EMPLOYMENT TRIBUNALS

Claimant: Ms A Kownacka

Respondent: Textbook Teachers Limited

Heard via Cloud Video Platform **On:** 25, 26, 27 January and 30 March 2021

Before: **Employment Judge Brewer**
Ms G Howdle
Mr A Wood

Representation

Claimant: Mr M Gordon, Counsel
Respondent: Ms J Coyne, Counsel

JUDGMENT

1. The claimant's claim for direct disability discrimination fails and is dismissed.
2. The claimant's claims for failure to make reasonable adjustments fails and is dismissed.
3. The claimant's claim for harassment related to disability succeeds to the extent set out in the reasons below.

REASONS

Introduction

1. This case was initially listed to be heard over 3 days commencing on 25 January 2021. In the event the evidence did not finish in the allotted time and the case was listed for 1 further day to complete the evidence and submissions. The Tribunal reserved judgment and met on 31 March to deliberate and reach a unanimous decision which is set out below.

2. At the hearing we heard evidence from the claimant. and her husband. On behalf of the respondent we heard from Sharon Paul, Managing Director, Kirsty Dunleavy, Branch Manager, and Kat Jasinska, Branch Manager at the relevant time, now Operations Manager. Each witness produced a written statement which they adopted as their evidence in chief. We had an agreed bundle of documents. The parties had agreed a list of issues which we set out below. Finally, we had detailed written submissions from both counsel, supplemented by oral submissions. We thank both counsel for their assistance in dealing with this case.

Issues

3. The following were agreed as the issues in the case.

Direct Discrimination (section 13 EA 2010)

4. Did Sharon Paul make the following comments:

    a. On 6 June 2018, by telephone:

        i. Words to the effect of "its not like you're going to die", " what do you need that amount of time off for?" "its only early stages of cancer" and that the Claimant should leave treatment to her doctors and the Claimant should "focus on filling jobs for September";

        ii. Words to the effect of the Claimant would be best to get back to the office and questioning "what would you do with all the time at home";

        iii. Words to the effect of the Claimant was taking her condition "too seriously";

        iv. Words to the effect that it was "no big deal" the Claimant would be forced into menopause at the age of 37 and no longer able to conceive children;

    b. On 18 June 2018, by telephone:

        i. Words to the effect of "Aggie are you ready to come back yet? I'm having to come in and fill in for you!";

        ii. Words to the effect the Claimant was "lucky to have a free boob job off the NHS", asking the Claimant if she was happy with her

"new breast size" and if she was going to have another "free boob job" so the other matched;

c. On 13 July 2018, by telephone:

i. Words to the effect that the Claimant would have a high libido due to the hormone treatment she received and Sharon had a treat for her return to work, a "male Polish PE teacher;

d. Attempt to contact/contacting the Claimant and ask her to return to work on:
   i. 11th July 2018 by telephone;

   ii. 12th July 2018 by telephone;

e. Requiring the Claimant to provide evidence and explain her "attendance at appointments and supporting her ill health" on 11th July and suggesting the Claimant did not have evidence of her attendance.

5. Did Kirsty Dunleavy make the following comments:

   a. On 6 June 2018, by telephone:

      i. Words to the effect of the Claimant was a "massive inconvenience" due to the time off she was due to take due to her cancer;

      ii. Words to the effect of "surely you would not want or need that much time off, you will be bored especially when your daughter goes off to school, what are you going to do with all that time";

      iii. Requesting evidence and explanation as to the Claimant's attendance at appointments and supporting that she had ill health for the period of absence 11 June to September 2018 when the Respondent was aware of the Claimant's diagnosis.

6. If any of the comments/actions above are held as having taken place, is this less favourable treatment?

7. If so, is the treatment because of the protected characteristic of disability (cancer)? The Claimant relies on a hypothetical comparator of a person who does not have cancer.

Harassment (section 26 EA 2010)

8. If any of the conduct in paragraphs 4 to 7 above is upheld as having taken place:

    a. Was that conduct unwanted?

    b. Was that conducted related to the protected characteristic of disability (cancer)?

    c. Taking into account the Claimant's perception, did that conduct have the purpose or effect of:

        i. Violating the Claimant's dignity; or

        ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Failure to make reasonable adjustments (section 20-21 EA 2010)

9. Is the following a provision criterion or practice of the Respondent's ("PCP") and if so, did the respondent apply any such PCP:

    a. The requirement to travel;

    b. The requirement to be fully fit;

    c. The requirement to perform without adaptations to the role?

10. If so, does the PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with a person who does not have cancer? The alleged substantial disadvantages relied on by the Claimant are:

    a. An inability to carry out the Claimant's role fully due to illness;

    b. An inability to return to the Claimant's role;

    c. The Claimant being placed under undue pressure regarding her role.

11. If so, did the Respondent take such steps as was reasonable to avoid the disadvantage relied on? Examples of such adjustments are:

    a. Less travelling time;

    b. Not requesting her to drive;

c. Putting the Claimant on reduced hours;

d. Putting the Claimant on light duties;

e. Allowing the Claimant to work from home;

f. Not requiring the Claimant to drive to client visits.

