Mr Martin at the time.

50. Mr Martin's next text thanked the claimant for the update (a strange response to her written request to work remotely) but did not otherwise reply to that letter. Later in January there was also a message from colleagues wishing the claimant well and indicating she was irreplaceable.

51. Mr Martin then asked for the claimant's current fit note on Tuesday 29 January, but she still had no response to her request to work remotely. On 11 February she wrote a formal letter headed "request for flexible working" and she complied with the statutory regime setting out the impact and the suggested accommodation of a new working pattern in detail. She sought "to work 30 hours across four days working remotely which could either be from home or the hospital depending on the situation at the time. The hours will be made up over more days if I am unable to complete the work in four days due to circumstances." She set out a detailed business case addressing the way in which she would work remotely and said this: "having given you a snapshot of my justification I trust you will once again consider my request and look forward to your response once you have done so. I look forward to hearing from you."

52. There was no written reply or acknowledgment of that formal request but on 27 February Mr Martin invited the claimant to a meeting by text as follows: "Loraine

hope that both you and A are making progress. Can you please arrange a time with me to call into the office for a short update meeting to discuss your proposal for home working and your absence from work. Regards Chris". She replied saying A was quite poorly at that time but hoping he would pick up the following week and could she arrange to come over and see him on Thursday 7th. That was agreed Mr Martin saying, "it should only take 10 minutes or so". When the claimant attended that meeting she recorded it but did not let Mr Martin know she was recording.

53. It did take between 10 and 15 minutes as Mr Martin had said. The full transcript was before the Tribunal. The meeting started with Mr Martin asking how A was, about his treatment, and asking after the claimant and how she was bearing up. He also asked whether she was having treatment for her condition, having had some advice in advance of that meeting. The claimant's response to that question was, "*it's all just relating to A. Adjustment reaction they call it. One of those things. there isn't really much of a treatment.. it's just you've got to look after yourself and focus on what you need to focus on*.

54. Mr Martin then referred to the request of flexible working. He said that that was obviously given due consideration but "*unfortunately it's not something we can offer".* He went on that *your current role was office manager and to do that we feel you need to be in the office. Under the section of the Act and I could quote you which bit it is there are certain criteria which would preclude you from working from home and on a number of those you wouldn't qualify…. I can go into chapter and verse if you want a response on that but ultimately it would be detrimental to the business ..we don't think you could do the job as well as you could do if you were in the office so consequently it's not something we can work with..".*

55. The claimant asked what elements of her job she couldn't do and Mr Martin explained that when invoices came in.. "*we could scan them and send them over to you and then you send them to LJJ ….if I have to put them in the scanner I might as well send them to LJJ. There is absolutely no point in sending them to you to send LJJ…"* He went on to talk about payments.

56. He said… "*but within that obviously we have had now had months and a half months without you being in that role and we have had to restructure the business accordingly and a lot of the things that you did do are now being restructured so are either being absorbed by other people in the business or they have been sub-contracted out. Well not sub-contracted out but shipped out to LJJ so we don't do anything with the accounts … we don't raise invoices … the only thing we do is chase money … that's the only part of that part of the business that we do … so the job as was is no longer there.* "

57. He went on…*we have had to restructure the business so that we can manage without that position really. We effectively have somebody which we would class as an admin assistant at the moment. That's the limit of the role really* …"

58. The claimant asked who that was and was told that it was a new colleague, Ms B, albeit it had been Mrs P for the first two months. Mr Martin said he had assumed the claimant would be back in a couple of months and the claimant explained that she had said the treatment regime would be for six months, and that she would need to be with her son, and Mr Martin agreed that he fully appreciated that.

59. He continued… "as *I say we have had to restructure and that's working successfully at the moment. There are still tweaks to do but that's where we are so hence that ties … there is the working from home but even the working from home most of the things that you have listed that you do from home you wouldn't be doing anyway and they aren't there as a job anyway … they are done by other people … its mainly done by LJJ and you know we have always paid them a management fee as part of the deal and afraid what we are doing is saying you had better do a bit more for that management fee really. So in terms of the business it has worked out quite well."*

60. The claimant asked, "*where does that leave me then*?" This was at around eight minutes into their meeting. Mr Martin replied that he would like to put forward a settlement "*to go our separate ways … in that the job no longer exists we have had to structure and that's where we are you know*".

61. The claimant then asked if Mr Martin would reply to her letter and he indicated he would put everything in writing.

62. Mr Martin went on to explain that because he had already taken advice that there would be a document setting out the settlement agreement, independent legal advice would be required for the claimant and that he would contribute to that. He did not want to keep the claimant any longer, he was going to his next meeting.

63. The claimant explained that A was her absolute priority but things were looking good although she didn't know [in effect how things would develop] and that there would be a couple of years of tests. Mr Martin responded as follows, "*and you say … the reaction… for you it's not a broken leg for either of you. Oh well we've taken the plaster off, do these exercises now go back to work. For [A] it could be on and off for ages and for you it could be higher and low levels of anxiety that affects performance in all sorts of things. It is very difficult for you. It isn't finish the course of tablets and we are back where we were."*

64. After 13 minutes the claimant said she would let him get on with his next meeting and they parted. The claimant had been close to tears in that meeting and was in shock at the end, believing she had no job at all. She had driven from the hospital to attend and was then, very soon, driving again in shock.

65. Mr Martin made a summary note of that meeting in which he included this: "…*I advised we had given due consideration to the request to work from home but found it would have a negative impact on the business and it was not something we could accommodate. I then explained how the business had had to adapt to accommodate her absence and that this had resulted in a major restructure with the result that her role no longer existed….. I then confirmed that as the restructuring had resulted in there not being a position for an office manager it would be best for both parties if we went our separate ways…"*

66. In a letter to the claimant she received or was dated around 17 March he said this: *"with regards to your role in the office and as outlined in our meeting we have undergone a major restructuring of our office functions which has resulted in the outsourcing and/or reallocation of many of your previous activities. Given your current situation which is regrettable we find ourselves no longer in need of your support but do recognise you have been with us for many years."* Mr Martin then went on to set out the terms of the settlement offer. The respondent did not

seek to rely on privilege to render the meeting note or letter inadmissible before the Tribunal. That letter confirmed to the claimant what she had been told.

67. On 3 April 2019 the claimant wrote to Mr Martin setting out that she had put in an appeal, being very disappointed that her request for flexible working to look after her son seemed to have resulted in Mr Martin no longer needing her at all, and offering a termination package and that she was struggling with that. She said that she believed his actions were unfair and discriminatory. She also referred to having been told her job would be safe back in November and that her business case for remote working had not been properly considered.

68. She was then invited to a meeting to take place on Tuesday 23 April with Mr Martin to consider her appeal. She replied requesting that an independent person rather than Mr Martin review the decision on the remote working request. Mr Martin then asked a colleague, who had not known the claimant because he was a new joiner, to join him at the meeting in April. They considered each aspect of her business case for remote working. Their reasoned rejection was that, for example, in relation to invoicing, invoicing sheet needs to be circulated around the office in paper format. Delays in communication on that could be detrimental. Non-attendance at the weekly briefing would be detrimental to the business. Not completing forms in the office would involve additional time and cost for the business. Similarly stock levels and office supplies and scanning to enable the claimant to undertake the duties remotely would involve additional time and cost. The appeal was firmly rejected. The claimant did not attend the meeting at which it was considered.