Law

12. In relation to **direct sex discrimination**, for present purposes the following are the key principles.

13. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

14. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

15. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, 2007 IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

16. By virtue of section 136 EqA, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

17. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

18. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

19. In relation to **harassment**, the key legal principles are as follows.

20. For our purposes, the relevant part of section 26 EqA is as follows:

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

21. In **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT, Mr Justice Underhill asserted it would be a '*healthy discipline'* for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements but in some cases there will be considerable overlap between the components of the definition — for example, the question whether the conduct complained of was unwanted may overlap with the question whether it created an adverse environment for the employee.

22. An employment tribunal that does not deal with each element separately will not make an error of law for that reason alone (see **Ukeh v Ministry of Defence** UKEAT 0225/14).

23. One-off acts are not equivalent to an environment, and therefore acts must be sufficiently serious if they are to be said to give rise to an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (see **Henderson v General Municipal and Boilermakers Union** 2015 IRLR 451 EAT).

24. Where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used (see **Cam v Matrix Service Development and Training Ltd** UKEAT 0302/12).

25. A single incident can amount to unwanted conduct and found a complaint of harassment if 'serious'; para 7.8 EHRC Employment Code. whether a single act of unwanted conduct is sufficiently serious to found a complaint of harassment is a question of fact and degree (see **Insitu Cleaning Co Ltd v Heads** 1995 IRLR 4, EAT).

26. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' (see para 7.8 EHRC Employment Code and **Reed and anor v Stedman** 1999 IRLR 299).

27. In section 26, "unwanted" means unwanted *by the employee* (see **Thomas Sanderson Blinds Ltd v English** UKEAT 0316/10).

28. Finally, in relation to the **reasonable adjustments** claim, the key law is as follows.

29. Section 20 EqA states:

> *(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. ...*
>
> *£3)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.*

30. The duty arises only when a PCP does "put" a claimant to substantial disadvantage and a "substantial" disadvantage is "more than minor or trivial" disadvantage (see section 212(1) EqA). In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under section 20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage. The comparison involves a class (or group) rather than a particular individual (**Fareham College Corporation v Walters** 2009 IRLR 991, EAT).

31. A failure to comply with the requirement is discrimination (section 21 EA 2010). The Claimant must show that the duty arises and the nature of the adjustment that would ameliorate the substantial disadvantage. The burden then shifts to the Respondent to show that there has not been any failure to comply with the duty.

32. The EAT, in **Environment Agency v Rowan** 2008 ICR 218 EAT, set out that the Tribunal must consider: (1) the PCP applied by the Respondent; (2) the identity of the non-disabled comparators; and (3) the nature and extent of the substantial disadvantage.

33. A holistic approach should be taken to whether an adjustment is a reasonable one and this can be considered in conjunction with other adjustments made (see **Burke v The College of Law and anor** 2012 EWCA Civ 87, CA). The Tribunal should also consider a proposed adjustment's practicability (see **SSWP (Jobcentre Plus) and ors v Wilson** UKEAT 0289/09) and an adjustment will not be reasonable where it imposes a disproportionate burden on the employer. The test of reasonableness is objective (see **Smith v Churchills Stairlifts plc** 2006 ICR 524, CA).

Findings of fact

34. We make the following findings of fact (numbers in square brackets are references to page numbers in the bundle).

35. The respondent is a small employer employing 11 staff. It has operating premises in Oakham, Newark, Corby and Peterborough. The respondent's business is providing temporary and permanent teaching staff schools. Some 95% of the respondent's business involves placing temporary staff.

36. The claimant was employed by the respondent as a Recruitment Account Manager. Her employment started on 12 June 2017. She was good at her job and a valued member of the team. The claimant was responsible for the special needs sector of the respondent's business. She was line managed by Kirsty Dunleavy, Branch Manager at the respondent's Oakham Office.

37. The claimant's contract of employment is at [53 – 63]. Clause 7 of the contract deals with sickness absence [57]. The key parts of the clause are that the claimant could self-certify as sick for up to 7 consecutive days. For sickness absence of more than 7 consecutive days a fit note was required. Specifically, clause 7.4 [57] states that:

> *The Company has the right to monitor and record absence levels and reasons for absences. Such information will be kept confidential.*

38. Clause 7 also provides for company sick pay for a maximum of five days and after that the employee reverts to Statutory Sick Pay.

39. On 11 May 2018 the claimant told Ms Dunleavey that she had discovered a lump in her breast. The claimant attended a biopsy appointment on 14 May 2018 and on 23 May 2018 was diagnosed with breast cancer. Although Ms Dunleavey and the claimant had agreed that if the biopsy result indicated she

had cancer she would not go into the office, nevertheless the claimant turned up for work at around 12 noon. The claimant had a meeting with Ms Dunleavey in which she advised her of the diagnosis. The claimant then told other staff in the office as part of a handover of her work. The claimant left the office at around 1.45 pm.

40. On 24 May 2018 Ms Dunleavey undertook to deal with two school visits which the claimant had been scheduled to undertake. Ms Dunleavey attended one visit and re-scheduled the second.

41. The claimant attended a hospital appointment on 4 June 2018. On 5 June 2018 Ms Paul told the claimant that she would pay her full pay during her absence rather than limit that to the five days as set out in clause 7 of the contract.

42. On 6 June 2018 the claimant had a morning appointment and arrived in the office in the late morning. The claimant and Ms Dunleavy noted in the diary that she would be off work for two weeks. However, later that day the claimant called a client and during their discussion, referring to her return to work, the claimant was overheard by Ms Dunleavy stating that she would return to work in September 2018. Ms Dunleavy then raised this with the claimant stating that her understanding from previous discussions with the claimant that she would not be away for such a long period (some 12 weeks). In the late afternoon Ms Dunleavy called the claimant, who was on her way home. During that conversation Ms Dunleavy asked the claimant to provide any paperwork relating to the proposed 12 weeks' absence. When the claimant got home, she called Ms Paul.

43. On 7 June 2018 the claimant provided some documentation to Ms Dunleavy.

44. 8 June 2018 was the claimant's last working day before her operation. A meeting had been scheduled between the claimant, Ms Dunleavy and Ms Paul. Prior to the meeting, a colleague and friend of the claimant, TJ, advised her to record the meeting. The meeting was positive and there were discussions around how a phased return to work would be facilitated and it was agreed to keep this under review. At that point it was agreed that the claimant would definitely be off for four weeks. The claimant asked if contact about her progress could be through her husband, which the respondent accepted, and Ms Paul asked for the claimant's husband's contact number so that she could check to see how the claimant was after her operation. At the end of the day the claimant's husband collected her from work.

45. The claimant had surgery on 12 June 2018.

46. On 18 June 2018 the claimant telephoned Ms Paul and discussed how the operation went.

47. On 26 June 2018 the claimant texted Ms Paul to invite her to meet her at her home. The message says [121]:

> *Hi Sharon. I hear you want to pay me a visit which is lovely, I am at home all the time and very flexible, so I'm happy to make it work for you…look forward to seeing you guys xxx*

48. The meeting took place on 26 June 2018 and was positive. Ms Paul provided the claimant with a medical form she had requested Ms Paul to fill out. In a series of text messages to TJ on 27 June 2018 [299j – 299m], the claimant described the meeting stating that the respondent agreed that it would provide the claimant with admin support and would "*accommodate the hours and duties I want to do*" on her return to work, and that Ms Paul and Ms Dunleavy were "*sweet*" although she added "*not honest*" [299m]. At around the same time the claimant was in contact with and received advice from the Macmillan organization (hereafter "Macmillan") [200]. She had called their help line. Macmillan responded on 26 June 2018 with a link to some CAB guidance and attached information on dealing with "*managing sickness absence*" [200]. On the same day the claimant had received legal advice and she emailed TJ to say:

> *I have started a case against them…1h 16 min on the phone with legal team…All recorded*
> [297].

49. On 4 July 2018 the claimant texted Ms Paul to say that her future plans will depend what she is told by her clinicians at an appointment she was due to attend on 9 July 2018 [123].

50. Following the above appointment, the claimant texted Ms Paul to say that she had good news and that she would "*like to return to work on Monday 16th July*" [124]. The claimant had a further appointment at the hospital on Thursday 12 July 2018.

51. At [200] is a log of advice which the claimant received from Macmillan. The second entry has the date "12.7.20" and the third entry has the date "17.7.20". We find that the reference dates must be typing errors and the dates are respectively 12 July 2018 and 17 July 2018. On 12 July 2018 the Macmillan notes say that the claimant was due to have radiotherapy every day for 4 weeks in August, but she was "*hoping to go back on Monday to work for 2 weeks before treatment starts*" [200]. The note goes on to say that the claimant "*is worried about her managers being so unsupportive. They have been asking for details of hospital appointments whilst she has been off work – which seems unnecessary…".* The reference to "Monday" is to 16 July 2018.

52. On 13 July 2018 Ms Paul and the claimant had a telephone conversation to discuss the claimant's return to work on 16 July 2018. The plan was that they would meet at the office and then they would both attend Marshfields School together, Ms Paul would drive. The claimant agreed.

53. On 16 July 2018 Ms Paul was unwell and unable to attend the meeting at Marshfield School. Ms Paul's partner had notified Ms Dunleavy about the sickness and as a result Ms Dunleavy sent a text to the claimant at 7.41 am on 16 July 2018 confirming that she, Ms Dunleavy, would attend the meeting at the school in Ms Paul's place [129]. About 5 or 10 minutes later the claimant and Ms Dunleavy had a telephone conversation in which claimant said that she did not want to go to the meeting at the school. Ms Dunleavy said in that case, she would attend the meeting at the school and that the claimant should go into the office where the two could meet later in the day. In the event the clamant did not attend the office [129]. She instead went to her gP and was signed off work as sick.