69. The claimant received the rejection of her appeal signed by Mr Martin on or about 5 May 2019, which was around the time that her son was discharged from hospital for a period. They had returned home together and that letter was waiting for her on her return. She was at that time utterly exhausted. She continued to suffer migraines. She suffered difficulty sleeping, irregularity with making meals, difficulty concentrating, which limited cooking and other household tasks and difficulty undertaking some social activities. For the next six weeks or so the claimant was very unwell with these symptoms. She had, throughout the period November to May driven to and from hospital as required, in between staying there, and continued to do so afterwards.

70. The claimant recovered sufficiently, and felt able to write to Mr Martin on 1 July. She felt that she had been in dispute with her employer about her son's illness and that had been an added source of stress.

71. She wrote about her circumstances, namely that she and her son were back at home providing care there, and that the course of chemotherapy was at an end. She asked Mr Martin to look again and reconsider the rejection of the flexible working request. She indicated her upset at her role having been determined as redundant and that having impacted upon her when she was already upset. She took each of the bullet points given for rejecting the appeal and sought to provide arguments or solutions including scanning by smartphone, taking minutes. She considered that the request to work remotely or from home would not have the impact that Mr Martin considered it would.

72. Mr Martin wrote in reply on 10 July 2019 saying as follows "we understand that you are still signed off work and diagnosed with "adjustment reaction", which we understand to be a serious condition. In the alternative and recognising the time you have been away and signed off work with an illness not readily cured with

medication or consultation we sought to make you an offer which you chose to refuse and acceptance of the same is now time barred. We point out it was not an offer of redundancy payment or anything of the sort but was to assist you financially without obligation but conditional upon you resigning your position with MDA. If you wish to reconsider we are prepared to do so however the terms are not negotiable". He again sent his good wishes for the claimant's son.

73. The claimant tendered a resignation by letter dated 17 July 2019. She referred to Mr Martin's letter of 10 July and to the response to her flexible working application and she resigned with immediate effect.

74. The resignation letter said, "I believe your treatment of me, everything that I have set out in my flexible working request, amounts to a fundamental breach of my contract, a breach of the flexible working regulations and is discriminatory on a number of grounds not least sex discrimination and disability discrimination. It is clear that you no longer want me to work at the business and that the reason for that desire is based at least in part on the fact that I need to work flexibly in order to care for my son as he undergoes his cancer treatment. You are also aware of my health issues at this time principally brought on by my child's serious health issues and by your treatment of me. Not least that you have suggested my role is redundant when clearly you just want to replace me. This is deeply upsetting given my long and loyal service since 4 January 2007."

75. The claimant's resignation was acknowledged and accepted by letter and all payments were processed. The respondent again wished her son a speedy recovery and for herself while rebutting the allegations in the resignation letter.

The Law

Constructive unfair dismissal

76. The Employment Judge recording the July case management hearing said this: "*The respondent does not seek to advance a reason for dismissal in the alternative. It follows that if the claimant succeeds in discharging the burden on her to show dismissal the claim under S.98 ERA must succeed."*

77. The relevant provisions of the Employment Rights Act 1996 and common law principles are these:

"94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if ...

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

78. Western Excavating (ECC) Limited v Sharp [1978] IRLR 27:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains, for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

79. Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84: A term is to be implied into all contracts of employment that the employer will not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

80. Woods v WM Carr Services (Peterborough) Limited [1981] ICR 666: To constitute a breach of the implied term of trust and confidence, it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, was such that the employee cannot be expected to put up with it.

81. Malik v Bank of Credit & Commerce International SA [1997] IRLR 462: In assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intention of the employer. Moreover, the impact on the employee must be assessed objectively.

82. The "last straw" doctrine means that if a person resigns in response to a series of actions which, together, constitute a fundamental breach, the last of the actions (the "last straw") must be more than trivial: London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493. It must contribute, however slightly, to the breach of the implied term of trust and confidence.

83. The principles of affirmation were examined in Cockram v Air Products EAT 0038/14/LA and were helpfully summarised. Mrs Justice Silber said this (paragraph 25): "The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright lines or rigid rules." At paragraph 15 she says: "It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in Bournemouth University Corporation v Buckland [2011] QB 323 at para. 54 as follows:

84. "..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

85. The tension between "last straw" cumulative cases and affirmation has recently been addressed in the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. At paragraph 51, Underhill LJ holds: "I cannot agree with [the above] passage. As I have shown above, both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the Malik term… fall within the well-recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter… the right to terminate depends on the employer's post-affirmation conduct."

The Equality Act complaints

86. In this case four types of discrimination are pursued in the claim and further particulars in the following order: harassment (Section 26); discrimination because of something arising in consequence of disability (Section 15); direct sex discrimination (Section 13); and discrimination by way of a failure to make reasonable adjustments (Section 21).

87. Section 136 relevantly provides that if there are facts, in the absence of any other explanation, from which the [Tribunal] could conclude a contravention of the Act has occurred, it must do so unless a respondent shows that there has not been a contravention.

88. In examining primary facts, poor treatment is not enough to establish discrimination. See in particular Madarassy v Numora International Plc [2007] IRLR 246 para 56, per Mummery LJ: "The bear facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination".

89. If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, this is sufficient to establish direct discrimination. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in Nagarajan v London Regional Transport [2000] 1AC501 House of Lords at 512H to 513B. Significant in this context means not trivial.

90. Section 39(2)(c) and (d) of the 2010 Act prohibit an employer discriminating against an employee by dismissing him or subjecting him to "any other detriment"; any other detriment in this context means, objectively viewed unfavourable treatment, rather than an unjustified sense of grievance.

91. Section 40 specifically prohibits harassment. Section 26 (1) relevantly provides: *a person (A) harasses another (B) if*

    (a) A engages in unwanted conduct related to a relevant protected characteristic, and

    (b) the conduct has the purpose or effect of

    (i) violating B's dignity, or

    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (together in these reasons "the prohibited effect").

92. Section 26(4) provides

    In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

    The perception of B;

    The other circumstances of the case;

    Whether it is reasonable for the conduct to have that effect.

93. Direct Discrimination

    Section 13(1) of the Equality Act 2010, relevantly 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.

94. It is established (see also paragraphs 3.18 to 3.20 of the EHRC Code) that less favourable treatment can be a contravention where it is because of the protected characteristic of someone with whom an employee has a close association (for example parent or son or daughter, partner or carer or friend).

95. Section 23(1) relevantly provides: *"On a comparison of cases for the purposes of Section 13..there must be no material difference between the circumstances relating to each case."*

96. The principles in applying these provisions can be summarised as follows (see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337).

97. The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.

98. The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant: section 3(4).

99. The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in Shamoon at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

100. It is probably uncommon to find a real person who qualifies … as a statutory comparator. Lord Rodger's example at paragraph 139 of Shamoon of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on [racial] grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."

101. Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in Ladell: "Where the applicant has proven facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination".