54. On the same day, 16 July 2018, the claimant exchanged a series of text messages with TJ. At one point she stated: "*I am off now…and taking it to Tribunal*" [104].

55. On the same day, 16 July 2018, the claimant had a conversation with Macmillan. She told them that she had been instructed to attend the meeting at Marshfield school on her own, that her manager had agreed she would go in place of the claimant and that the claimant should instead go into the office [200]. On the same day the claimant received further legal advice and decided to raise a grievance [203/204].

56. At this point the claimant decided that all further contact from the respondent should be through the claimant's husband and she confirmed this by email on 23 July 2018 [132 - 134].

57. The claimant again made contact with Macmillan on 23 July 2018. According to the log [201] the claimant is said to have stated that she was "*still having problems at work*" and that she had received legal advice.

58. On 23 July 2018 the claimant submitted her grievance alleging direct discrimination and harassment on the grounds of sex, nationality and disability, and failure to make reasonable adjustments in relation to the alleged failure to arrange a return to work meeting and asking the claimant to complete unspecified tasks [136].

59. On 30 November 2018 the claimant presented her complaint to the Tribunal.

60. On 4 December 2018 the claimant resigned with notice expiring on 23 December 2018.

Discussion and conclusions

61. Despite hearing four full days of evidence, it is apparent from the agreed list of issues that the differences between the parties in this case are fairly narrow. Those issues relate in essence to allegations by the claimant that certain things were said by Ms Paul and Ms Dunleavy that were discriminatory (either directly or by harassment) and that there was a failure to make reasonable adjustments for the claimant's disability. Having said that, we note that the evidence given, including the documentary evidence, provides an overall picture of what was taking place such that we may draw inferences from that in order to assist in determining the merits of the case. We were addressed by both counsel on the question of witness credibility. We note that in many cases it can be very difficult to tell whether a witness is telling the truth or not. In our view, where there is a conflict of evidence, such as there is in this case, reference to the objective facts we have found, and set out above, and to the contemporaneous documents, along with a consideration of motives and the overall probabilities, can be of very great assistance in ascertaining the truth. We also note that credibility is not "all or nothing" and we may find parts of a witness testimony credible even if we find other parts not credible. We address this further below in relation to Ms Dunleavy and MS Paul.

62. In respect of the claimant's evidence, we find that she was inclined to see everything which happened, and which she objected to, as very negative. This is perhaps entirely understandable given what she was going through at the time. But that perception has, in our judgment, led to her overstating some of her case particularly in relation to Ms Dunleavy, a person with whom she appears to have had an excellent relationship until June 2018 and, as far as Ms Dunleavy was concerned, at least until she saw the text messages in the bundle, that continued to be the case after 6 June 2018 and the claimant did and said nothing to alter that perception until she submitted her grievance. As to the claimant's husband, at paragraph 3 of his statement he refers to taking an original copy of a "*sick note*" to the respondent because Ms Paul threatened that she would cease the claimant's Statutory Sick Pay without it. In his oral evidence he changed his account and said that he delivered an envelope, but he did not know what was in it. We reject that evidence although nothing in the case turns on the point in issue. We find that he altered his account because in her evidence the claimant said something different and no doubt, they felt it best if their evidence matched. Having said that we have no reason to doubt the rest of Mr Kownacka's evidence.

63. We also reject the respondent's contention that by 6 June 2018 the claimant had determined to bring employment Tribunal proceedings and that her subsequent texts were falsified in order to be used to in some way set up or substantiate the claim. The best evidence is that the claimant formulated her intention to bring a claim around 26 June 2018 (see paragraph 48 above and [297]). Further, the Tribunal's judgment is that had there been a plan to fabricate evidence in order to substantiate a claim, that evidence would have been clearer and more detailed than we have found was the case.

Failure to make reasonable adjustments

64. We turn first to the claim for failure to make reasonable adjustments. The claim is that the respondent applied the three PCPs set out at paragraph 10 above to its staff and that these caused the claimant the substantial disadvantages set out at paragraph 11 above. We deal with these in turn.

65. The first PCP is put as "the requirement to travel". It is clear from the evidence that part of the claimant's role was to travel to visit client schools. On her return to work on 16 July 2018 the claimant was initially going to attend Marshfield school by being driven by Ms Paul. In the event she was not required to undertake that visit. As we know Ms Dunleavy attended that appointment. On the evidence, the claimant was driving into the office on 16 July 2018 when she felt unwell. She therefore went to her GP and was signed off sick.

66. At no point in her evidence did the claimant say that she was unable to travel, nor did she assert that the requirement to travel caused her any, let alone any substantial disadvantage. The claimant's evidence was that by 16 July 2018 she could drive but anticipated having difficulty driving long distances. She accepted that she was able to take public transport to attend appointments. We do not read "travel" as being synonymous with "driving" and therefore this claim cannot succeed. The claim falls because there was no disadvantage to the claimant by the application of the PCP.

67. The second PCP is said to be the requirement to be fully fit. The Tribunal addressed this issue with Mr Gordon during his submissions. The PCP is to be taken as read, that is the assertion that the respondent requires all staff to be "fully fit". There was no evidence led, nor any cross-examination of the respondent's witnesses on this PCP. In his submissions Mr Gordon endeavoured to spin the wording, or perhaps the meaning of this PCP. He said that it meant that the respondent required staff to be fit enough to undertake all of their duties, to, as it were, work normally.

68. We take the PCP as set out in the agreed list of issues to mean what it says. In that context the Tribunal finds that there was no evidence that at any point the

respondent applied a PCP that staff had to be "fully fit". Even if we are wrong about that, and the PCP is given the more limited meaning advocated for by Mr Gordon, it amounts to no more than that staff should be fit enough to undertake their duties. Given that the claimant was about to attend work on 16 July 2018, initially with a school visit and thereafter attend the office, and when that altered, she was to attend the office, she has not shown that she was substantially disadvantaged by the requirement. She was clearly intending to go to work and to work normally, felt fit to do so until that changed at which point she was signed off.

69. The third PCP is the requirement to perform without adaptations to the role. We agree with Ms Coyne's submission that this is somewhat tautological. It amounts really to another way of saying that there was a failure to make reasonable adjustments because the respondent had a PCP not to make adjustments.

70. But on the claimant's own case she says that at the meeting on 27 June 2018, at the claimant's home, the respondent agreed that they would provide the claimant with admin support and would "*accommodate the hours and duties I want to do*". Although she goes on to tell TJ in her text message that she did not believe this, that does not mean it was not the respondent's genuine intention. In the event as the claimant never returned to work, the matter is somewhat moot. Mr Gordon's case was essentially that the PCP is made out because the adjustments were not in place prior to 16 July 2018. But this ignores the claimant's own evidence. As we have set out above, on 16 July 2018 the claimant was going to attend work absent any pre-agreed adjustments, initially with a school visit and thereafter to attend the office, and when that altered, she was simply going to attend the office, before feeling too unwell and getting signed off sick. Given those facts it is impossible to see how the claimant can state both that she was going to work and that she was substantially disadvantaged by going to work believing that there were no adjustments. Further, Ms Dunleavy's evidence, which we accept, was that when the claimant told her that she did not feel up to attending the school visit, Ms Dunleavy said she would meet the claimant later, in the office, and her intention was to discuss what adjustments the claimant might need at that meeting having previously accepted that the claimant could pick her hours and duties. So, we are left with the fact that had the claimant not felt too unwell to work on 16 July 2018, she would have not gone to the meeting at Marshfield school, which was an adjustment, and would instead have undertaken only office based work subject to a discussion with Ms Dunleavy later that day about the specific duties and hours to be undertaken by the claimant going forward. In the circumstances this claim must also fail.

Direct disability and harassment

Comments by Kirsty Dunleavy

71. We turn next to the alleged comments which form the basis of the claims for direct disability discrimination and harassment.

72. We deal first with the allegations in relation to Ms Dunleavy.

73. The Tribunal was impressed with Ms Dunleavy as a witness. Her evidence was internally consistent and accorded with all of the contemporaneous documents. She answered all of the questions put to her clearly and consistently and was visibly upset by recalling the point she realised that according to the claimant's text messages to TJ, the claimant had a very different perception of the relationship between them than either Ms Dunleavy though was the case and, in fact, in relation to the way the claimant acted towards Ms Dunleavy.

74. It is alleged that on 6 June 2018, in a telephone conversation in the afternoon, Ms Dunleavy said to the claimant, that she, the claimant, would be a "*massive inconvenience*" because of the amount of time off "*she was due to take due to her cancer*" and that she said words to the effect of "*surely you would not want or need that much time off, you will be bored especially when your daughter goes off to school, what are you going to do with all that time*" (see issues at 4(a)(i) and (ii) above).

75. It is convenient to take these comments together because they deal with the same alleged concern – the claimant's proposed time off.

76. Ms Dunleavy's evidence, which she was not cross-examined about, was that 95% of the respondent's business was placing temporary staff in schools and that therefore the school summer holiday period is the respondent's least busy period, so much so that staff work shortened hours. Given that context we say three things. First, it would make no sense, and be patently wrong, for Ms Dunleavy to assert that the claimant's absence over the respondent's least busy period would be any sort of inconvenience. Second, given that the claimant's daughter would not be going to school over the summer, commenting that the claimant would be bored when her daughter goes to school also makes no sense and was patently wrong. In fact, the claimant's daughter's return to school would have coincided with the claimant's proposed return to work in September. Third, given that context, it also seems odd that the claimant at no point says that she responded in any way to what, by any measure would have been easily countered views by Ms Dunleavy. We consider that, for example had Ms Dunleavy refer to the claimant being bored by her daughter's absence at school the claimant would be bound to have said something along the lines iof that she would not be going to school until September.