102. Underhill J in the Martin v Devonshire Solicitors [2011] ICR 352, para 37 said: "Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in Nagarajan, namely whether the prescribed ground or protected act had a significant influence on the outcome". In Igen Limited v Wong [2005] IRLR 258CA the guidance issued in Barton in respect of sex discrimination cases and was said to apply and approved in relation to race and disability discrimination:

103. "…the first stage involves the claimant establishing such facts from which the Tribunal could conclude that the respondent had committed an act of discrimination in the absence of an adequate explanation from the respondent ("such facts"). If the claimant does not prove such facts he or she will fail...

104. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves, in some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in...

105. In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences [for inferences, read, further facts] it is proper to draw from the primary facts found by the tribunal... "

106. The guidance goes on to say that in considering the conclusions that can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation. At the final stage, the respondent must establish that the treatment is in no sense whatsoever on the grounds of the protected characteristic.

107. Mr Justice Underhill (then President) in IPC Media Limited v Millar UKEAT/0395/12/SM is a reminder that our starting point is to identify the putative discriminator, and to examine their thought processes, conscious or unconscious.

108. Section 15 of the Act says:

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

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

<u>Reasonable Adjustments</u>

109. Section 39 (5) imposes the duty to make adjustments and Section 20 explains it:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage… [the second or third requirements are not relevant to the claimant's complaints]. Section 21 provides that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

110. The effect of Schedule 8, paragraph 20 (1) of the Act is that an employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

111. This involves the Tribunal potentially answering two questions: did the employer know about both disability and likely disadvantage; if not, ought the employer reasonably to have known?

112. . The Code[1] provides as follows:

"5.14

It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15

An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example:

A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

113. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance.

Whether the complaints are in time

114. Section 123 provides (1) Proceedings on a complaint within section 120 may not be brought after the end of—

[1] Equality and Human Rights Commission Code on Employment (2011)

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

115. Conduct extending over a period is for the claimant to establish, either by direct evidence, primary facts or inference: the alleged incidents of discrimination must be linked to one another and there must be evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period" (see **Hendricks v NPC [2003] IRLR 96**.)

116. For the factors to be taken into account in extending time, where claims are otherwise out of time, (see **Harvey L (5) [832]**, which reflect the general Limitation Act provisions. These are as follows: "- the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the conduct of the claimant over the same period; the length of time for which the application is out of time; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; the extent to which professional advice for making a claim was sought and if it was sought, the content of any advice given".

117. The exercise of discretion in extending time limits is the exception rather than the rule – see **Robertson v Bexley Community Centre [2003] IRLR 434, per Auld LJ**.

Determining whether the claimant met the definition of disability at the material times

118. Disability is a protected characteristic under Section 4 of the Equality Act 2010. It is defined in Section 6 as physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out day to day activities. "Substantial" in this context means more than minor or trivial and "long term" means having lasted a year or more or likely to so last or to be terminal. The law on the "disability question" is further set out below, because in this case, whether the claimant met the statutory definition of disability at the material times was resisted by the respondent.

119. Section 6(3) clarifies that a reference to a person with the protected characteristic of disability is a reference to a person who has a particular disability.
120. The statutory provisions require the Tribunal to ask the following questions:-

    a. At the material time did the claimant have a mental or physical impairment?
    b. If the Tribunal can decide on the basis of expert or other medical evidence that the claimant has established the impairment, or if the Tribunal decides to adopt the approach in **J v DLA Piper UK LLP [2010] ICR 1050**, the Tribunal asks the following "condition" questions.
    c. Has the claimant shown effects on her ability to carry out normal day to day activities[2] at the material times?
    d. Has the claimant shown these effects are more than minor or trivial at the material times? This assessment takes account of the deduced effect principle described in paragraph 5(1) of schedule 1 of the Equality Act 2010: an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if (a) measures are being taken to treat or correct it, and (b) but for that it would be likely to have that effect. Likely means "could well happen"[3].
    e. Has the claimant shown that the effects were long term? Paragraph 2 (1) of schedule 1 of the Act prescribes that the effect of the impairment is long term if –

        i. It has lasted for at least 12 months,
        ii. It is likely to last for at least 12 months or
        iii. It is likely to last the rest of the life of the person affected.

121. In answering the condition questions above, that is when examining the nature of any impact of impairment on the claimant's ability to carry out day to day activities, or when inferring impairment from effects, Piper includes a cautionary note at Footnote 5: "Clinical depression may also be triggered by adverse circumstances or events, so that the distinction cannot be neatly characterised as being between cases where the symptoms can be shown to be caused/triggered by adverse circumstances or events in cases where they cannot."

122. As to nature of evidence required the **Royal Bank of Scotland Plc v Mr M Morris [2011] UK EAT/0436/10/MAA** at paragraph 63:

    "*The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the*

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[2] What are normal day to day activities? They are activities carried out by most men and women on a fairly and regular or frequent basis. Day to day activities thus include – are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing and taking exams, going to the toilet, talking, listening to conversations, music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself. Normal day to day activities encompass activities which are relevant to working life." Ibid note 5, paragraph 14, Appendix 1.

[3] **SCA Packaging v Boyle [2009] IRLR 746** ("likely" in the context of whether the impairment is long term but see Piper as authority for the same meaning in paragraph 5(1)).

issues arising under the Act, give a Tribunal a sufficient evidential basis to make common sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted."

123. See also paragraph 55 where Mr Justice Underhill (President, as he then was) also recorded:

"The burden of proving disability relies on the claimant. There is no rule of law that that burden can only be discharged by adducing first hand expert evidence, but difficult questions frequently arise in relation to mental impairment, and in **Morgan v Staffordshire University [2002] ICR 475** this Tribunal, Lindsay P presiding, observed that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" and it was held in that case reference to the applicant's GP notes were insufficient to establish that she was suffering from a disabling depression (we should acknowledge that at the time that **Morgan** was decided paragraph 1 of Schedule 1 [to the DDA] contained a provision relevant to mental impairment which has since been repealed; but it does not seem to us that Lyndsey P's observation was more specifically related to that point.)

124. See also **Rayner v Turning Point & others UK EAT/0397/10 ZT 26** where His Honour Judge McMullen said at paragraph 22: "It seems to me, if a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine."

125. He further held at paragraph 26: "for myself I hold that a GP treating conditions such as depression over a long period of time is in a very strong position to give an authoritative view of materials relevant to the assessment of disability under the Act and sometimes may be in a better position than a consultant examining a claimant on one occasion only. Those are matters of assessment for an Employment Tribunal and that is what will now happen." This judgment recognised that the Tribunal had not had the benefit of the Piper Judgment in clarifying the approach to examining mental impairment after the removal of the need for a clinically well recognised illness.

126. In relation to the meaning of a physical or mental impairment see also **Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644** at paragraph 34 where the Employment Tribunal says (in the context of the DDA) "impairment for this purpose and in this context has in our judgment to mean some damage, defect, disorder or disease compared with the person having the full set of physical and mental equipment in normal condition. The phrase "physical or mental impairment" refers to a person having (in everyday language) something wrong

with them physically, or something wrong with them mentally." The Code at Appendix 1 does not expand on what impairment covers, other than at paragraph 5 in advising that physical and mental impairments include sensory impairments; it concludes that mental impairment is intended to cover a wide range of impairments relating to mental functioning including what are often known as learning disabilities.