77. We find that Ms Dunleavy did not make the comments alleged in the issues at paragraph 4(a)(i) and (ii) above.

78. In relation to the final allegation against Ms Dunleavy, it is asserted that she discriminated against and/or harassed the claimant by "*requesting evidence and explanation as to the claimant's attendance at appointments and supporting that she had ill health for the period of absence 11 June to September 2018 when the respondent was aware of the claimant's diagnosis*" (see paragraph 4(a)(iii) above). Ms Dunleavy accepts that she did ask the claimant to bring whatever documents she had about the proposed 12-week absence to a meeting they were due to have on 8 June 2018. That leaves the question of whether this request amounted to either direct discrimination or harassment.

79. We find that on 6 June 2018 the claimant initially told Ms Dunleavy that she would be off for one or two weeks. The claimant and Ms Dunleavy entered dates of absence in the shared diary. Later that day the claimant was overheard by Ms Dunleavy telling a client, over the telephone, that she would be off until September 2018. That was an apparent change from a 2-week absence to a 12-week absence. Ms Dunleavy's evidence, which we accept, was that she wanted to understand why that was the case. The respondent has the right under the claimant's contract of employment to monitor the employee's time off and reasons for any absence (see clause 7, [57]). Given that at the date this occurred the claimant was not sick, she did not have a sick note and was not off work, and given the change during the course of the day from a two-week absence to a seemingly proposed 12-week absence, it seems to us that the claimant's assertion that it was somehow wrong of Ms Dunleavy to wish to understand what time off was needed and why is unjustified. It was, we find, a reasonable matter for a manager to pursue. The fact that Ms Dunleavy was aware of the claimant's diagnosis is irrelevant, and it is simply wrong to assert that the claimant "*had ill health for the period of absence 11 June to September 2018…".* That assertion is to conflate disability with ill health. As far as Ms Dunleavy knew at the time, the claimant was to have surgery, there would be a recovery period and at some point, the claimant would have a course of either radiotherapy or possibly chemotherapy. Neither the claimant nor Ms Dunleavy knew what the post-operative recovery period would be, what the course of post-operative therapy would be nor what exactly it would entail. On the face of it, in the telephone call with the client overheard by Ms Dunleavy, the claimant was simply asserting that she was going to take 3 months off work without giving the respondent any reason or any evidence supporting that absence, and, in those circumstances, we find that Ms Dunleavy would have asked any employee in the same circumstances, but *absent* disability, for the same evidence and therefore she did not directly discriminate against the claimant.

80. In relation to the allegation of harassment related to disability, we start with the obvious point that the claimant did not wish to be asked about the absence or the reasons for it, largely, we find, that at the relevant date (between 6 and 8 June 2018) she did not actually know she would need that time off. She did not know what treatment and time off she might require until mid-July 2018 (see paragraph 15 above).

81. We turn first to the question of whether the request was related to the disability. The words 'related to' in section 26(1)(a) have a broad meaning and holding for example, that conduct cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — **Hartley v Foreign and Commonwealth Office Services 2016** ICR D17, EAT. We also note that in disability cases, the mere fact that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person will not necessarily mean that it is related to the disability. (see **Private Medicine Intermediaries Ltd v Hodkinson** EAT 0134/15).

82. Given the claimant's disability and the subject matter which gave rise to Ms Dunleavy's request, we are satisfied that in the broad sense, time off at around this period, and the request for information about that, was related to the claimant's disability. That leaves the question of whether Ms Dunleavy's request had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

83. In the present case, given all the circumstances we have set out above, Ms Dunleavy was reasonably exercising her managerial right to enquire as to the basis for the claimant's assertion, which on 6 June 2018 was news to Ms Dunleavy, that she would be away from work for 12 weeks. Ms Dunleavy asked only for any documents the claimant had, she did not require her to obtain evidence, her request was what we may describe as low key. We find that Ms Dunleavy is a careful and thoughtful manager, she was faced with an uncertain set of circumstances and sought to understand what would be happening in the course of the next few months. In that context we unhesitatingly find that the request did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment

84. That leaves the question of effect. We remind ourselves that in considering this question, each of the following must be taken into account: the perception of the claimant; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

85. In **Richmond Pharmacology v Dhaliwal** (above), a case concerning race, Mr Justice Underhill, then President of the EAT, said: '*Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or*

transitory, particularly if it should have been clear that any offence was unintended'.

86. As we set out above, in the circumstances we find that Ms Dunleavy made a reasonable request, in line with her managerial responsibilities, and in accordance with the claimant's contract of employment, for such documents she had explaining the proposed time off, and do not find that the request for sight of such documentation as the clamant possessed to be one which had the effect of violating the claimant's dignity, even taking into account how the claimant was feeling at the time (which we address further below).