Submissions

127. Both advocates provided written skeleton arguments and developed these orally, in relation to both liability and remedy. Those submissions are not repeated here for reasons of brevity but the themes will be apparent from the discussions below. The Tribunal was very grateful for the assistance they both provided in giving focus to the key points.

Discussion and Conclusions

Preliminary Issue: disability

128. The claimant has to prove disability on the balance of probabilities. She was diagnosed with adjustment reaction continually between 14 November 2018 and 14 July 2019 (the material times) by different GPs. That was the pleaded condition on which she relied. We had no direct medical evidence to help us with the nature of adjustment reaction as a condition, but we do have the assistance of the authorities above, our industrial knowledge and some information from the claimant. The Tribunal would have been helped by hearing from an expert or a GP.

129. On the written medical evidence that we have, Dr Travis, with whom the claimant consulted a number of times, has been clear in his letter that the first and subsequent fit notes were given because the claimant needed to be with her son and her boss was not permitting flexible working. The diagnosis of adjustment reaction (accepting the claimant's account of Dr Saxby's 14 November advice), reflected that a "reaction", or interference with a normal mental state, arises within three months of a stressful life event, and typically resolves within six months of the underlying stressful event resolving.

130. Mr Martin's evidence was that adjustment reaction can be a serious condition, having done some research himself by his July 2019 letter.

131. We find that between 14 November and her resignation the claimant had the mental impairment of adjustment reaction: she was distressed, "upset struggling", to adopt the words used in her medical notes, because of her son's illness and the respondent's refusal to permit remote working. "Struggling" is also the word used by the Youth Support Coordinator. These words indicate to us that her emotional and mental resilience was reduced, as would the resilience of many people faced with these circumstances – in the language of Rugamer struggling and upset is a normal reaction in these circumstances and does not denote something being wrong mentally.

132. We do not find that the claimant had "adjustment disorder" at the material times: this was a 2020 diagnosis by Dr Stenton and we see it nowhere in the claimant's medical records. Nor do we see "depression" diagnosed, to which the claimant refers as being present **now,** in the present tense, in her impact statement.

133. We place little, if any, weight on Dr Stenton's evidence, given as it was in writing, but without the letter of instruction being apparent, or generally De Keyser principles having been observed. The diagnosis has changed to "disorder", but without any indication of treatment, referrals to psychiatric services and so on. His references to "significant mental health difficulties" and a "significant impact on day to day functioning", written in June 2020 and unsupported, does not help us with an effect on day to day activities from adjustment reaction, from November 2018 to July 2019, the material period in this case.

134. Has the claimant proven substantial adverse effect on her ability to undertake day to day activities from adjustment reaction **at the material times**?

135. There was no corroboration in the contemporaneous GP notes for the claimant's witness evidence as to the substantial adverse effect on her ability to undertake day to day activities **at the time**. Initially Dr Saxby recorded she was "sleeping okay and eating." That was consistent with the claimant's oral evidence that "there were not many [effects] at that point. The only description of symptoms or effects were "struggling", and "upset". This is not a case where the GP has advised refraining from work because of the claimant's condition (again see the common sense inference to usually to be drawn) but has advised refraining from work because the claimant's boss will not permit flexible working.

136. We accepted the claimant's evidence of her practical difficulties and state of emotional resilience and health in May 2019, when A was discharged from hospital; her oral evidence about this was compelling and inherently likely. She was exhausted and low. Our findings are above.

137. We accept her impact statement evidence that she had disturbed sleep, even while in hospital, and we find this developed over time after from December 2018. Sleeping is a day to day activity, and disruption to normal sleeping patterns is more than minor or trivial when extended or maintained over time; our finding is corroborated by the claimant's exhaustion by May 2019. The other effects described from November 2018, such as leaving a tap running, or not eating properly, may also have been present intermittently. Not socialising at that time (November to July) was unsurprising in the circumstances, whereas good support from family and friends, as recorded by the GP, and consistent with normal social interaction supporting the claimant's caring role. There was little time for anything else.

138. We also take into account that the claimant was communicating precisely and forcefully in writing with Mr Martin from November to May. On the first two telephone calls in November, she was naturally upset, but thereafter she was sufficiently focussed to record her meeting with him and write considered letters. Her engagement with him demonstrated focus, research and understanding, and

the transcript and other documents reflected that. She was engaged in a stressful conflict with him.

139. In the round we find that **at the material times** disrupted sleep over several months and intermittent concentration difficulties amounted to a substantial adverse effect on her ability to carry out normal day to day activities by May 2019, but not before.

140. Has the claimant proven that this substantial adverse effect had lasted a year - it had not, by any of the dates in the material period. Has she shown it was likely to last for 12 months or for the rest of her life, assessing that from May 2019?

141. The difficulty in making this assessment is the nature of underlying condition: the likely presence of adjustment reaction was dependent on the length of the cancer treatment and/or recovery of the claimant's son and the length of time her boss would not permit remote working. The claimant's case in her April 2020 impact statement is that adjustment reaction is a disability, or at least it is, **for her**. Her position is that Mr Martin should have known she would be disabled because he would have known that cancer is an illness from which it takes a long time to recover, and hence her illness would be similarly long lived.

142. The Tribunal has to assess likelihood **at the time,** of **the substantial adverse effect,** lasting 12 months**,** not the longevity of the diagnosed condition or illness. Whether it could well happen that substantially disrupted sleep and concentration would last at least 12 months from May 2019, must objectively take into account the known circumstances at the time. The claimant's son had been discharged following a substantial course of chemotherapy; his future was uncertain, but the immediate and exhausting strain of that initial treatment regime had subsided and after a period of being unable to do very much, the claimant recovered herself sufficient to raise remote working again in July.

143. It was not known in July 2019 that the claimant's son would suffer Bells Palsy after the claimant's resignation, nor a relapse in August 2019 such that a bone marrow transplant became the way forward, both of which were further challenges to the claimant's resilience. These matters play a significant part in the claimant's evidence about the effects on her of adjustment reaction in her April 2020 impact statement, much of which is expressed in the present tense.

144. At the time, however, and without hindsight, we do not find that the effect could well last twelve months or more from May 2019, in all the circumstances of this case. Those circumstances include the reason for the first diagnosis in November: the claimant was in acute emotional pain and distress by her son's illness and Mr Martin's comments on that 14 November call.

145. They take into account that the claimant did not wish, nor had the time, for treatment via her GP, she was worried medication would affect her ability to function well as a carer for her son; instead she treated the effect herself, accessing cancer charities' counselling for family members and carers, which proved of great benefit.

146. The claimant did not rely on recurrence of substantial adverse effect as a basis for longevity. She did not approach her GP about adjustment reaction effects or symptoms (disrupted sleep, concentration, or "struggling") after her employment ended, from July 2019 until January 2020, and then to seek help with these proceedings and for migraine treatment. Any substantial adverse effect of the kind we have found, would need to be established as likely to build up again; and without the lens of hindsight, we do not consider that is proven in this case.

147. For these reasons the claimant has not proven she was a disabled person at the material times. It follows that the reasonable adjustments and Section 15 complaints must be dismissed.

148. If our assessment is considered wrong, the Tribunal has addressed the knowledge issue. It is clear that at no time before July did Mr Martin consider or know that the claimant's condition was a disability. The claimant had described herself to him as "I am an absolute mess"; that was entirely consistent with the strain of her situation. She did not tell him about the practical effects on her sleep or concentration or the other matters recorded above.

149. Mr Martin later described adjustment reaction as a serious condition in his July letter, refusing to reconsider the decision on remote working, having done some research. There was nothing to alert him to the effect on the claimant's ability to undertake day to day activities before that, or the likely longevity of such an effect. The claimant's communications to him throughout did not do so, when she was raising many other matters, but not disability. Her resignation letter did so only obliquely. Her request to work remotely was put on compassionate grounds and for her own wellbeing to be strong for her son. Latterly it was put as a formal flexible working request, rather than on the basis of a disability adjustment. The need to be with her son was presented as a natural consequence of the circumstances of his condition, rather than hers. Mr Martin did not know the claimant was to be considered a disabled person in her own right from May or at any time.

150. It was suggested to Mr Martin that he ought reasonably to have sought occupational health advice and thereby known of disability. The Tribunal considers that it was plain to all that the reason for the claimant's absence was her caring for her son when she was not permitted to work remotely. In the very particular circumstances of this case we agree with Mr Martin that it was not reasonable for him to seek independent occupational health advice at this time; or more accurately put, we do not consider he ought reasonably to have known of disability by seeking that advice: these were very particular circumstances where the reason for the claimant's absence was well understood, and seeking occupational health advice may well have appeared intrusive, and insensitive. The particular circumstances of this case are very different to the Code example, and/or many of the issues of knowledge of disability that come before this Tribunal. The Section 15 complaints and reasonable adjustment complaints would also fail for want of knowledge of disability.

<u>Constructive Unfair Dismissal, Harassment and Sex Discrimination</u>

151. The claimant relies on the same or many similar matters as breaching the implied term **and** amounting to contraventions of the Equality Act with duplication. We address these as they appear in the claimant's further and better particulars. In this case we must make findings about the reason why – or the influences – on Mr Martin's decisions and actions – including his "reasonable and proper cause". These are the facts known to him and the beliefs held which caused him to act as he did. The respondent did not contend that this was a case in which it relied on the burden of proof provision but encouraged the Tribunal to focus on the "reasons why".

Failure to allow the claimant to work from hospital using a company laptop and mobile telephone/I don't have an open cheque book Lorraine/Recruiting Mrs P (Particulars 1 a, b, d, f, 2a, and 4)

152. On our findings the reasons Mr Martin gave the claimant at the time for not allowing her to work from hospital on 14 November were twofold: he could not expect the claimant to work while at her son's bedside - family comes first was the way he put it in his evidence - and money. He did not give as a reason that there was no work that could be done from hospital, and indeed he had already accepted that there was at least 50% of her work that could be done remotely, in his earlier text.

153. Mr Martin had already taken on Mrs P to cover the claimant's absence when he made the cheque book remark. The decision to engage Mrs P was before the claimant was certified unfit for work and he did not know she would be, but she had been absent for over a week. The reason to recruit Mrs P was to cover the claimant during what Mr Martin expected to be absence, for compassionate or caring reasons.

154. We infer from his comment about money, that having arranged cover for the claimant, he did not want to be in the position of having to pay two people at the same time. That is consistent with his suggestion on 14 November that the claimant take unpaid leave. He denied that money was a reason not to allow remote working, (witness statement paragraph 6), but its relevance clear from the subsequent reduction in the claimant's November salary and adjustments to her pay without her consent. Money was a reason.

155. We also find that Mr Martin's decision was influenced by his belief that he knew best for the claimant, or "the right thing" for her to be doing. His statement said: "I stand by that statement as a caring family man I would not expect my wife or any member of my staff to continue working in such a stressful situation". In oral evidence he explained his position in this way: when a rugby player sustains a knock to the head and is saying they wish to continue, they are not permitted to do so because they may have concussion. Someone had to take the decision to send them off. This belief was apparent in his comment that the claimant could go on unpaid leave or take holiday and her job would be there when she returned: he was sending her off, in effect.

156. Mr Martin made that decision for the claimant: she could not work and look after her son's needs in hospital, whatever she thought – he gave her views no credit

and had a closed mind to the idea that she could fulfil all or part of her role remotely. That was despite Mr Martin having no knowledge of aggressive cancer care or treatment in the young and the consequences for the claimant. The claimant had faced a similar reaction earlier in the year when he considered it best for A that the claimant work in the office and not from home.

157. That refusal to permit remote working earlier in the year, and the decision from 12 November, were in stark contrast to the approach taken to male colleagues, whose requests for remote working were granted, both for sporadic short term requests, and more enduring ones. There was no suggestion that remote working arrangements might not be good for the families or the wellbeing of those male colleagues in their particular circumstances, or that Mr Martin knew better than they did what would be best for them: the colleague who wished to work because he was bored while recovering from a physical operation had his views accommodated.

158. The respondent's case on the male colleagues as comparators was that the nature of the male colleagues' work was substantially different compared to that of the claimant: in essence she did office work and they did project work; and the longevity and proportion of their remote working was much less than that proposed by the claimant. They were not valid comparators because there were these material differences between their circumstances and hers.

159. As our findings above illustrate there were a range of circumstances affecting each colleague relied upon by the claimant and it would be impossible to find a comparator whose circumstances precisely matched her own. However, where the less favourable treatment alleged is a failure to permit remote working, the Tribunal considers that the material differences have to be assessed at the time: on or around 12 to 14 November.

160. At that time, Mr Martin did not know for how long remote working would need to be in place for the claimant – just as he did not know that when he agreed it for PT for 100% of his time; nor precisely when he took work for the colleague waiting to be able to drive again. Longevity can only be addressed with hindsight. In all three of these situations, there was a compelling immediate reason why a colleague sought to work remotely, and Mr Martin permitted it for these two male colleagues; and he did not do so for the claimant, despite her explaining her compelling reasons: he knew best.

161. As to the nature of the work, the position advanced for the claimant was that the nature of the work (be it project or administrative) was not a material difference in the circumstances: both the claimant and her comparators did work which relied upon computer programmes (be that Sage accounting or design packages) which could be accessed remotely. We agree with this submission and consider the differences in the type of work are not material differences in all the circumstances of this case.

162. If we are wrong as to the comparators' circumstances, we consider that the colleagues are evidential comparators which assist us in finding what would have happened if there had been a precise comparator, whose only difference was

sex. We do not accept Mr Martin's evidence that he would have similarly refused a male colleague who was by the bedside of a family member with cancer - just as we do not accept his evidence that money played no part in his thinking at the time, when it demonstrably did. We find that he would have accepted that a male colleague was best placed to know what he could and could not do in such circumstances and would have put arrangements in place.