87. Finally, we turn to whether the request had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

88. Some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education** EAT 0630/11. Langstaff P held that a tribunal did not err in finding no harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. Langstaff P also pointed out that the word 'environment' means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within section 26(1)(b)(ii) EqA.

89. The meaning of the term 'environment' was also considered in **Pemberton v Inwood** 2017 ICR 929, EAT, where P, a Church of England priest, was refused a licence that would allow him to take up a position as a hospital chaplain because he had entered into a same-sex marriage against the Church's doctrines. The EAT upheld the tribunal's decision that this was not unlawful discrimination or harassment, because a religious occupational requirement exception applied. But the EAT also noted that the tribunal had apparently failed to engage with the question whether the decision not to grant the licence and its communication created an 'environment'. P argued that this could be inferred from the tribunal's findings that the refusal obviously caused him stress, would have been humiliating and degrading for someone in his position, and was a stunning blow. However, the EAT found it hard to see that the tribunal had shown how it found that the requisite environment was thereby created.

90. Although in the present case the claimant asserts that she was asked for evidence on a number of occasions, this was the first time and thus at the relevant time it cannot be said that there was in existence a 'state of affairs' in relation to requesting evidence for time off. It may be that the claimant was upset by being asked, but we have found that this was the first matter she was concerned about (given our findings above), that the request was reasonable in

the circumstances, there is no allegation that Ms Dunleavy's tone or demeanour were in any way unacceptable.

91. We find that there was no 'environment' created or in existence at this time as required by section 26(1)(b)(ii) EqA. In those circumstances the claim on this point fails. Even if we are wrong about that, even though the claimant was upset by Ms Dunleavy's request, given all the circumstances that upset was not reasonable and the claim fails in any event.

92. In short, Ms Dunleavy did not directly discriminate against the claimant because of disability nor did she harass the claimant.

Comments by Sharon Paul

93. We turn now to the allegations against Ms Paul.

94. The Tribunal's assessment of Ms Paul was that as the owner and managing Director of the respondent she was business focused and most concerned with the running of her business. The Tribunal accepted Ms Paul's evidence that she has experience of supporting someone with cancer – her brother. But that fact does not mean she did not make the comments as alleged by the claimant. We have no doubt that every cancer patient's experience is personal to them and it cannot be presumed that if one person deals with the diagnosis by say stoicism and does not mind others making light of the disease, others with the same diagnosis will feel the same.

95. We turn first to the allegations on 6 June 2018. The claimant alleges that Ms Paul said:

    a. Words to the effect of "its not like you're going to die", " what do you need that amount of time off for?" "its only early stages of cancer" and that the Claimant should leave treatment to her doctors and the Claimant should "focus on filling jobs for September";

    b. Words to the effect of the Claimant would be best to get back to the office and questioning "what would you do with all the time at home";

    c. Words to the effect of the Claimant was taking her condition "too seriously";

    d. Words to the effect that it was "no big deal" the Claimant would be forced into menopause at the age of 37 and no longer able to conceive children;

96. On 6 June the claimant's diagnosis was still relatively new and we accept that she was feeling extremely anxious and concerned about an uncertain future. The claimant's evidence was that she was upset by her call with Ms Dunleavy

and when she got home, she called Ms Paul. In her witness statement Ms Paul barely touches on the specific allegations, making a simple denial that "*this was the basis of our conversation*". The claimant's husband states, in his witness statement, that when he got home from work on 6 June, he saw his wife on the telephone, she looked "*very upset*", he says that after the call "*Aggie cried*". This was the call with Ms Paul. In the text messages between the claimant and TJ the claimant says that she was "*so tired of crying today*" and while there is no specific mention of the comments above, the tribunal considers that on balance the claimant was telling the truth about her conversation with Ms Paul.

97. We turn next to the allegations about what was said on 18 June 2018. These are that Ms Paul used:

    a. words to the effect of "*Aggie are you ready to come back yet? I'm having to come in and fill in for you*!";

    b. words to the effect the Claimant was "*lucky to have a free boob job off the NHS*", asking the Claimant if she was happy with her "*new breast size*" and if she was going to have another "*free boob job*" so the other matched.

98. Ms Paul deals with this in a short paragraph in her witness statement. She accepts that there was a conversation over the telephone and says that she and the claimant chatted amicably about the business. She denies she made the alleged comments.

99. In her oral evidence Ms Paul's emphasis was different. When asked about the telephone call on 18 June 2018 she said that she did not "*emphasise*" that she was having to cover for the claimant, which suggests to the Tribunal that the subject of Ms Paul covering for the claimant was discussed, just not emphatically as it were. At paragraph 56 of her statement Ms Paul says that it was the claimant who made the comment about having "*a free boob job off the NHS*". In her oral evidence she rowed back somewhat from this position and said that the comment was made by the claimant, just not made to her, Ms Paul.

100. The claimant references the "boob job" comment in a text to TJ on 19 June 2018 [288l].

101. The Tribunal finds that on balance it is more likely than not that the comments attributed to Ms Paul by the claimant on 18 June 2018 were said.