163. Mr Martin treated the claimant less favourably because of, that is materially influenced by, her sex, than he treated, or would have treated her male colleagues when he refused to permit remote working from 12 November. Her complaint of sex discrimination succeeds.

164. It will be apparent that in circumstances when the claimant requested to work remotely **and** be with her son, for both financial and emotional reasons, Mr Martin's failure to allow that was likely to seriously damage trust and confidence. She knew that he had enabled male colleagues to work from home, providing equipment, and taking work to them on occasions; and there was, in any event, that very same equipment available on her desk at the time.

165. Did Mr Martin have reasonable and proper cause for his failure? On our conclusions above, he did not. Sending an employee off the field, to use his analogy, in these circumstances, and without giving any weight to their own wishes or views is not "reasonable and proper cause", even if not tainted by discrimination. That is all the more so when in other circumstances colleagues' wishes to work remotely have been accommodated. Mr Martin knew there would be an immediate and profound impact on the claimant's pay if she was not permitted to work remotely. He was not offering any paid compassionate leave – and his flippant and insensitive comment made that all too clear that he was suggesting unpaid leave only. For an employee of the claimant's length of service, who was well liked, and valued for her work, and considered irreplaceable by some, failing to allow remote working to enable the claimant to earn money, accompanied by an insensitive remark, breached the implied term. That was all the more so when Mr Martin's position endured over many months.

166. Mrs P's recruitment is pursued as a breach of the implied term. Mr Martin's reason was that he needed some support in the office and the claimant had been absent for over week. We consider that arranging interim cover in the circumstances above cannot, of itself, be conduct without reasonable and proper cause as a reaction to absence. This does not contribute to a breach of the implied term at that time.

167. As harassment, an allegation of unwanted conduct related to a protected characteristic (A's cancer) which had the purpose or effect of creating a hostile etc environment for the claimant, failing to allow remote working does not succeed. We have found the decision was because of money and influenced by sex including Mr Martin's stereotypical view of what the claimant should and should not be doing at such a time, and that he knew best. The Tribunal could well envisage comments which could "relate to" the disability of a family member, or other person with whom an employee is closely related, and amount to a contravention of the act, but we consider Mr Martin's conduct is not such a

contravention. It did not relate to A's cancer, albeit the cancer and treatment was the context for his decision not to permit the claimant to remote work. There was nothing about his comments on 14 November which indicated his decision was related to A's diagnosis or illness or prognosis, which at that time was very uncertain. This complaint fails.

Harassing the claimant to return back to work (the texts on 29 December and 9 January, and letter on 2 January (Particulars 2b)

168. For similar reasons these allegations fail as complaints of harassment related to A's disability. Our findings above relay the details of these communications from Mr Martin. They do not relate to A's disability. They seek to secure the claimant's return to the office. If anything, they demonstrate an absence of thinking about A's situation, and a continuation of a closed and discriminatory mind to the claimant wishing to remote work. The claimant may well have considered them premature and unwelcome because her fit note was not due to expire until 14 January, but these communications include a reply to the claimant's letter about pay. There is an offer of a return to part time work in the office or unpaid leave. As above, the context is A's diagnosis and treatment, but they do not relate to that. They relate to seeking clarity on when the claimant might return to the office and pay matters. As harassment (associative) these complaints fail. They were not included in the claimant's list of breaches of the implied term.

169. The text invite of 27 February 2019 was not relied on in the claimant's particulars as part of harassing her back to work. As the claimant says, she understood it as an invitation to discuss flexible or remote working in response to her detailed statutory request. Its true purpose, to propose the ending of the claimant's employment on terms, did relate to A's disability and forms part of our conclusion below.

Failure to handle her flexible working request in a reasonable way/Suggesting the claimant's role was redundant and then denying that (1e, g and 2 (c)).

170. The claimant had set out one informal request to work flexibly in January 2019, to which she had had no response, and then she set it out further, formally, and at great length in February. Again, there was no detailed response or genuine proposal for a discussion. Instead Mr Martin took advice, decided to propose the ending of her employment on terms, by suggesting the role was no longer required, and invited her to a meeting on false pretences.

171. He had no intention to discuss the detail of the statutory request at all, and the claimant's thoughtful and lengthy analysis of her role. This was an entirely unreasonable approach. The circumstances included that the claimant was in a strained emotional state with enormous pressures on her in every direction, and her earnings were reduced to statutory sick pay at the time. Mr Martin knew that she wanted to work for both financial and emotional reasons. To suggest to her that her employment come to an end on agreed terms because her role was redundant was grossly inequitable treatment of a long serving colleague, and wholly without reasonable and proper cause. It was highly likely, in these circumstances, to destroy trust and confidence.

172. Mr Martin's suggestion that this was a benevolent act of kindness is rejected by the Tribunal. The amount of the severance offer was such as to cause upset alone, when it bore little relationship to the claimant's statutory redundancy or contractual entitlements accrued over many years of loyal service. Humiliating is a strong word, and rarely appropriate in such circumstances but on this occasion it is apt. In November Mr Martin had told the claimant her job would still be there for her when she could return to work. His subsequent conduct in March was an egregious breach of the implied term of trust and confidence in all the circumstances.

173. Furthermore, the wholehearted denial by Mr Martin that he had suggested the role was redundant, implicit in his July letter and maintained in his evidence before this Tribunal, beggars belief. That is precisely what was said, both in the meeting, and confirmed in the substance of his subsequent letter. We repeat paragraphs 60 to 67 and in particular his reply to the claimant's question, where does that leave me then: "*in that the job no longer exists we have had to structure and that's where we are".* There was no suggestion that these arrangements were reversible and temporary. The claimant's feeling that she had been told she had lost her job, was entirely justified. Similarly: having restructured the office.."*we find ourselves no longer in need of your support"* in the letter rejecting her flexible working application.

174. As to whether Mr Martin's conduct in that meeting was related to A's disability, it was clear to the claimant that the nature of his disease had been in his mind in suggesting her role was redundant when he said at the end of the meeting: *and you say … the reaction… for you it's not a broken leg for either of you. Oh well we've taken the plaster off, do these exercises now go back to work. For [A] it could be on and off for ages and for you it could be higher and low levels of anxiety that affects performance in all sorts of things. It is very difficult for you. It isn't finish the course of tablets and we are back where we were."*

175. On balance we consider that suggesting the claimant's role was redundant, in the way proposed in that meeting and planned before the invitation, was unwelcome conduct, relating to A's disability, which had the effect of creating a hostile working environment for the claimant. The suggestion was in the context of the claimant seeking ways to return to work by remote working. There are few responses to that which are more likely to create a hostile working environment for those caring for family members with disability than, "the job is no longer there", and we no longer need your services. That is all the more so when Mr Martin had suggested the job would be there for her when she was able to return. The conduct was reasonably to be perceived as breaching the Equality Act harassment threshold and we uphold this complaint.

176. The allegation of breach of the implied term includes a failure by the respondent to handle the claimant's flexible working request in a reasonable way. The facts we have found bear this out. The initial failure has been found to be discriminatory and that failure continued after the claimant formalised her request in January and February. The only substantive written response was an invite to a severance meeting and some peremptory comments in the meeting. Thereafter

the claimant appealed and her appeal was not considered by anyone with an open mind; indeed, Mr Martin's response with his new colleague had hardened, and was in conflict with his initial consideration that half of the tasks could be done remotely, to refusing all remote working on grounds, ostensibly, including cost. When the claimant made one final attempt to revisit matters in July, having recovered some energy, she received a curt and negative response.

177. In the round the Tribunal considers the handling of the flexible working request both informal and formal from 12 November to July 2019 was conduct without reasonable and proper cause in all the circumstances detailed above, including that it was discriminatory. It was likely to (and did) destroy the necessary mutual trust and confidence between employer and employee.

178. Did the claimant affirm the repudiatory conduct, particularly after receiving the appeal outcome on 5 May?

179. We ask ourselves whether after 5 May the claimant was letting bygones be bygones by not resigning then, having endured the conflict and discrimination she had over several months. Had she returned to work in the office, that submission might have force, but she was unwell and exhausted until the beginning of July, and was receiving only statutory sick pay. There was no communication of an acceptance of the outcome of the appeal. Silence in these circumstances, and requesting a further fit note when she was ill, are not, in all the circumstances of this case properly to be considered letting bygones be bygones concerning breaches of her employment contract. The claimant genuinely sought to raise the matter again in July – that is not affirmation and applying the authorities above, the curt response she received was again without reasonable and proper cause for someone in the claimant's circumstances and given Mr Martin's previous conduct. It added something to the earlier breaches. She was entitled at that point to accept the cumulative breaches and resign. She has established a constructive dismissal and the respondent advancing no Section 98 reason for dismissal, there was no reason substantial enough to justify her dismissal. Her complaint of unfair dismissal is well founded and succeeds.

<u>The law, facts and conclusions in relation to remedy</u>

180. The relevant provisions are of the Employment Rights Act 1996 are Sections 111 to 126. The claimant did not wish reinstatement or re-engagement. The parties were in agreement about the claimant's calculation of the Basic Award of £8186.58. There was no submission that if her unfair dismissal complaint succeeded we should not make that award and we did so.

181. As to a compensatory award, the Tribunal limited that sum to the sum claimed by the claimant in respect of loss of statutory rights, in circumstances where it was likely to make awards in respect of contraventions of the Equality Act. Justice and equity requires there to be no "double recovery". As to that sum, given the longevity of service, and the claimant's previous net earnings of some £366, per week, we awarded the sum claimed.

182. The Equality Act 2010 (Sections 124 and 119), provides that the Tribunal may declare unlawful discrimination, award compensation and make appropriate

recommendations. Recommendations were not sought in this case, and the Tribunal came to consider compensation having first concluded that no recommendations were to be made, the parties having gone their separate ways.

183. The Tribunal may award compensation for injury to feelings and financial losses on normal tortious principles, including whether it was reasonably foreseeable that the losses would arise from the contravention of the Act, and whether they were caused by the contravention.

184. Injury to feelings awards are compensatory not punitive. The Tribunal should focus on the degree of injury. The "Vento" bands as uprated assist us.

185. Aggravated damages arise to the extent that the discriminator acts in an exceptionally high handed way, or insulting, or oppressive behaviour. Subsequent conduct which has increased the injury to the claimant's feelings, can generate an award of aggravated damages; examples of this are failing to treat the complaint with the requisite seriousness, failing to apologise. An award is compensatory and not punitive (see for example Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11ZT).

186. The Tribunal must stand back from its awards and guard against both double recovery and excessive awards where there are several contraventions found.

187. As to remedy, the Tribunal understood from the claimant's schedule of loss and evidence that she sought: injury to feelings of £17500, aggravated damages of £5000, and lost earnings and benefits on the basis that if not for the dismissal/discrimination, the claimant would have received her contractual pay and benefits for two years from the date of her dismissal. She also claimed an uplift in respect of an alleged unreasonable failure to follow the provisions of the ACAS code but there was no explanation the particular code provision applicable or unreasonably not applied in this case and the Tribunal dismissed that part of the remedy case summarily.

188. A counter-schedule on behalf of the respondent did not greatly assist in that it sought to challenge all sums claimed but without necessarily referring to any legal principles engaged. Ms Callan remedied the position in her submissions and Mr Ryan explained the claimant's case. It was agreed that the Tribunal would have to apply the appropriate principles to the facts found and decisions reached if any of the complaints succeeded.

189. The underlying sums and information in respect of age, earnings and so on in the claimant's schedule of loss were not disputed.

190. The claimant did not seek new employment after her resignation in July 2019. Her reasons were she was too ill at that time, and that she was again "living at the hospital" until March 2020 and she could not expect another employer to take that on at that time. That was in circumstances where her son had suffered a relapse and he required a bone marrow transplant and other complications from August. There then followed the pandemic, and all the isolation and shielding

measures, that were, in any event, part and parcel of the claimant's care for an extremely vulnerable person from the onset of his diagnosis.

191. The claimant did not claim job seekers' allowance, albeit latterly, and certainly by 2021 she has been able to access a carer's allowance as her son's carer.

192. As to the injury to her feelings, she said this: I feel that when so many other members of staff were given so much flexibility for their own families…and the way he has dealt with everything it is very difficult to me to accept that I am so different to all of them…I feel very wronged – about the whole situation – for no fault of my own as far as I am concerned. From day one when I offered to work I have had a "hand in my face" … everything has been thrown at me as if I am the cause of so much trouble, [suggesting] the business is going to suffer so badly if they let me have that flexibility [for my son's chemotherapy] and [Mr Martin] knew all of this. I was given nowhere near the consideration others were given and I had earned it – I had worked for the two companies and done everything asked of me and done it as well as I possibly could and been very, very loyal."

193. We accepted that evidence. The degree of injury to her feelings was considerable in these circumstances. The claimant's evidence about that is corroborated by the GP notes. While damage to the claimant's health by the time of this hearing was primarily caused by her son's illness and ongoing care for him, it is very clear that her emotional state was made worse by Mr Martin's decision, from mid November 2018, not to agree to remote working. The claimant suffered injury to feelings at that time, which were considerable, arising from this contravention. It was reasonably foreseeable that would arise and it was entirely to be expected in all the circumstances, but including the claimant's knowledge of the treatment of her colleagues, her long and loyal service, the fact that equipment was available; and the failure by Mr Martin at any stage to even trial remote working arrangements.

194. As a single discriminatory decision), the sex discrimination suffered by the claimant can be placed in the lower band of Vento, but at the higher end of that band and we award £7500. We also consider it in the interests of justice to award interest on this sum as calculated below running from 14 November 2018 to our decision date (18 February 2021).

195. We find that Mr Martin's dismissal of remote working, so lightly in these very acute circumstances known to him, was a repeat of the oppressive way in which he had denied her working from home earlier in the year to care for her son's mental state because of his and his wife's view that it would not be good for her son. The claimant relied on this as aggravating conduct. The claimant also relied on the repeated requests for her to physically return to work as aggravating factors. Mr Ryan said that the claimant's case was that the meeting of 7 March was the aggravating conduct.

196. We find that the claimant has established aggravating conduct by Mr Martin. Seeking her return to physical attendance at the office in late December and early January was oppressive conduct in these circumstances, indicating that there

would no change from the refusal to permit remote working and no trial - that Mr Martin's mind was closed to that; and that he knew best. It sought to ride roughshod over the claimant's wish to work remotely in very compelling circumstances and it did nothing to indicate any sense of regret in his initial refusal, or to rethink it, or put it right. It did make the impact on the claimant of the original decision worse. We award the sum claimed and we consider that the two sums together (£12,500) in respect of the claimant's injury to her feelings are proportionate and just and equitable in respect of this contravention. We additionally award interest on the additional £5000 aggravated damages. It is not in the interests of justice (and would be duplication) to consider the 7 March meeting as aggravating conduct, when the impact of it comes to be assessed for that contravention in any event – see below.

197. As to the harassment contravention (suggesting her role was redundant, in the claimant's words, that she had no job), the claimant was in shock in this meeting, and was close to tears. Her upset was likely upon a proposal to end her employment given her circumstances, and we find that she was very hurt by it indeed and could not really believe it. It was a suggestion that she had no job in circumstances where Mr Martin knew she had to put a roof over her head (and that of her son). The prospect of losing one's employment and income is almost always unwelcome and upsetting, but in the claimant's case of years of loyal service and through no fault of her own, when she might have expected her employer's support, it was doubly so. It was one thing not to be permitted to work remotely, it was even worse to be told one's job was no longer there, having been told it would be at the onset of A's illness.

198. We assess the value of the injury to her feelings arising from this contravention at £10, 000 and we award interest, again, from the date of that contravention (7 March 2019) to the date of our assessment (18 February 2021).

199. In the round, again we stand back and assess the overall award in respect of injury to feelings arising from the two Equality Act contraventions as we have found them. We take into account that these allegations were also put as disability discrimination, and that the injury to feelings award sought was a global figure assuming, perhaps that all complaints succeeded. We also take into account that not all the Equality Act complaints have succeeded. However we considered it instructive that when asked about injury to feelings at the end of her evidence, the claimant's evidence was very much about her treatment compared to other colleagues, her sex discrimination complaint, having given evidence about the effect on her of the 7 March meeting earlier in her evidence.

200. In these circumstances we consider our assessment a just one, reflecting the real hurt caused by the particular contraventions we have found, and we consider again, standing back, £22,500 plus interest in this case cannot be considered manifestly unjust or out of proportion to the damage inflicted on the claimant's emotional state by the respondent's contraventions.

201. As to financial losses, we must make findings about what would have happened, absent the first and subsequent contraventions tethered to evidence. We cannot simply speculate.

202. The respondent's case is that the claimant's ill health prevented earnings from work, not its conduct. Similarly, further caring for her son and the pandemic would also have prevented the claimant working after her resignation. It is not in the interests of justice for the respondent to be held responsible for financial losses caused by these matters.

203. The respondent's case was also put as a failure to mitigate, (this was apparent in questions to the claimant about her marketable skills and in the respondent's counter schedule). It was suggested she had not sought work because she expected the respondent to be held accountable in this claim, or words to that effect.

204. The Tribunal indicated that as the respondent had called no evidence about steps which the claimant could have taken which would have mitigated her losses, a failure to mitigate was unlikely to be fruitful ground should any of the complaints succeed.

205. We find, taking into account our findings about parents and family often working from hospital, and the persistence and determination to continue to work exhibited by the claimant, that had Mr Martin taken her work and equipment, as he had done for others, she would have completed work from hospital from the very outset. In all likelihood she would not have visited her GP to gain advice to refrain from work. That is supported by her decision not to do so after her employment ended.

206. We take into account that the claimant did not seek a fit note advising her to work with adjustments, but in real life, and given the pressure the claimant was under, it is unsurprising that neither she nor her GP thought to say that in a fit note. Our industrial knowledge tells us that advice that an employee may be fit to work with adjustments is, notwithstanding it has been available to GPs for a long time, used far less frequently and is far less understood than is helpful.

207. There was a tension between the claimant's disability case and her remedy case. Ordinarily if someone has been unable to work because of illness (where that illness is not caused by the employer's contravention), then ordinary causation results in there being no compensation in respect of lost income.

208. In this case though, our findings include that the claimant was certified unable to work as a direct result of the first contravention: she was well enough to complete work remotely; she was not able in the circumstances of the trauma facing A, not to be at his side or close by. We consider the clarification from Dr Travis to that effect as highly likely, and consistent with the contemporaneous notes (and we refer to it in our findings above on disability).

209. The claimant's schedule sought lost earnings until 21 May 2022. We consider this a just period, in the circumstances, over which losses can be said to have been caused by the respondent's contravention.

210. As to how much work she could have completed, and what earnings she would have sustained as a result, we assess this by reference to all the circumstances of this case including Mr Martin's evidence We find that he considered 50% of her work could be done remotely (15 hours). We have found that some work, if it was to be sustained over a period, required presence in the office (acting as his pa, for example, at that time). We also take into account that the saving to be achieved by having an associate company undertake accounts work may very well have come to light in any event – it was introduced as a stop gap, but when the saving was realised it became the status quo. We also assess average hours and earnings by taking into account the demands on the claimant of being her son's carer.

211. We find that absent discrimination on 14 November the claimant would have retained her employment working remote hours at an average of 10 hours per week. We cannot be certain as to how much work the claimant would have been able to undertake at any point in her son's treatment and this average takes into account the fluctuating nature of those demands, the length of the loss period, the impact of the pandemic, and so on. In the round, we consider this loss is properly caused by the discriminatory decision on 14 November. Had that not taken place, the claimant's best, and only real source of income and employment, was to retain work with the respondent at a level that she could sustain and that the respondent could afford in the long term. The respondent could reasonably have foreseen that the claimant would suffer lost earnings as a result of that decision to refuse remote working and to pay others to do what the claimant could have done. In some ways the pandemic may have resulted in the claimant being able to do more work remotely, but that could not have reasonably been foreseen by Mr Martin, and it is not therefore, just to assess loss on that basis.

212. The loss period is 176 weeks and the mid point (for the interest calculation) is 88 weeks. That is assessed as 65 weeks from the date of this hearing to 21 May 2022 and 111 weeks from the date of this hearing back to the end of December 2018 when the claimant's earnings were reduced by reason of her not working at all (we appreciate there was dispute about the pay and its scheduling In November/December 2018 but we have taken a broad assessment of the date when loss commenced).

213. The weekly net loss figure is £373.05 taking into account the claimed pension loss. That is multiplied by 176 weeks and divided by three, to reflect the lost earnings that we have assessed were caused by the discriminatory act in November 2018. The interest calculation is properly done at the mid point.

214. It will be apparent from the findings and conclusions above that, were we to come to assess lost earnings under the Employment Rights Act provision – a sum that we consider just and equitable which is in consequence of the dismissal in so far as that loss is attributable to action taken by the employer - we would assess the same sum, save that the weeks of 2019 before resignation would not fall into

account. In these circumstances we make no compensatory award other than lost statutory rights.

Employment Judge JM Wade

Date 30 March 2021