102. We now turn to the allegation that on 13 July 2018 in a telephone conversation, Ms Paul said words to the effect that the claimant would have a

high libido due to the hormone treatment she received and that Ms Paul "*had a treat for her return to work, a male Polish PE teacher*".

103. Ms Paul strongly denies these allegations in paragraph 38 of her witness statement.

104. The first point to make is that there was to be a meeting on 16 July 2018 at Marshfield school which the claimant and Ms Paul were both going to attend. One of the teachers they were going to see was a PE teacher. We note that in one of the diary entries for 13 July was a proposed meeting between the claimant and one Alena Janikova. The respondent says that this was the female, Polish PE teacher and there never was a meeting or proposed meeting with a male PE teacher. The claimant's evidence was that Alena Janikova was a female teacher, but she was not Polish and there's no reference to her being a PE teacher.

105. On balance we prefer the claimant's evidence about this matter. Given the claimant's nationality and the fact that she was the only person who had contact with Ms Janikova, we accept that she was not the Polish PE teacher referred to and thus that Ms Paul did say that she had " *a treat*" for the claimant as alleged. Given that finding we also find that it is more likely than not that Ms Paul also discussed the claimant's libido as alleged.

106. The final allegations we take together since they touch upon a common issue which is regarding the claimant's absence and her return to work. It is alleged that Ms Paul

a. attempted to contact/contacted the claimant and asked her to return to work on:11th July 2018 by telephone; and

b. attempted to contact/contacted the claimant and asked her to return to work on:12th July 2018 by telephone; and

c. required the claimant to provide evidence and explain her "attendance at appointments and supporting her ill health" on 11th July and suggesting the claimant did not have evidence of her attendance.

107. We have no doubt that there were a number of discussions about the claimant's absence and given all of the findings above we find it more likely than not that the comment at paragraph 106(c) was made.

108. As to the call or attempted calls on 11 and/or 12 July 2018, on the claimant's own evidence she and Ms Paul were trying to speak to each other on 11 July and given that the claimant herself had told the respondent on 9 July 2018 [123] by text that she would "*like to return to work on Monday 16th July*", it is hardly surprising that there were attempts to speak to the claimant

beforehand, and indeed as we know she and Ms Paul did speak on 13 July 2018 to make arrangements for the claimant's return on 16 July 2018.

Did Ms Paul directly discriminate against the claimant?

109. We have said above that Ms Paul was highly business focused. We have no doubt that her intentions in her discussions with the claimant were twofold. First to ensure the smooth running of her business and second to deal with the claimant in a way which she, Ms Paul, felt was appropriate. We do not consider that in making the comments we have found that she did she was treating the claimant any differently to the way she would have treated a comparator. The comments may be seen by the claimant as unreasonable, but unreasonable treatment is not synonymous with less favourable treatment (see **Glasgow City Council v Zafar** [1998] 2 All ER 953). We find that Ms Paul did not directly discriminate against the claimant.

Did Ms Paul subject the claimant to harassment?

110. We turn then to the question of harassment. For the reasons set out at paragraph 109 above, we find that Ms Paul's comments set out at paragraph 4(a) (i) to (iv) above did not have the purpose of harassing the claimant. She was, we find, intending to engage with the claimant in what were clearly difficult circumstances but in doing so in the manner set out she showed a lack of insight, sensitivity and empathy.

111. We then turn to the effect question. As we discussed above in relation to the allegations against Ms Dunleavy, the period in question was a difficult time for the claimant. She had been given a life changing diagnosis, she was uncertain about the course of the disease, the operation, any ongoing treatment and more generally about the future. We are in no doubt that Ms Paul's comments had the effect of violating the claimant's dignity and of creating an offensive environment for her. We stress that we do not find that Ms Paul intended this, but both subjectively it was the case, and objectively the claimant was reasonable in all the circumstances in feeling the way she did. To that end the claim of harassment related to disability is made out.

112. We turn to two final matters. Is the respondent responsible for the actions of Ms Paul and was the claim brought in time.

Vicarious liability

113. At no point did the respondent suggest that it was not or would not be responsible for the actions of either Ms Dunleavy or Ms Paul. Ms Paul's actions which we have found amounted to harassment were clearly undertaken in the

course of employment and if there was any doubt then we find the respondent vicariously liable for Ms Paul's harassment of the claimant.

Time limits

114. The date of the last act complained of which we find amounted to harassment was 13 July 2018. The claim form was presented on 30 November 2018 and taking into account early conciliation any allegation regarding conduct before the 3 July 2018 is potentially out of time. The claimant asserts that the comments made by Ms Paul on 6 June, 18 June, and 13 July are linked so as to be continuing acts or to constitute an ongoing state of affairs as considered in **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, CA (see also **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548, CA and **Aziz v FDA** 2010 EWCA Civ 304, CA). We agree.

115. Further, even if we are wrong about that we would extend time to bring the claims on the basis that it is just and equitable to do so

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Employment Judge Brewer

Date: 1 April 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE