EMPLOYMENT TRIBUNALS

Claimant: Ms Z Lalji

Respondent: Medecho Ltd

Heard at: Watford Employment Tribunal
(Sitting at Aylesbury Crown Court – fully remotely by video)

On: 22 to 26 February and 1 to 2 March 2021

Before: Employment Judge Quill
Members: Mr A Scott
Mr D Wharton

Appearances
For the Claimant: Mr J Cook, counsel
For the respondent: Mr E Macfarlane, consultant

JUDGMENT having been sent to the parties on 24 March 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. EJ Quill apologises for the delay in these reasons being sent to the parties. It is noted that a request for reasons was made by email on 6 April 2021. However, unfortunately it was only passed to EJ Quill on 20 May 2021.

The Hearing

2. The hearing that took place via video over seven days in total. There were two witnesses on the claimant's side; there was the claimant herself and Mr Blair-Reid. There were four witnesses on the respondent's side; there was Ms Alani, Ms Kotarska, Mr Shaban and Mr Karshe. Each of the witnesses gave their evidence based on written statements, two in the case of Ms Lalji and Mr Karshe, and they answered our questions and questions from the other side.

3. We had an agreed bundle of 3,463 pages. Although we were sent a core bundle as well as required by the directions, the parties did not use that core bundle and so we were required to use the main bundle throughout.

4. We had statements of agreed facts which we took into account. There was an agreed list of issues which was in the bundle starting on page 89. It was

prepared, initially, at a hearing in December 2018. We refer to the list of issues as we give our analysis and conclusions rather than reading it out now.

Facts

5. The claimant worked for the respondent as a Recruitment Consultant. The respondent's business model is that it has banks of doctors as its clients for whom it attempts to find work. Generally speaking, these are doctors who might generally work overseas or otherwise outside of the NHS but who are potentially available to spend periods of time working as locums in the NHS.

6. The respondent receives lists of vacancies from various NHS Trusts and goes through these lists of vacancies to potentially match (in terms of dates of availability and qualifications etc) one of its doctors to the vacancy. The respondent then liaises with the doctor and the Trust with a view to reaching a suitable agreement in relation to everything including things like rates of pay, agency commission, duration of the assignment and so on.

7. At the time relevant to this dispute, the respondent had its London office and that was where the claimant worked, and it also had another UK office in Milton Keynes. It also had a significant number of staff working for it in India. The London office typically had less than 10 employees at the times relevant to this dispute and the respondent as a whole had between 60 and 70 employees.

8. Amongst the functions carried out in India was compliance. In other words, staff in India would make sure the doctors (the respondent's clients) had all the necessary clearances and qualifications to work for the NHS in the UK in the specific roles that were identified for them. Each of the doctors in the respondent's database were allocated to just one recruitment consultant. Once the doctor was allocated to that one recruitment consultant then that particular recruitment consultant would always be the person who was credited with what the respondent earned from that doctor's placements, regardless of whether the specific assignment which generated the earnings was negotiated by that consultant or by a colleague. Therefore, when we refer in these reasons to "the claimant's doctors" or to "her doctors", that is what we mean. In other words, a doctor allocated to her by the respondent. Some of those doctors may be people that the claimant recruited herself, (including people that she brought to the respondent when she joined) and others were allocated by the respondent on a rotation basis. The Directors' PA, Ms Kotarska, was the person who handled that and sought to allocate new doctors fairly between staff (and, for obvious reasons, the recruitment consultants were keen to be allocated new doctors).

9. The claimant commenced work for the respondent in September 2008. She had continuity of employment until 22 February 2018. The hours of work which were agreed were Monday to Friday, 9am to 6pm with one hour for lunch. So that works out as 40 hours per week. Her basic salary was agreed. For the times relevant to this dispute that basic salary was £29,000 per year. In addition, there was an entitlement to commission. We do not accept that this was a purely discretionary arrangement that could be cancelled at any time by the respondent, or that it could be paid or not paid at the respondent's sole discretion. There was a specific formula and all the consultants,

including the claimant, expected to be, and were in fact, paid in accordance with the formula. The commission arrangements had changed in 2009 but at the times relevant to this dispute the earnings generated for the respondent by the claimant's doctors had to exceed £5,000 in a given month and provided they did so, then a commission payment would be calculated and paid to her. There were also bonus arrangements

10. In relation to sick pay, the original agreement between the parties was that the claimant would have an entitlement to 11 sick days per year. This was to be calculated on the basis of a rolling 12-month period. This original agreement was not in the bundle. The claimant knows that her copy was lost in a flood. The respondent, having been chased for a copy by the claimant since 2015, is apparently unable to locate its version of the document. However, in the grounds of resistance and the list of issues, the respondent concedes that 11 days is what was agreed in initially, albeit the respondent's case is that it was later changed.

11. The respondent alleges that in around 2010 new terms and conditions were issued which removed entitlement to sick pay and replaced it with an arrangement which was entirely discretionary, and which was for a maximum of up to eight days per year, if the discretion was exercised at all. The claimant denies receipt of the contract containing this variation. She states that she did not agree to it and she did not sign it. The respondent has not provided us with a signed copy and has not provided us with any covering letter or covering email in relation to the alleged supply of this 2010 alleged contract to the claimant. We are not satisfied on the evidence that the claimant received this 2010 version. We are not satisfied that the respondent validly varied the terms and conditions. The purported contract was 29 December 2010. Our finding is that the earlier version of the contract, the one that entitled the claimant to 11 days sick pay per year, is the one that remains in force.

12. The respondent did supply copies of three emails from prior to 29 December 2010, those were three emails which asserted that the claimant or staff generally were *already* not entitled to any automatic full pay for sickness absences. The latest of the three emails was dated 16 November 2010. The other two emails were earlier than that, but the dates were not known.

13. The oldest of the emails (at least the one lowest down in the trail, and so we infer it is the oldest) stated that sick pay was only discretionary, and, amongst other things, it asked everybody to reply by 5pm, on whatever day the email was sent. No reply from the claimant has been supplied to us by the respondent. Even if it was sent to her it would be ineffective to vary her contract in the absence of her consent and there is no evidence that she consented. The email does not purport to be a variation of contract or a notification of a proposed variation of contract. It simply an assertion (and we have found it to be an incorrect assertion, in the claimant's case) that there was no existing contractual entitlement to sick pay.

14. The second oldest of the emails said that absences had reached an unacceptable level and that for every period of absence there would be a back to work interview during which a decision would be made as to whether the days of purported sickness absence would be deducted or would be

treated as sickness absence and therefore deductions made to pay, or else treated as holiday. The email said that in most cases, in the absence of a doctor's note, the absence would be treated as holiday and the email repeated the assertion that contrary to the claimant's actual contractual rights, her sick pay was in the absolute discretion of the directors. Again, this did not vary the claimant's contract it simply made an incorrect assertion.

15. The 16 November 2010 email stated that failing to contact the respondent by 9.10am on a particular day if running late or if going to be absent from work that day would be treated as unauthorised, unpaid, absence.

Claimant's attendance and medical records in 2016 and 2017

16. The respondent's attendance records were kept by Ms Kotarska who was a witness in the hearing and who is the personal assistant to the directors. The respondent's attendance records were not disclosed to the claimant when they should have been as per the case management orders. In fact, they were not disclosed until after Day 3 of this hearing which was after Ms Kotarska had given her evidence. The absence records were on an electronic drive and they were accessible to the directors at all relevant items. The absence records were kept on spreadsheets, one for each year with rows for each member of staff.

17. As can be noted from the three emails that we described a moment ago, the directors did pay close attention to staff absences, to lateness and to attendance and we are sure therefore that they reviewed these electronic spreadsheets regularly as a matter of routine. They also had the opportunity to refer to them whenever they wanted to including whenever any issue in relation to the claimant's attendance, or the claimant's absence, arose.

18. Prior to Day 5 of the hearing the parties' representatives agreed some facts from their readings of the attendance records just mentioned. We are grateful to the parties for doing that and that saved the tribunal having to look through the documents itself.

19. Based on the agreed facts, for the period Monday 9 May 2016 to Friday 13 May 2016, which is five days, a note is made that the claimant was signed off sick by a doctor with a gastro problem. The respondent treated those days as holiday.

20. On 16 May 2016, the claimant was in work from 8.38 to 12.23 and, again, she was signed off by a doctor with a gastro problem and that was treated as a half days holiday by the respondent. On Tuesday to Thursday 17 to 19 May 2016, similarly, the claimant was signed off by the doctor with a gastro problem, but the days were treated as holiday. The fit note signed by the GP for these two periods in May 2016 is in the bundle (there are two, 2.12 and 2.13 in the bundle). One of them covers 9 and 10 May and the other one Monday through to Wednesday 9 to 11 May.

21. The claimant's medical notes in respect of the period May 2016 are also in the bundle.
    a. On 10 May the report is that the claimant had had a lot of chilli at a restaurant and she had abdominal pain. It stated that she was

prescribed omeprazole and that she had been taking Imodium which, of course, is an over the counter medicine for diarrhoea.

b. The following week, 16 May, that was dealt with by telephone.

22. The claimant had further interactions with her GP later in May and then also in June and September 2016 but all of those are fully redacted and therefore are not matters that we can take into account when assessing any of the matters that we have to assess including whether the claimant is disabled.

23. According to the claimant's impact statement, the claimant states the symptoms did not improve after May and she says her digestive problems got worse. The claimant suggests that after May there were some occasions when she had diarrhoea at the office, and she was unable to make it to the bathroom in time resulting in significant embarrassment to her.

24. The unredacted parts of the medical notes do not support the suggestion that the claimant was going to her GP between May and November about such a problem. Furthermore, by letter to the claimant's GP dated 16 May 2017 - so the following year - a consultant physician and gastroenterologist reported that the claimant had presented on 15 May 2017 with a six-month history of epigastric pain. In other words, the consultant did not decide, having seen the unredacted GP notes that an issue had commenced in May 2016 and had been ongoing from that date for 12 months.

25. Furthermore, in the claimant's impact statement, the claimant refers to having reported frequently to David Blair-Reid, the Operations Manager, that she was having abdominal pain and was having to leave the office. Since Mr Blair-Reid only commenced working for the respondent in October 2016, the issues that the claimant is recalling cannot have been prior to then.

26. So, for the reasons that we have just mentioned, we are not satisfied that for the period May 2016 to the end of October 2016 the claimant was already suffering from the ongoing effects of the impairment which we are about to describe. We do accept that there were one or more occasions on which the claimant had fecal incontinence while at work, but we do not think that the first instant was earlier than October 2016 and it is possible that the claimant was thinking of incidents that took place in November 2016 or slightly later than that.

27. Our finding is that if there had been a regular pattern of incontinence between May 2016 and October 2016, then it would have been referred to in her GP notes and/or the consultant would have mentioned that the issues had been ongoing for longer than six months (as of May 2017) and the claimant would have recalled reporting to the respondent prior to Mr Blair-Reid's employment that she was having gastric problems. (We are not ignoring that the claimant's absence records report that for 8 and 9 September 2016 she did inform Ms Kotarska that she was having some stomach problems).

28. Commencing in early November 2016, the claimant began to have regular and frequent diarrhoea. She reported to her GP that as of 10 November she had been having a problem for about four days. She was still having symptoms on 14 November as well. A sick note was supplied to the respondent, dated 14 November) covering the period 3 November to 14

November.

29. From 3 November onwards the only November days which the claimant attended work were full days on 15 and 25 November and a half day on 28 November 2016. (She was also in on 1 and 2 November 2016).

30. On 15 November the claimant worked through her lunchbreak and she left work an hour early because she was having stomach problems and she informed the respondent of that.

31. As per the agreed facts, in December 2016, the claimant only attended work on one date: that was 2 December and was a half day. She then attended work on five days in January 2017 each of which was for a half day.

32. Other than the first fit note from November 2016, the remaining fit notes for November, December and January refer to other ailments without superficially referring to abdominal pain or diarrhoea. The next fit note to specifically refer to such symptoms is the one that is dated 6 February, that refers to an absence from 3 through to 7 February 2017.

33. All the remaining fit notes in the bundle and sent to the respondent refer to something similar to that.
    a. The next note covers the period 16 to 24 February. There is then a note covering the period 13 March to 21 March although that particular note was based on an examination of 20 March and so the respondent did not have it until on or after 20 March.
    b. There is then a series of consecutive notes and thorough those notes the claimant is continuously certificated as being unfit for work from 13 March until a note which is dated 28 November and covers the period 14 to 30 November 2017.
    c. That was the last fit note which the claimant supplied to her employer, the respondent. We do note however that according to the transcript of the GP notes as per the bundle, the claimant was also issued with a fit note which said that she was not fit for work either for the -period 1 December through to 31 December. Again, the diagnosis for that one was abdominal pain.
    d. All of the fit notes with one exception state that the claimant was not fit for work at all. The one exception is the note dated 18 January which covers the period 16 through to 18 January 2017. It is the one which refers to a chest infection and this document states that the claimant might be fit for work taking account of the advice contained in the note and that advice was for workplace adaptations being, “PT has been working from home”. (Our finding is that PT means patient.) Given that the note is dated 18 January and said to cover a period which ends on 18 January, that note is not suggesting that the claimant is fit to work only from home after 18 January; rather it is saying that she had been fit to work only from home for the few days ending on 18th.

34. The claimant attended work for seven days in February 2017, each of which was a half day. She attended work on five different days in March 2017. One of those was marked as a full day but, in fact, on that particular day the claimant arrived at 11am. All the other days in March were treated as half days. She attended work for one half day in April and one-half day in May.

Those were the only days which the claimant attended to office to do any work after 3 November 2016. The attendance/absence informatio does not necessarily record time when the claimant very briefly attended the office purely to supply a sick note and then left again.

35. The claimant's GP's surgery did not initially recognize that there might be an underlying medical condition which was causing the claimant's diarrhoea and her absences from work. The 18 January document stated specifically that there was no clear reason for the claimant to stay off work and that the fit note would not be extended anymore. However, the surgery did eventually come to the realisation that a referral to the hospital should be made.

36. On 3 February 2017, the GP noted that the claimant had not been feeling well for about three months and that she had generalized abdominal pain and she had constipation alternating with diarrhoea and she had suffered from weight loss. The GP noted that the condition had no relation to food. The GP noted that the condition looked like it might be Irritable Bowel Syndrome, but it was appropriate in accordance with proper professional guidelines to do further tests so that other conditions might be ruled out before settling on the final diagnosis.

37. A referral for a scan at hospital was made. In due course, following the scan, the claimant was seen on 15 May by the consultant and this led to the letter that we mentioned above. This letter mentioned that there was a six-month history of epigastric pain and that the pain was occurring on a daily basis; there had been a change in the claimant's bowel habit and there was trouble with some diarrhoea associated with urgency and with episodes of incontinence. The consultant noted that this had become so severe as to limit the claimant to working from home. We acknowledge - of course - that in making the comment about working from home, the consultant is reciting information based on what the claimant had told her. Having referred to a number of medications which the claimant was taking in connection with her condition, the consultant also stated her opinion that the symptoms were due to Irritable Bowel Syndrome and gastroesophageal reflux.

38. Further tests were scheduled by the consultant and further medication prescribed. The consultant's letter contains no suggestion that the symptoms were likely to come to an end in the near future. It is not expressly stated in the letter, but our finding is that the consultant was of the opinion that as of May 2017 the condition was likely to last for a significant further time and our inference that it was likely to last for at least a further six months and probably longer. In other words, taking her up to November 2017, being 12 months after the onset of this particular impairment in early November 2016.

39. The GP was also of the view - as of 3 February 2017 - that the claimant probably had Irritable Bowel Syndrome and, based on that assessment, our inference is that the GP was also not expecting the impairment to clear up promptly. It is always the case when a condition has not yet been definitively identified that potentially further tests might uncover some information which could lead to the symptoms being quickly treated and quickly brought to an end. But our inference is that both the GP and the consultant thought that the more likely prognosis was that the claimant had Irritable Bowel syndrome and that she was going to have symptoms that would last for probably years,

rather than months, into the future.

40. In fact, as a result of the further tests, the consultant had recommended and the ongoing investigations, it was in fact eventually noted that the claimant had some polyps. These were identified specifically on 28 July 2017.

41. On 17 August 2017, surgical removal was planned and it was noted that following the surgery the claimant would need to be kept under surveillance pending potential recurrence in the future of the polyps. On 8 September 2017, three polyps were removed with the recommendations that there be a further procedure one year later. A further seven polyps were removed in October 2018. After the 2018 procedure the claimant was still to remain under further surveillance.

42. The ongoing hospital reports confirmed the diagnosis of Irritable Bowel Syndrome made by the GP in February and confirmed by the consultant in May. Those earlier assessments in fact did turn out to be correct although of course, it was known as early as February that it was necessarily going to be correct.

43. In October 2019, the claimant's GP wrote a short letter for the employment tribunal which stated that in the GP's opinion as of that date the claimant was suffering from chronic gastritis, Irritable Bowel Syndrome and frequent diarrhoea and abdominal pain and discomfort. The letter reported that the claimant would have difficulty reaching toilets that were situated a long way away from her and gave the doctor's opinion that the claimant's abdominal diseases had a detrimental and disabling impact on the claimant's life and meant that she was only able to work from home.

The workplace and the duties

44. In the respondent's workplace, the respondent shares the fifth floor of the building with other tenants. There are some toilets accessible on the fourth floor of the building but on the fifth floor itself, where the respondent's office facility is, the nearest toilets to the claimant's desk are some 40 or 50 meters away from the desk.

45. We had some limited information about the assignments of the claimant's doctors and the earnings from those assignments in the bundle. Witnesses were asked to compare documents in the bundle and to use those to decide whether the respondent's earnings from the claimant's doctors were higher during certain months in 2015 or the corresponding months in 2017. The witnesses all agreed that documents showed that the earnings were higher in 2017. Based on the names of the doctors in the attachments to the claimant's pay slips we inferred that the claimant's earnings during 2017 came from a total of seven different doctors although that seven had numerous assignments between them.

46. There was a factual dispute between the parties which can be summarised as follows: On the claimant's case whenever any of the doctors (identified as per the pay slips for 2017) started an assignment, that was the end result of considerable work on the claimant's part. She had to, she claimed, locate a suitable locum vacancy for that doctor and negotiate the arrangements with

the Trust and liaise with the doctor about the assignment and rate, and then liaise with the doctor and colleagues in relation to compliance issues, and do communication and other work to finally get the assignment fully approved and up and running. After the assignment was up and running, the claimant said that she would then potentially continue to liaise with the doctor to keep things running smoothly and, in particular, she would liaise with the respondent's Finance Department to ensure that the doctor's timesheets had been submitted and were processed (resulting in the doctor's being paid and, of course, the respondent's being paid.) On the claimant's case the only thing that she could not do in 2017 – while she claims to have been working from home - was to actually make appropriate entries onto the respondent's computer systems. On her case she was fully working from home other than that. It is common ground that the respondent's computer systems could not be accessed by her if she was working from home during 2017.

47. On the respondent's case almost the entirety of the claimant's account is disputed. On the respondent's case, nobody asked the claimant to do any work at all and therefore any work whatsoever that the claimant did was entirely voluntary, they claim. At the very least, it was work done of her own initiative and without the respondent's knowledge or express consent. The respondent says that any work that the claimant did, if any at all, was minimal and was simply along the lines of passing on messages from, for example, the doctor to, for example, the Accounts Department. The respondent says that in relation to any new assignments or the renewal of existing assignments for the claimant's doctors, if the claimant played any part at all (and they do not admit that she did play any part) then her role was minimal in that it was the doctor who directly liaised with the hospital and made all the necessary arrangements and once all the arrangements had been completed the doctor simply told the claimant so that the claimant could pass a message on to colleagues so that the respondent's records could be updated.

48. More generally on the respondent's case, while the claimant was away from the office after 3 November 2016, all of her doctors were being looked after by colleagues and, in particular, by Tina Alani. Ms Alani was a witness in this hearing. She is another senior recruitment consultant. She sat near the claimant in the office (when the claimant was at work) and her duties were generally similar to those of the claimant. On the respondent's case, there was what it called a "buddy system". On its description, if any of the consultants were out of the office for any reason then a buddy in the office would cover their work for them but without being paid any of the commission for any transactions which they did for the other person's doctors.

49. Our findings in relation this this factual dispute are as follows:
    a. The claimant alleges that it is particularly significant that her earnings from her doctors in July were the highest for that month in the company, higher than any of her colleagues and she also said it was significant that her doctors earnings in 2017 were higher than her doctors earnings in 2015.
    b. Neither of these two factors are entirely inconsistent with the respondent's version of events. However, if it was true that it was Ms Alani who was placing the claimant's doctors and negotiating the assignments for them then we would have been expected to be taken to some contemporaneous documentary evidence to demonstrate that.

We were not taken to any such contemporaneous evidence.

c. Other contemporaneous evidence is all far more consistent with the claimant's account than it is with the respondent's account. There is evidence of the claimant liaising with her doctors in relation to potential placements and then liaising with the staff in the office seeking particular types of vacancies. In other words, vacancies that would be suitable for her doctors.

d. There is evidence of the claimant being congratulated by her line manager, Mr Blair-Reid, in connection with what he seemed to regard at the time as successful efforts by the claimant in generating income for the respondent. There is also the evidence of the claimant asking Ms Alani by email to update the system for her. In other words, to make certain entries onto the respondent's computer records to reflect the work that (we find) the claimant had done, namely negotiating contracts for her doctors.

e. There is also evidence in the bundle that the directors of the respondent knew or believed that the claimant was working from home. For example, there is evidence of Ms Alani telling the claimant that the bosses were happy with her. We are satisfied that 'bosses' was a reference to the directors and that this September 2017 communication meant that as late as September 2017 the directors were happy with the work that the claimant was doing while she was working from home. She was getting good results for the company.

f. So, our finding is that in conclusion that in the period commencing 3 November 2016 and concluding until shortly after 20 October 2017, the claimant, with the knowledge and consent of her line manager, Mr Blair-Reid, and the knowledge and consent of the respondent's directors, Mr Shaban and Mr Karshe, was doing some valuable work for the respondent while she was at home.

50. It was not proven to our satisfaction that the claimant was working 9am to 6pm with an hour for lunch during this period. It was not proven to our satisfaction that she was doing 40 hours per week. In fact, there is no direct evidence, even in the claimant's account, about how many hours per week she was working. However, the work that she was doing was not negligible. Her line manger had agreed that she would work from home. Her line manager had arranged for her to be sent job vacancies at home so she could match them to her doctors. When doing work at home the claimant was using her own personal broadband connection and her own personal email account and her own personal mobile phone. The claimant liaised frequently with Ms Alani as well as with Mr Blair-Reid and she also liaised with the Compliance Departments in India and the respondent's Accounts Department.

51. So, our further finding is that the respondent's suggestion that its directors were unaware that the claimant was dosing this work is false. They were fully aware of the fact that the claimant was doing some work. We accept that - like this tribunal - they had no direct evidence about the number of hours of work which the claimant was actually doing. However, it was the respondent's obligation to ensure that such records were maintained. The directors knew the claimant was using her personal email address because they saw correspondence from that address including correspondence sent to doctors and correspondence sent to the respondent's Accounts Department by the claimant forwarding timesheets from doctors which she

had received into her personal email account. The directors were also naturally in decision making whenever a director level decision was required, such as approving payments on a discretionary basis to a doctor (such as paying for compliance rather than making a doctor pay for it). The directors could see from those email trails what work the Claimant was doing and what involvement the claimant was having in negotiating with particular doctors and on behalf of particular doctors.

Arrangements for working from home

52. Ms Kotarska, the personal assistant to the directors, is an extremely hardworking and diligent employee, there is an extensive series of text messages between her and the claimant, including messages which show that the directors have asked Ms Kotarska to pass on a message or a query to the claimant. Ms Kotarska did not tell the directors about every single message that she received from the claimant but, in general terms, whenever there was information about the claimant which Ms Kotarska thought needed to be passed on to the directors she did so and we are satisfied that every relevant piece of information that was in Ms Kotarska's possession was also in the possession of the directors as well.

53. The directors we find, run the respondent by keeping the staff under reasonably close supervision. We accept that they were not present in the London office all of the time, and perhaps as little as 50 per cent of the time. However, they kept an eye on the business including noticing if people turned up more than 10 minutes late or of there was any unauthorised absence.

54. The directors were aware that the claimant was signed off sick by her GP and supplying fit notes. They were also aware that she was not being paid basic pay and they were aware that she was doing at least some work while she was at home. The directors were aware that the reasons for the claimant's absences included stomach problems and diarrhoea and they were aware that she had been off sick subject to the very small number of days mentioned above, continuously for a period starting on 3 November 2016. The directors were aware of the physical layout of the building in which the respondent's offices were placed and were aware of the distance (whether they measured it or not), and of long it takes to walk, from the claimant's desk to the toilets. They were aware, or at least they ought to have been aware, that there were only two cubicles in the female toilets on the fifth floor.

55. The claimant did not reach a specific agreement with Mr Blair-Reid as to the hours of work that she performed while she was at home. She reached no specific agreement about whether or not she would receive basic pay or whether she would receive anything other than her commission payment and bonus. Mr Blair-Reid did not know what the claimant's basic pay was and he left the money side of things to the directors. The claimant did not seek to discuss her basic pay with Mr Blair-Reid. The claimant was aware that it would only be the directors who could authorise basic pay to be paid to her while she was not working in the office. The claimant was aware that the view of the directors was that she would not be entitled to basic pay if not attending the office. That was the reason the claimant obtained the fit notes from her GP. She obtained the fit notes and submitted them to the respondent because she was genuinely unable to go to the office due to the

ongoing effects of her diarrhoea and incontinence. In particular, her symptoms made it difficult for her to be sure that she could travel from her home address to the workplace without suffering from incontinence during the journey. Furthermore, her condition made it impossible for her to be sure that she would not suffer incontinence during the day and if she did feel the urgent need to use the bathroom that she would be able to safely get from her desk to the female toilets in time.

56. The claimant knew that if she did not attend the office she would be marked as absent in the attendance record maintained by the respondent and that in turn this would mean that she would receive no basic pay. The claimant was aware that if she submitted sick notes then the respondent would pay her at least her entitlement to SSP. She was also aware that if she earned commission while working from home then they would pay that to her too.

57. The claimant was aware from previous communications sent by the directors, that absence without a certificate might not be paid. In May 2016 Ms Kotarska had notified the claimant that the claimant had only 10.5 days annual leave left and therefore the sickness absence for May 2016 could potentially be taken as absence for which SSP would be paid instead. In the event, it was decided that the May 2016 absence would be treated as annual leave. We note it was put to the claimant during cross examination that the fact that she had been paid normally from May 2016 meant that she had used during that period, some or all of her entitlement to full day's pay for sickness absence. However, that is not what happened. Her entitlement to sick leave at full pay was not partially used in May 2016.

58. During her absence the respondent asked the claimant how much work she was doing at home. This was a question which the directors wanted to have answered. Around June 2017, the claimant had a detailed conversation with Mr Karshe (one of the respondent's directors) about her absence and the reasons for her absence from the workplace and her medical symptoms and the things that she was doing at home

59. One of the reasons the respondent asked the claimant was how much work she was doing at home was that the respondent wanted to consider whether it make arrangements so that the claimant was able to fully access the respondent's computer systems while she was at home. As mentioned above, rather than directly assessing the computer systems she was having to ask somebody in the office, usually Ms Alani, to add details of bookings onto the computer system. A more efficient arrangement might have been for the claimant to have direct access to the computer systems so that she could add the booking arrangements onto the computer system just like she would do if she was in the office (and like other consultants were doing in the office).

60. Mr Shaban is the director who deals mainly with the IT side of things and it was Mr Shaban who had overseen the arrangements so that the India office could communicate easily with the Milton Keynes and London offices. According to Mr Shaban's oral evidence, when he looked into what arrangements would have to be made so that the claimant could have full access from home to all of the respondent's computer systems, he found out that the cost would be £12,500. He told us that it was because of this the

respondent decided it would not be appropriate to spend this amount of money to enable the claimant to have full access to the computer systems from home. He said that the respondent took into account amongst other things that, according to him, the claimant was only submitting short-term sick notes and was expected to be back in the office shortly.

a. There are a number of difficulties with Mr Shaban's evidence on this point. For one thing the claimant was by now submitting sick notes that were lasting for around one month at a time and, in any event, by June 2017 the respondent was aware that the claimant had submitted sick notes for the vast majority of the period from 3 November 2016 onwards, and hardly been able to attend the office at all after that as a result of her medical condition.
b. Secondly, the information about enquiring into arrangements to be made to give the claimant access to the computer system at home and how much such arrangements would cost, is not information that was included in the written statement nor is given orally. It was not something in the pleadings, or list of issues or the responses to the claimant's solicitor's letters or in the grievance outcome. The position generally maintained in those documents was that the claimant was not working from home and that nothing had been raised with the respondent about the claimant potentially wishing to work from home or actually working from home.
c. Thirdly, there are no contemporaneous documents to support Mr Shaban's account in relation to the cost or the apparent decision not to incur the cost. There are no board minutes produced; there is no email traffic between himself and his co-director or anybody else discussing the hypothetical decision which he described to us. There are no quotes or estimates or any correspondence at all between him and any third party in relation to the arrangements.

61. We do accept that Mr Shaban thought about what would be required in order to give the claimant full access from home to the respondent's computer systems and we do accept that a decision was made by the respondent that they would not make this arrangement. It is quite possible - and indeed quite likely that - the respondent decided it was a cost that they did not wish to incur. However, we are not persuaded on the evidence that the actual cost would have been £12,500. That is a particularly round number and the first time that it was mentioned was in oral evidence in February 2021. We also not that on his own account Mr Shaban did not seek detailed expert guidance but he relied on a phone call which he made to BT and on his own opinion about what might be required.

62. In any event, the respondent decided that the existing arrangements would continue. The Respondent decided that the claimant would remain working from home without direct access to their systems, and would contact the office whenever she needed somebody in the office to make entries onto the respondent's system. The respondent decided - presumably – that this was a more cost effective method of having the work done than of making the changes to allow the claimant to directly access the computer systems from home. A factor in their thinking – presumably – was that the Claimant was already generating income with the current method. (We say "presumably" because the Respondent denies that the Claimant was working from home.)

63. In around July 2017 there was a period in which the claimant was not working. This is a period in which she travelled to Canada to see her mother. To the extent that the respondent states that this trip demonstrates that the symptoms of the claimant's conditions were not something that affected the claimant as significantly as the claimant has said, we reject the respondent's arguments. The claimant travelled only after obtaining medical advice that she could do so and only after making arrangements with the airline so that she could be seated appropriately on the flight. The claimant wished to travel to see her mother who was ill at the time and the claimant was willing to undertake the arduous journey for that particular reason to the extent that the respondent argues that the claimant was not working while in Canada, we do agree with that. However, we do not agree with any suggestion, if there is one by the respondent, that this might have been an unauthorised absence. Ms Kotarska during her oral evidence stated that she recalled the claimant did notify the respondent of the proposed trip.

64. Prior to going to Canada, the claimant had made numerous bookings for doctors such that during July 2017 her doctors earned more for the respondent than the doctors of any other consultant.

65. On the claimant's return from Canada the previous arrangements resumed. In other words, the claimant worked from her home using her own email account, her own mobile phone, resumed making bookings for her doctors and liaising with those doctors and with the NHS Trusts as well as internally with the respondent's other colleagues. The claimant had had a surgical procedure on 8 September. The claimant did not work on 8 September, but she did resume her work activities shortly afterwards.

66. The claimant continued to get paid commission that she was due up to and including September 2017. The claimant has suggested that for the period while she was working at home the commission arrangements should be that she gets commission calculated on the entire earnings for her doctors. In other words, not merely the sum that is in excess of £5,000 per month. The claimant's argument in her evidence was that even if this threshold was a reasonable one during time she was working on the respondent's premises (when the Respondent was incurring overheads for her work by providing a desk in the office), she was working from home during this period in 2017 and therefore there should be no such threshold. The claimant does not suggest that she actually reached any such agreement with the respondent. Our finding is that there was no such agreement with the respondent and commission arrangements were not varied for the period when the claimant was working from home. Subject to that issue the claimant does accept that the commission that she was paid for the period up to and including September 2017 was correct.

Events after the Claimant appointed solicitors

67. In October 2017, the respondent received a letter dated 20 October from solicitors acting on behalf of the claimant. The letter included comments that stated that the claimant was a disabled person and that there was disability discrimination and that the claimant was not receiving the National Minimum Wage. The allegations were made in good faith and the allegations represented the claimant's genuine opinions. The claimant had now received

legal advice. Prior to this letter the claimant had not sought to challenge the respondent about the fact that she was not being paid basic pay or that she was not receiving the National Minimum Wage or that there should have been adjustments / arrangements made so that she could work from home more fully and easily than she was actually doing.

68. On receipt of the letter of 20 October the respondent took several steps. The respondent decided that from now on the claimant would not receive commission in relation to her doctors and the respondent decided that from now on she would not be sent details of new job vacancies which the respondent received. In other words, the claimant would not be supplied with this vital information and therefore would not be able to make new bookings for her doctors based on these new vacancies.

69. The respondent also decided that the claimant's colleagues would contact the claimant's doctors and inform them of the names of particular staff who would be dealing with them from that point on. At this time, initially at least, the emails to the doctors and hospitals stated that the claimant was absent and that therefore the colleague was only temporarily covering the absence. However, we make two observations about this.
    a. Firstly, on the respondent's case, this was the situation that had supposedly existed ever since November 2016. In other words, according to them ever since November 2016, according to them, the claimant's doctors had already been covered by colleagues and arrangements had already been made for that to happen. However, there are no emails to the Claimant;s doctors about arrangements to cover the Claimant's absence for the period after 3 November 2016. The onlty emails are those sent after the respondent received 20 October 2017 letter. The emails in the bundle after 20 October 2017 letter evidence the respondent's staff stating that they were going to be looking after the claimant's doctors.
    b. Secondly, on the Respondent's case, the previous arrangement had been that the claimant would receive commission on those doctors regardless of whether it was she or (as the respondent claimed was always true),a colleague who had made the particular booking. This is an important plank of the Respondent's argument that the Claimant was not working from home. That is they say there was no inconsistency between her being paid the commission and the Respondent's position that she was off sick and not working. However, having received the 20 October letter, the Respondent decided that the claimant would no longer receive commission in relation to her doctors, even though, according to them, the situation did not change. Ie according to them, the Claimant's colleagues had already been making the bookings.

70. Because of the actions the Respondent took, after 20 October 2017, the Claimant was unable to make new bookings, and earn commission for such new bookings. She was also not receiving payments in relation to bookings that she had previously made. These two decisions were a direct response by the respondent to the solicitor's letter dated 20 October.

71. The respondent arranged for two letters each of them signed by Mr Karshe, to be sent. One letter went to the claimant's solicitors and stated that the allegations in the solicitor's letter would be treated at a grievance and the

other letter went to the claimant. The letter to the solicitors, dated 24 October, as well as containing general denials of the assertions made, stated as far as the respondent was concerned, the claimant was not working at home and if she was doing anything at home, then this would potentially constitute unauthorised use of data or confidential information and that the respondent would be looking into this matter and that the respondent would potentially seek legal advice over it. These comments were not made in good faith because the respondent, including the two directors as well as their personal assistants and as well as the operations manager and as well as their Compliance Departments and as well as numerous other colleagues, all knew full well that the claimant had been working from home with the knowledge and consent of the respondent.

72. The letter sent to the claimant, dated 27 October, said that there would be a grievance meeting at Costa Coffee. This letter was not sent in good faith because Mr Karshe knew that the claimant - if her grievance was to be discussed thoroughly - would be giving information about diarrhoea and incontinence. Mr Karshe stated in his evidence that he knew the coffee shop well and he was confident that it would be possible to find a secluded and quiet area within the coffee shop. However, he did not claim that he had made a particular arrangement with the shop to book a private area and nor did he suggest in his letter to the claimant that the meeting would only proceed provided a private area could be found. We are satisfied, on the balance of probabilities, that the reason for choosing a coffee shop for the proposed meeting was to increase the chances of the claimant's not attending the meeting at all or, alternatively, making it more difficult for her to speak frankly about the full effects of the medical condition and the full reasons that she was saying that she needed reasonable adjustments should be made.

73. There was a letter from the solicitors dated 2 November 2017. In it, the claimant rejected the proposed meeting with the director in the coffee shop and the letter also set out allegations of victimisation clearly and unequivocally. The allegations of victimisation were made in good faith and represented the claimant's genuine opinion.

74. Following the 2 November letter, the respondent decided to inform the claimant that her grievance would be dealt with by Mr Blair-Reid and it also agreed that the meeting would not take in the coffee shop but would instead take place in the same building as the respondent's office, but on a different floor. Mr Blair-Reid did not want to deal with the grievance, but he was instructed to deal with it. Mr Blair-Reid decided to make contact with an HR provider called Deminos, that is the same provider which has continued to represent the respondent since then including during the defence of these proceedings.

75. The claimant was notified of a proposed meeting date of 1 December 2017. By letter dated 30 November the claimant, via her solicitors, objected to Mr Blair-Reid being the person to hold a grievance meeting and it was suggested he was not sufficiently independent or sufficiently experienced and it was stated that emails between him and the claimant would potentially form part of the argument that the claimant wanted to make to demonstrate that she had in fact been working.

76. The respondent's invitation letter to the grievance meeting did not say that the meeting would take place in the claimant's absence; it said that the claimant should notify the respondent if not attending. The 30 November letter did do that.

77. There was no specific response immediately form the respondent to the 30 November letter. Based on advice which was received from Deminos on 1 December, the respondent decided that the meeting to be held by Mr Blair-Reid would proceed in the Claimant's absence. Mr Blair-Reid prepared an analysis of the documents, he thought relevant to the grievance letters 20 October and 2 November and he identified particular topics to be discussed.

78. The respondent sought advice. Commenting on a draft response sent to it, Deminos made clear to the respondent that the outcome letter should be detailed and should not simply say in response to particular allegations that, for example, "the allegation is rejected". The Deminos advice made clear that the letter should give some reasons as to whether any factual assertions were true or false and whether the grievance was upheld partially or rejected.

79. Mr Blair-Reid had some input into the final outcome letter. However, he did not draft the final version himself. The final version of the outcome letter was prepared by Mr Karshe and the signatory was to be Mr Blair-Reid. The final version, prepared after Demonis' comments on the draft, was still extremely brief. For almost all the allegations, it simply said either "rejected" or "completely rejected" without giving any particular reasons as to the respondent's position or commenting specifically on what the claimant had said.

80. On around 8 January 2018, Mr Karshe asked Mr Blair-Reid to sign the final version so that it could be sent out. At first Mr Blair-Reid said he was not comfortable doing so. Mr Karshe said that the contents of the outcome letter were appropriate and that it was appropriate for Mr Blair-Reid as the named decision maker to sign the letter. Mr Blair-Reid read and signed the letter which was then sent out in his name. The claimant received it shortly after 8 January 2018. The letter stated that the claimant could appeal a grievance outcome is she wished to do so. The claimant did not do so.

81. Through each of October, November and December the claimant received zero pay other than a small PAYE rebate. After 20 October 2017, because of the lack of information about jobs from the respondent, the claimant was not able to make any new bookings, but she did attempt to contact her doctors to liaise with them.

82. Although the claimant did not appeal in relation to the grievance outcome she did not tell the respondent that she agreed with the contents of it and nor did she say or do anything that would lead the respondent to believe that the complaint that the claimant had made in her 20 October and then 2 November letters had been dropped.

83. Mr Blair-Reid had been approached by an agency around late 2017 and through the agency he had become aware that there was an opportunity for him to commence work for a local authority with effect from 1 February 2018.

On 1 February 2018 he submitted a resignation letter to the respondent which asserted he was not obliged to work out his notice. He deliberately timed his exit from the respondent to ensure that he received his January pay before leaving. Mr Blair-Reid in his resignation letter listed a number of reasons for his resignation and for his assertion that he was not obliged to work out his notice and one of the reasons he gave was the role that the respondent had asked him to play in dealing with the claimant's grievance. Another of those reasons was that the respondent was reluctant to pay staff when they were sick.

84. Following Mr Blair-Reid's resignation, the claimant and Mr Blair-Reid spoke by telephone on or around 5 February 2018. Mr Blair-Reid made an effort to contact the claimant. He later sent her an email dated 14 February 2018 which is in the bundle, giving additional information in relation to the 5 February discussion. Mr Blair-Reid on 5 February, informed the claimant he had not been the main author of the grievance outcome and he suggested in his 14 February email that he had been forced to sign it.

85. The respondent invites us to consider that potentially Mr Blair-Reid has his own personal reasons for being dissatisfied with the respondent and/or that he potentially had motives to assert wrongdoing by the respondent so that he would have an excuse to leave without working his notice or being bound by other post-employment restrictions We acknowledge those hypothetical motivations. That being said, we heard from Mr Blair-Reid and we are satisfied he gave his evidence truthfully. We would say it was a slight exaggeration to suggest that he was "forced" to sign the letter; he was not threatened with any adverse consequences if he refused to sign it. However, he was put on under pressure to sign the letter despite his initial misgivings. He was not given the opportunity to redraft the letter before it was sent out. He felt obliged to sign the version which Mr Karshe had produced.

86. The information which the claimant received by phone on 5 February and which was confirmed in writing on 14 February was new information to her. In other words, prior to then she did not know that it had been Mr Karshe rather than Mr Blair-Reid who had been the main author of that letter. She also did not know that Mr Blair-Reid had told the respondent that he did not think that he was the suitable person to do the grievance.

87. The claimant had commenced (via her solicitors we assume) early conciliation on 18 December 2017 and that early conciliation period went through to 18 January 2018.

88. On 16 February 2018 the claimant issued what we will call Claim 1, 3304084/2018. In the document the claimant, or her solicitors, referred to issues which came later than the start of the early conciliation, including some issues which came later that the finish of the early conciliation. For example, she referred to the receipt of the grievance outcome letter around 8 January, that is at paragraph 24. And in paragraph 25 she gave some details of the information that she had received from Mr Blair-Reid in February.

89. At the time the claimant submitted this claim on 16 February she had not yet made up her mind to resign. Without waiving privilege, the claimant gave told us that she had been considering the options with her solicitor before making

a decision. In fact, the claimant resigned with effect on 22 February 2018 and she did so by email.

90. In the resignation letter the claimant referred to 20 October grievance and referred to the fact that she thought it had been dealt with badly. She mentioned speaking to Mr Blair-Reid on 5 February and described what she had been told by him. She referred under the heading 'Other actions of the Company': "In addition to the mismanagement of my grievance the company has…" and she referred to failures to pay basic salary, she referred to the allegations of victimisation and failure to pay National Minimum Wage and said as a result of her 20 October letter the respondent had threatened to investigate her, given her work to other people, stopped giving her work, stopped making payments of commission to her and told her clients and candidates not to contact her. She also mentioned subject access request. She (or whoever drafted the email) summed up by saying:

> "The company's actions have fundamentally breached my contract of employment and I am resigning in response to this breach whilst my resignation is without notice I fully expect to receive a payment in respect of my untaken holiday payment."

91. She referred to some other potential claims including disability discrimination and victimisation. She said that she had already issued an employment tribunal claim and that the respondent would be receiving that shortly.

92. On 21 May 2018, the claimant or somebody acting on her behalf, commenced early conciliation again, in relation to the same respondent. This second period of early conciliation (or purported early conciliation, because the respondent does not accept the validity of it) continued until 21 June. Following this, a claim form was presented on 20 July 2018.

The law

93. Section 6 of the Equality Act 2010 provides the definition of disability.

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.

94. Schedule 1 contains various supplementary provisions. Paragraphs 2(1) and 2(2) of the Schedule provide:

> (1) The effect of an impairment is a long-term one if either
> (a) It has lasted for at least 12 months
> (b) It is likely to last for at least 12 months; or
> (c) It is likely to last for the rest of the life of the person affected."
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.

95. Sub paragraphs 5(1) and 5(2) provide:

> (1) 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.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

96. So, in summary, the tribunal must consider is whether the person has a physical or mental impairment; whether the impairment affects the person's ability to carry out normal day to day activities, whether the effects on such activities are substantial (which means more than trivial) and the effects must be long-term.

97. The third and fourth matters, long-term and substantial, can be analysed separately but also they go hand in hand with each other. The substantial effects must also be long-term.

98. In Walker v SITA Information Networking Computing Ltd [2013] 2 WLUK 272 . the Employment Appeal Tribunal noted that when considering whether an individual is disabled, the tribunal must concentrate on the question of whether she has a physical or mental impairment. The cause of the impairment (or the apparent absence of a cause) is not of zero significance, but the significance is evidential rather than legal. In other words, a cause identified by a medical expert might corroborate that the evidence that impairment actually exists. Or the lack of a proven cause might lead the tribunal to conclude that the claimant does not genuinely suffer from the alleged impairment. However, provided the tribunal is satisfied that the symptoms are genuine, then lack of a specific diagnosis of the cause does not mean that the claimant cannot have an impairment.

99. Day to day activities are things that people do on a regular or daily basis. Examples include shopping, reading, writing, having a conversation, using a phone, using the internet, watching TV, getting washed, getting dressed, preparing food, eating food, carrying out household tasks, walking, travelling by various modes of transport and talking part in social activities. Activities which are not performed by the majority of the population can still be day to day activities and activities. Some activities which are usually only performed in connection with work (such as – say - attending job interviews or maintaining shift pattern, those kinds of things) might potentially be considered day to day activities. If the activities are highly specialised or they involve high levels of attainment, then that might mean that they are not normal day to day activities. It is a matter for the tribunal to decide.

100. The issue of whether the claimant meets the definition is to be decided as of the date of the alleged contravention of the Equality Act. This is particularly important when considering the part of the definition that refers to long-term. If, by the time of the alleged contravention the impairment already had a substantial adverse effect on the ability to carry out normal day to day activities for at least 12 months then it is unnecessary to consider the

alternative parts of the definition of long-term. However, if that is not the case it is necessary for the tribunal to analyse the situation as of the date of the alleged contravention and ask itself whether as of that particular date the effects were likely to last for 12 months in total (or until death, if sooner). The tribunal has to avoid hindsight. Having said that, the fact that there might not have been - by the date of the contravention - a diagnosis from the doctor does not in itself prevent the tribunal deciding that it was likely - as of the date of the contravention – that the adverse effects were likely to last for 12 months.

101. The employer's knowledge or opinion is not relevant to this part of the analysis. The fact that, as of a particular date, the employer did not know the impairment (existed or) was likely to last for 12 months does not prevent the tribunal deciding that, as of that date, the Claimant had met the definition in section 6.

102. In Nissa v Waverly Education Foundation Limited [2018] 11 WLUK 718, at paragraph 14 the Employment Appeal Tribunal referred to the test to be applied and it stated:

> As for those cases where it is necessary to project forward to determine whether an impairment is long-term (see paragraph 1(b) under the relevant Part of Schedule 1), in *SCA Packaging Ltd v Boyle [2009] ICR 1056 HL* Baroness Hale (with whom the other Justices of the Supreme Court agreed) clarified that in considering whether something was likely, it must be asked whether it could well happen . The Guidance on Matters to be taken into Account in Determining Questions relating to the Definition of Disability ("the Guidance"), accordingly now states (see paragraph C3) that " 'likely' should be interpreted as meaning that it could well happen " rather than it is more probable than not that it will happen. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material time, see *Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT* .

103. Time limits applying to an Equality Act complaint are to be found in section 123 of the Equality Act. Section 123 of EA 2010 states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
> (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.
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

104. As per 123(1), the time limit is extended by early conciliation. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act

extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

105. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The facts that might potentially be helpful to the exercise of wide discretion include the length of and the reasons for the delay on the part of the claimant, the extent to which because of the delay, the evidence is likely to be less cogent than if it had been brought within time and whether any conduct of the respondent after the cause of action arose is relevant including the way in which the respondent has dealt with requests for information or documents. If the claimant has a good reason for the delay, then that is something that can be taken into account. The absence of a good reason for the delay (while relevant) does not mean that time cannot be extended in an appropriate case. Time limits are there for a reason, and the onus is on the Claimant to persuade the tribunal to extend time; however, that does not mean that time can only be extended if there are exceptional circumstances. The tribunal should weigh up the prejudice caused to the Claimant by refusing the extension against the prejudice caused to the Respondent by extending time.

106. The burden of proof for Equality Act complaints is referred to in s.136 of the Equality Act. It is applicable to all the contraventions of the Equality Act as per the allegations in this action. S.136 states in part that:

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

107. In other words, it is a two-stage approach. At the first stage the tribunal considers whether the claimant has proved facts that on the balance of probability from which the tribunal could potentially conclude in the absence of an adequate explanation and that the contravention has occurred. At this stage it is not sufficient for the claimant to simply prove that the facts that she alleges did happen. She has to provide some other evidential basis from which the tribunal could reasonably infer from those proven facts that there was a contravention of the Equality Act. However, the tribunal can look at all the relevant facts and circumstances when considering this part of the burden of proof test and it can make reasonable inferences where appropriate. If the claimant succeeds at the first stage, then that means the burden of proof shifted to the respondent and the claim has to be upheld unless the

respondent proves the contravention did not occur.

108. The definition of victimisation is contained in s.27 of the Equality Act. Victimisation as per sub section 1 occurs if:

> 27 Victimisation
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

109. So, there is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act. The alleged victimiser's improper motivation could be something that is conscious or unconscious. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that their treatment was less favourable that another's.

110. As per section (2)(d) an act might be a protected act where the allegation is either express or implied and there is no requirement for the claimant to have specifically mentioned phrase Equality Act or used any particular magic words such as discrimination or victimisation and so on.

111. To succeed in a claim of victimisation the claimant must show she was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

112. Where there has been a detriment and a protected act then that is not sufficient in itself for the complaints to succeed. The tribunal must consider the reason for the claimant's treatment and decide what consciously or subconsciously motivated the respondent to subject the claimant to the detriment. That requires identification of the decision makers and consideration of the mental processes of the decision makers.

113. If the necessary link between the detriment suffered and the protected act is established the complaints of victimisation succeeds. The claim does not succeed simply by establishing but for the protected act she would not have been subjected to the detriment. The claimant does not have to persuade us that the protected act was the only reason for the detriment. If the employer has more than one reason for the detriment, then the claimant does not have to establish that the protected act was the principal reason.

114. The victimisation complaint can succeed provided protected acts have a significant influence on the decision making. For an influence to be significant it does not necessarily have to have been of huge importance. A significant influence is an influence which is more than trivial.

115. A victimisation claim might fail where the reason for the detriment was not the

protected act itself but some feature of the communication which could properly be treated as separable from the protected act itself, such as , so the manner in which the protected act was carried out for example. Section 136 applies and so the initial burden on the claimant to prove facts from which we could infer victimisation. If the claimant does do that then the burden shifts to the respondent.

116. In relation to discrimination arising from disability, s.15 Equality Act states:

> 15 Discrimination arising from disability
> (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.

117. The elements that must be made out in order for the claimant to succeed in their s.15 claim are there must be unfavourable treatment, there must be something that arises in consequence of the claimant's disability and the unfavourable treatment must be because of (that is caused by) the something that arises in consequence of the disability. Even then, the claim fails if the Respondent can show that either 15(1)(b) or 15(2) apply.

118. The word unfavourable in s.15 is not separately defined by the legislation and it is to be interpreted consistently with case law including taking account of the Equality and Human Rights Commissions Code of Practice. This section does not require the disabled person to show that his or her treatment was less favourable than that of a comparator. The fact that a particular policy has been applied to a disabled person or in circumstances in which the same policy would have been applied to a non-disabled person does not in itself mean that there has been no unfavourable treatment. In other words, a decision that adversely affects the claimant could potentially still amount to treating the claimant unfavourable even if the decision was based on a policy that applied to other people as well.

119. Dismissal can amount to unfavourable treatment. However, it does not follow that there has been unfavourable treatment merely because a claimant can prove that they genuinely believe that they should have had better treatment

120. The unfavourable treatment must be because of something arising in consequence of the disability, as opposed to being because of the disability itself. The latter might be a breach of some other part of the Equality Act, but is not a breach of s.15.

121. We must consider two separate steps in relation to causation:
    a. Is "something" arising in consequence of the disability. That is an objective test.
    b. Was the unfavourable treatment (if any) because of that "something". That requires analysis amongst other things of the decision maker's thought processes, both conscious and sub-conscious.

122. The unfavourable treatment does not have to have been caused solely by the "something" but the "something" must be more than a trivial reason for the unfavourable treatment.

123. In relation to s15(1)(b) and proportionality, it is not necessary for the respondent to go as far as proving that the course of action it chose to follow was the only possible way of achieving its legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective then that might imply the treatment was not proportionate. It is necessary to carry out a balancing exercise taking into account the importance to the respondent of achieving its proposed legitimate aim and taking account of the discriminatory effect of the treatment on the claimant. It is not necessary for the respondent to prove that it itself carried out the balancing exercise at the time of the unfavourable treatment; the exercise is one for the tribunal to do.

124. If a respondent employer has failed in an obligation to make a reasonable adjustment (as defined in the Equality Act 2010) which would have prevented or minimised the unfavourable treatment, then it will be difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

125. When considering what the respondent knew and/or what it could not reasonably have been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. If there are examples of unfavourable treatment at different times, it is necessary to consider the respondent's state of knowledge or constructive knowledge as of the date of each time it treated the claimant unfavourably.

126. In relation to failure to make reasonable adjustments s.20 and 21 of the Equality Act 2010 says in part

> 20 Duty to make adjustments
> (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.
> (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.
> (4) The second requirement is a requirement, where a physical feature 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.
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
>
> 21 Failure to comply with duty
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

127. Paragraph 20 of Schedule 8 states in part:

> A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know …. … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

128. The expression provision criterion or practice or PCP is not expressly defined in the legislation, but we must have regard to the guidance given by the EHRC, and its Code of Practice on Employment, to the effect that the expression should be construed widely so as to include for example any formal or informal policies, rules or practices, arrangements, criteria, etc.

129. The claimant has to clearly identify the PCP to which it is asserted that adjustments ought to have been made. We must only consider the PCPs so identified by the claimant. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and there are facts from which it could reasonably be inferred that the duty may have been breached. If she does so, then we need to identify the step or steps, if any, which the respondent could have taken to prevent the claimant suffering the disadvantage n question. If there appear to be such steps the burden is on the respondent to show that the disadvantage would not have been eliminated or reduced by the potential adjustments and/or that the adjustment was not a reasonable one for it to have to had to make.

130. There is no breach of s.21 if the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. Furthermore, in relation to a particular disadvantage there is no breach of s.21 of the employer did not know and could not reasonably have been expected to know that the PCP would place the claimant at that disadvantage.

131. Section 13(1) the Equality Act 2010 defines direct discrimination.

> 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.

132. In relation to direct discrimination in relation to disability, the appropriate comparator for a claimant is a person who has the same abilities as the claimant but who does not share the same disability.

133. Indirect discrimination is defined in s.19 of the Equality Act. It applies to the protected characteristic of disability:

> 19 Indirect discrimination

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

134. Section 39 of the Equality Act 2010 contains the prohibitions on discrimination and victimisation by an employer. Section 39(7)(b) states:

> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
> (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

135. In relation to constructive dismissal. For an employee to claim constructive dismissal four conditions must be met. There must be a breach of contract by the employer (actual breach or anticipatory breach). The breach must be sufficiently serious to justify the employee resigning, in other words it must be what is known as a repudiatory breach. The employee's resignation must in part at least be in response to the breach and not solely for some other unconnected reason and the claimant must not act in such a way as they are deemed to have waived the breach.

136. Examples of repudiatory conduct includes breaches of express term but as per Malik v BCCI there is an implied term of a contract that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or serious damage the relationship of confidence and trust between employer and employee.

137. In relation to unfair dismissal, section 98 of the Employment Rights Act describes the provisions on fairness including the need to consider whether there is a potentially fair reason for a dismissal and the general fairness provisions under s.98(4).

138. If the claimant is deemed to have been dismissed, then the respondent bears the burden of proving on the balance of probabilities that the dismissal reason was a fair reason. In a constructive unfair dismissal case if there is found to have been a dismissal, then the reason for the dismissal is deemed to have been the conduct by the employer which caused the employee to resign.

139. Part II of the Employment Rights Act 1996 (sections 13 to 27) deals with "Protection of Wages". Section 13 (alongside the exceptions set out in Section 14) deals with the right not to have unauthorised deductions made from wages. Other than deductions authorised by statute (which is not an issue in this case), for a deduction to be authorised it must either be one which is authorised by the contract of employment (with either the term itself being part of a written agreement, or else the term itself being something which the Respondent has explained to the Claimant in writing, before the date of the deduction) or be one which the employee has agreed to in writing (such agreement occurring after the date of the specific event which is said to be the reason for the deduction, but before the deduction itself. As per

section 13(3), a shortfall (other than one due to computation error) in the sums properly payable to the worker is to be regarded as a deduction even if the employer does not refer to it as a deduction.

140. In accordance with section 1(1) of the National Minimum Wage Act 1998
> A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

141. In accordance with sections 23 and 24 of that Act, there is a right not to be subjected to any detriment (by any act, or any deliberate failure to act by the employer) on the ground that any action was with a view to enforcing rights under the Act was taken by (or on behalf of) the employee. There is a right to bring a complaint to a tribunal. The procedures remedies and time limit are those which apply in complaints under Pt V of the Employment Rights Act 1996.

Analysis and Conclusions

142. We will refer to the list of issues that is in the bundle starting on page 89. The first heading/ section is:

Unlawful Deduction from Wages
1. Was the Claimant entitled to receive:
1.1 a basic salary of £29,000 gross per annum ("Basic Salary")?;
1.2 commission payments based on income generated by the Claimant in excess of £5,000 per month ("Commission")?; and/or
1.3 company sick pay of her full Basic Salary for 11 days sick leave per annum ("Company Sick Pay")?
2. If so, was the Claimant entitled to receive:
2.1 Basic Salary for the period from on or around 1 November 2016?; and/or
2.2 Commission from on or around 1 November 2016; and/or
2.3 in the alternative Company Sick Pay during the period from 1 November 2016?
3 Did the Respondent make a deduction from the Claimant's wages in that it failed to pay the Claimant her Basic Salary, Commission, or Company Sick Pay as was her entitlement?
4 Was the Respondent required to make employer contributions in respect of the Claimant's employment since October 2016? If so, did the Respondent make them?

143. In relation to paragraph 1, it is agreed that the claimant's basic salary was £29,000 per annum and it is also agreed between the parties that she was entitled to commission payments based on income in excess of £5,000 per month.

144. At 1.3, there is a dispute which we resolved above in our findings of fact. Our finding was that the claimant was still entitled as she was initially, to 11 days sick leave per annum for a rolling 12-month period.

145. In relation to 2.1, our finding is that the claimant was not entitled by virtue of her contract to basic salary for all of the period from 1 November 2016 onwards. From 1 November 2016 onwards, she was entitled to her basic salary pro rata for those days on which she attended the office. There was no contractual agreement between the parties that she would receive her basic salary in relation to hours which she worked at home. Mr Blair-Reid did not agree this or address his mind to it. Mr Blair-Reid was aware that the

directors had told him that the claimant was not entitled to be regarded as working - for basic pay purposes - when she was at home. The claimant knew that that was the respondent's position. It was because she knew that the respondent did not regard her as contractually entitled to basic salary when she was at home that the claimant supplied the sick notes to the respondent. She was not able, for health reasons, to work in the office, and she supplied the sick notes to the respondent so they would pay her at least SSP when she was working from home. She did not supply those sick notes in the expectation that they would be paying her a basic salary in respect of the hours she worked at home. The claimant knew that that was not what the parties had agreed.

146. Although the claimant is not entitled to her basic salary, she is entitled to at least the National Minimum Wage in relation to the hours that she worked in each pay period. Her actual entitlement will be calculated at a remedy hearing which will need to take account of any time after November 2016 in which the claimant was actually on holiday (for example, the trip to Canada potentially) and also any other periods in which she was unable to work due to ill-health (such as the surgical procedure which she had on 8 September 2017 and any recovery time immediately after that).

147. The correct classification for the purposes of the National Minimum Wage of the type of work that the claimant was doing, is something that can be decided at the remedies hearing. We do not necessarily accept the contention put forward by the respondent that it is salaried hours work but that is a matter about which both parties can make submissions at the remedy hearing.

148. In relation to question 2.2, the claimant was entitled to commission from 1 November 2016 onwards (as well as before) and on her own evidence, she was paid the correct amounts up to and including September 2017. That is because we have rejected her contention that the £5,000 threshold should be removed or varied.

149. The claimant was not paid the correct amounts for October 2017 and for the remainder of her period of employment. The remedy hearing will determine what the correct amounts of commission are to be from October 2017 onwards.

150. In relation to 2.3 of the list of issues, the claimant was entitled to 11 days full pay as sick pay within the period starting around 3 November 2016 and ending at the end of her employment. She would not be entitled to sick pay for any time period in which she was actually working. Sick periods and holiday periods are mutually exclusive, and it may be a matter of argument and evidence to say which is which. If not used prior to the 8 September 2017 then the claimant would potentially be entitled to some sick pay for 8 September and for any period immediately after that if she was not working because she was recovering from the operation.

151. For the period November 2017 onwards, the claimant was signed off sick from work and the respondent was not providing her with any work and she had no opportunity to do any work. Therefore, if she has not exhausted her entitlement to full sick pay by November 2017 then she would be entitled to some sick pay during that month. The exact dates on which the claimant is

entitled to sick pay (and whether it can be for part days or only whole days) and the exact amounts can be calculated at the remedy hearing.

152. In relation to question 3, the respondent did make unauthorised deduction from wages as just mentioned. In other words, it has failed to pay commission and failed to pay sick pay.

153. The issue of what credit, if any, should be given to the respondent in relation to the SSP payments which it did make from 3 November 2016 onwards as against the claimant's National Minimum Wage entitlement and as against her actual entitlement to SSP, will be assessed at the remedy hearing as will question 4.

Disability
5. Is the Claimant disabled within the meaning of section 6 of the Equality Act 2010 ("EQA")? The condition the Claimant relies upon is polyps in her colon which cause abdominal pain and other symptoms which require that she is close to toilet facilities at all times.
6. If the Claimant was a disabled person, when did she become a disabled person, and did the Respondent, or could it reasonably have been expected to have known, that the Claimant was a disabled person?

154. In relation to question 5, the issue of disability, the claimant suffered from an impairment which commenced around November 2016. She had had previous incidents of diarrhoea and incontinence and abdominal pain. However, the consultant's report of May 2017 did not treat those previous incidents (in May 2016 and September 2016) as having been connected to the more severe and ongoing and continuous symptoms which the claimant exhibited starting from the very start of November 2016.

155. The claimant had an impairment from November 29016 and that impairment lasted until at least 2019. There may have been times when it was worse than other times and times when it was better than average. However, the evidence is that the impairment was always present each month from November 2016 onwards and the impairment continued even after the procedure in 2017 and even after the further procedure the following year.

156. From November 2016 onwards the impairment had significant adverse effect on the claimant's day to day activities. In particular, her mobility was affected, she was unable to drive for long distances and was reluctant to be more than 10 or 15 minutes away from home. When away from home in a location where toilets were not readily accessible, the claimant was at risk of suffering incontinence. This restricted her ability to be away from home for significant periods of time and affected her ability to do such normal activities such as going to entertainment venues or any premises where she was a distance from the toilets.

157. The fact that the claimant suffers from Irritable Bowel Syndrome and the fact that she had polyps and that the polyps are recurring is not something that was diagnosed immediately in November 2016. As of November 2016, it was at least possible that the diarrhoea was going to be something of a short-term nature. It was possible that diarrhoea and gastric problems would go away. In January 2017 the claimant's doctors had not yet diagnosed an

ongoing problem and, more significantly perhaps, the absences, according to the sick certificates, were not based largely on diarrhoea. So, between November and January the absences were generally for problems other than the gastric problem and, indeed, one of the claimant's GPs did not regard it as appropriate to give the claimant an absence from work certificate on 18 January.

158. The claimant's gastric problems continued, and they got worse. On 3 February 2017, her GP noted that it was probably Irritable Bowel Syndrome, Therefore, as of 3 February 2017, in our judgment, the situation was that the problem could well last for longer than 12 months in total. In other words, it could well be the case, judged of 3 February 2017, that the impairment and the adverse effects on the claimant were likely to last until at least November 2017. Therefore, our finding is that as of 3 February 2017 the claimant met all of the conditions necessary to satisfy the full definition of disability as per section 6 of the Equality Act 2010.

159. In relation to question 6 of the list of issues, the respondent had all the information on the claimant's sick certificates and the GP certificate. There were some prior references to abdominal pain and gastric issues. They knew what they had been told in November 2016, September 2016 and May 2016 as well. But, in any event all of the certificates supplied after 3 February 2017 referred to gastric issues. The claimant was continuously certificated as unfit to work from work for the period 13 March 2017 onwards. However, these were not the only pieces of information which the respondent had. The claimant had mentioned to Mr Blair-Reid, her line manager, a number of times that she had to leave work and to work from home due to gastric problems. For example, on 30 January 2017, she texted him referring to tummy cramps, on 23 February she referred to a problem with her tummy, on 27 February again she referred to the fact that her tummy was preventing her attending the office. She did so again on 14 March, when she explained why she had to leave the workplace.

160. The respondent also had the notifications sent to the personal assistant of the directors and she was the person who was officially in charge, according to the respondent, of keeping records about sickness absence. So, on 6 December 2916, the claimant informed Ms Kotarska that she was having, amongst other things, tummy cramps. On 8 December 2016 the claimant notified of gastritis and swollen stomach and appetite problems and weakness. On 20 December the claimant notified that her tummy was distended, and she was not able to come to work and that she had been speaking to the emergency doctor. On 1 February 2017 she messaged to say that she was having tummy problems and tummy cramps and confirmed later the same day that it still had not settled. The following day, 6 February, the situation was similar, She sent a text to Ms Kotarska to say that she had acute diarrhoea, fever, tummy cramps and her medicine needed to be changed and she informed the respondent that she was to be sent for a scan as she had been told by her GP on 3 February. The claimant also reported that she had been told to stay home. On 8 February the claimant informed Ms Kotarska that she could not come into work because her tummy had still not settled. On 9 February she reported that she had to go to the medical centre with samples and she was still having tummy ache. She said she was only able to move slowly, and she could not come to work. She also said she

thought she had been going to collapse outside the medical centre. On 13 February she was still having yummy cramps and she hoped they were mostly under control. On 15 February the claimant reported again that she had been about to drive to work but she was unable to do so as her tummy was playing up.

161. Therefore, throughout February, the respondent was kept regularly informed that the claimant was suffering from diarrhoea and was off work and she would struggle to travel to the office and the respondent was aware, or deemed to be aware, that the claimant was potentially going to be affected by diarrhoea if she was in the office, even if she managed to overcome the hurdle of travelling in. Had the respondent made proper enquiries with the claimant and sought a letter from the claimant's GP, then at any time after 3 February 2017, the respondent would have been able - with the claimant's consent - to get a letter from the claimant's GP which would have informed it that the probable diagnosis was of Irritable Bowel Syndrome from which the respondent could have inferred that the condition was likely to be long-term. From May, the respondent would have been able to get a copy of the consultant's letter had it made proper enquiries.

162. In the respondent's favour we do take into account as we have mentioned, that some of the sick certificates in December and January gave different reasons for absence. However, given the frequency of absences and given the contents of the messages about those absences to Ms Kotarska and Mr Blair-Reed, our finding is that by no later than 20 March 2017 the respondent was, or at least ought to have been, aware, that the claimant had a medical condition which had severe impairment on her day to day activities and the condition was likely to last for at least 12 months and the effects of the condition were that she was disadvantaged by the requirement to travel to the office and by the requirement to work in the office and that the disadvantage was because of the claimant's diarrhoea.

s. 15 EQA Discrimination for a reason arising from a disability
7. If the Claimant was disabled. was she treated unfavourably because of something arising in consequence of the Claimant's disability? The Claimant says that:
7.1 as a consequence of her disability, she was unable to work from the Respondent's premises due to the distance between the Respondent's premises and toilet facilities and so the Claimant worked from home;
7.2 the Respondent failed to pay the Claimant her Basic Salary during the time when the Claimant was so working from home.
8. If the Claimant was discriminated for a reason arising from her disability, was the treatment a proportionate means of achieving a legitimate aim?

163. In relation to 7.1, there were two reasons that the claimant was not able to work every day from the respondent's premises from November 2016 onwards. Both of these reasons were things which were caused by her disability. One thing was that travelling to work by car was difficult because she might suffer from incontinence on the journey or otherwise be overcome by an urgent and painful need to use the toilet due to diarrhoea. The other thing was that during the day, if at the office, the claimant would similarly be liable to be overcome by an urgent need to use the toilet and she might have difficulties getting to the toilet in time given the distance that she had to walk from her desk and also given the possibility that on arrival, the cubicles would be occupied.

164. It is true that in relation to 7.2, for much of the time from November 2016 onwards, the respondent failed to pay the claimant her basic salary. The reason they did not pay her basic salary was that she was not attending the office. Not paying the basic salary to the claimant was unfavourable treatment and no comparator is required. The unfavourable treatment is that rather than pay the claimant the equivalent of around £29,000 a year basic salary they paid her nothing. They did not seek to pay her pro rata for the hours that she worked at home; they just took the position that absence from the office meant there would be no payment at all made for basic pay.

165. The respondent states that its legitimate aim is to pay employees only in relation to the consideration which the employees provide under the contract. In our judgment, the claimant was providing at least some consideration because she was working from home. However, in any event, the respondent's method of achieving this purported legitimate aim was to pay the claimant zero and that was not a proportionate means of achieving its legitimate aim.

166. As we will come on to discuss later on there was a failure by the respondent to make reasonable adjustments and that affects its argument that it was using proportionate means. In any event, the respondent has not demonstrated that - when we, the tribunal, balanced the needs of people with disabilities against the respondent's interests in achieving its legitimate aim - the methods the respondent has used are proportionate. It have been proportionate to pay the claimant something less than its £29,000 basic salary but the respondent paid the claimant zero on the basis that unless she came into the office, she was contractually entitled to nothing at all in relation to basic pay no matter how many hours she worked at home.

167. We did, of course, reject the respondent's arguments that the claimant was not working from home or, alternatively, that if she was working from home she was doing so without the respondent's knowledge or consent.

168. From 20 March 2017 onwards the respondent had the requisite knowledge that the claimant was a disabled person and that the reason that she was not attending the office was because of her disability.

s 19 Indirect Discrimination
9. Did a physical feature of the Respondent's premises put the Claimant at a significant disadvantage in comparison to those who are not disabled? The Claimant relies on the physical the distance to the toilets.
10. In the alternative, and if it is found that the Claimant was not permitted to work from home by the Respondent or did not work from home, did the Respondent apply a Provision, Criterion or Practice ("PCP")? The Claimant relies on the following PCPs:
10.1 requiring employees to work from the Respondent's premises;
10.2 using an employee's holiday pay to cover pay during periods of sickness absence.
11. If the Respondent applied the PCPs at paragraph 10.1 and/or10.2 above, did the PCP put the Claimant at a particular disadvantage in comparison with persons who are not disabled?
12. If the Claimant was indirectly discriminated against, was any less favourable treatment a proportionate means of achieving a legitimate aim?

169. In relation to number 9 in the list of issues, there was a physical feature of the

respondent's premises which put the claimant at a particular disadvantage and that was the fact that the distance from her desk to the nearest toilet was between 40 and 50 meters.

170. In relation to number 10.1, the respondent did have a requirement for employees to work in the respondent's office premises if employees wanted to be paid their basic pay. The respondent's witnesses all confirmed that that was in fact the case. Each of the directors told us that this was a requirement if employees were to be paid and Mr Blair-Reid told us that the directors had told him the same thing during his employment. Furthermore, the claimant was aware of this and that was the reason that she supplied the notes from her doctors so that she could at least get SSP.

171. In relation to 10.2, we refer to the emails from the directors which we described in our findings of fact. Those three emails make it clear that, potentially, if an employee comes back to work for the respondent following a period of sickness and fails to satisfy the respondent or the directs of the respondent that the sickness was genuine, then the employee might have their annual leave reduced accordingly. In other words, according to that email correspondence there could be an insistence by the respondent that annual leave be used even if the employee objects and even if, in actual fact, the illness or the absence was genuinely caused by illness. The directors purport to have the right to decide if the person had really been too ill to attend work.

172. In any event, on its own case, the respondent's position was that generally it would not pay for absence in relation to sickness other than SSP and would offer employees the opportunity to chose that they could have their sickness absence treated as holiday instead, even if the sickness absence was certificated.

173. The agreed facts document combined with the evidence which we have in the bundle, demonstrates that in May 2016 for example, the claimant did supply certificates form her GP in relation to at least some of that absence, but she was treated as being on annual leave for all of it. The sick certificates show that she was ill with diarrhoea at the time. May 2016 was before she had a disability, but the PCP existed then (and started before then), and continued to exist for the whole of the remainder of the Claimant's employment.

174. In terms of number 11 in the list of issues, each of the two PCPs 10.1 and 10.2, do place the claimant at a particular disadvantage in comparison with persons who are not disabled.
    a. Because of her disability the claimant was unable to attend the workplace (except for the small number of days that we have mentioned in our findings of fact) after 3 November 2016. The claimant was at a disadvantage in relation to 10.2 as she was potentially required to use significant proportions of her annual leave covering sickness absence. For example, it would seem from our calculations based on the agreed findings of fact, that there were at least 14 days which could potentially have properly been treated as sickness absence but were instead treated as holiday. Given that her annual entitlement was 32 days that would leave around 18 days left to be used as annual leave and that is

less than the Working Time Regulations minimum.

b. The situation did change slightly in 2017 for whatever reason. The claimant was not paid at the time anything in relation to holiday. The respondent treated the whole year as being absence which attracted, (after February), SSP and then nothing. Her annual leave entitlement was not paid at the termination of employment but was a claim which was settled shortly before this hearing. We do not know the exact terms on which it was settled but we infer from the agreed facts document she had 31 out of 32 days left for 2017.

175. In relation to any purported legitimate aim in insisting that employees have to attend the workplace in order to be paid salary, the respondent has not satisfied us that there was any such legitimate aim. First of all, on its own case (according to Mr Shaban's oral evidence), the respondent did look into the possibility of making arrangements so that the claimant fully access the respondent's computer systems while working from home. So, in other words, the respondent did not have some overriding and principled reason that would have prevented an employee from working form home in 2017. At the time, in 2017, to the extent that the respondent did make a specific decision not to provide facilities for the claimant to access the computer systems from home, it was for a financial reason rather than a principled reason. Even if the respondent had a legitimate aim in relation to requiring people to attend the work premises and work only from the work premises, the respondent failed to take into account the needs of disabled persons - in particular, the claimant - who might be disadvantaged by such a policy. The blanket ban was therefore not a proportionate means of achieving a legitimate aim. In particular, the respondent failed in its obligation to make reasonable adjustments for the claimant.

176. In relation to a purported insistence that people take annual leave whether they like it or not in relation to genuine sickness absence, that is not a legitimate aim. If it were to be suggested hypothetically that there was a legitimate aim in seeking to make sure that employees did not dishonestly claim to be sick when they were not in reality sick, then insisting that the claimant took annual leave would not have been a proportionate means of achieving that legitimate aim because the claimant was able to demonstrate with clear medical evidence (including fit notes from GP) that her absences were genuine.

177. We would also say that even if it was the claimant who did have some element of choice and it was her decision to use annual leave rather than sickness at relevant times, we still would not think that that was proportionate on the respondent's part as the respondent had an obligation, first of all to ensure that the claimant did receive payment of 11 days sickness per rolling year but also it had an obligation to ensure that the purpose of the Working Time Regulations was not thwarted and that employees were able to use the minimum European Directive entitlement at least in relation to leisure away from work as opposed to sickness.

S20 Failure to make reasonable adjustments
13. If the Claimant was not permitted to work from home, did a physical feature of the Respondent's premises (the distance to the toilets) place the Claimant at a substantial disadvantage in comparison with those who are not disabled?

14. If so, and the duty to make reasonable adjustments arose, did the Respondent take reasonable steps to avoid the disadvantage? Should the Respondent have permitted the Claimant to work from home?
15. Did the Respondent apply the PCP at paragraph 10.1 and did this put the Claimant at a substantial disadvantage in comparison with those who are not disabled?
16. if so, and the duty to make reasonable adjustments arose, did the Respondent take reasonable steps to avoid the disadvantage? Should the Respondent have permitted the Claimant to work from home?

178. In relation to 13 in the list of issues, it is true that the respondent's premises did have that physical feature which placed the claimant at a substantial disadvantage. The disadvantage is the same as the disadvantage discussed in relation PCP 10.1 as discussed above.

179. In terms of point 14, there were not reasonable steps that the respondent should have taken to actually change the physical premises. It would not have been reasonable that the respondent had to move to new premises or that it make some alterations to the building to insert an extra toilet. Issues such as relocating the claimant's desk within the office could have been considered. Relocating her to a new desk within the respondent's allocated office space would not have been sufficient to alleviate the disadvantage. We have seen no evidence as to whether it might have been possible to rent different additional office space within the building so that the Claimant's desk would be nearer to the toilets, but we do not find against the respondent on that particular issue. We have accepted that it would not have been reasonable to actually change the workplace itself so that the desk was as near to the toilets as it would have needed to be in order for the Claimant to attend the office premises.

180. However, a reasonable step for the respondent to have had to take would have been to make proper arrangements for the claimant to work from home. Firstly, the arrangements would have been setting her up so she had access to the respondent's computer systems from home. As we have mentioned the respondent has not persuaded us that the true cost of doing that would have been as stated orally, £12,500. Mr Shaban's evidence was that that is what he recalls form three and a half years before the date of this hearing. It might be what he genuinely believes now in 2021 but there is no contemporaneous evidence of this, and it was not mentioned previously. That being said, even if we assumed in the respondent's favour that £12,500 was the actual cost, then we would still say that a reasonable adjustment would have been for the respondent to have had to pay this sum in order to set the claimant up so that she could access the respondent's systems from home. The income generated by the claimant's work for the respondent fluctuated but it was typically several thousand pounds per month. We take into account that not all of that is profit but, even so, taking into account the respondents obligations to comply with the Equality Act, taking into account the income generated by the claimant for the respondent (both the total income that she generated from the start of her employment with them in 2008 and the total income she could have generated for them if they had properly accommodated her requirements and set her up properly to work from home in 2017), we do not think that £12,500 is such a large sum that this particular respondent should not have been expected to pay it. We also do not know whether the respondent might have been able to reclaim any of

the costs from, for example, Access to Work or from any other outside source; however, even assuming that is not the case, and that the full £12,500 had to be met by the respondent, it was a reasonable sum, in our judgment, for the respondent to have had to spend in order to comply with its duties to make reasonable adjustments.

181. However, and in any event, that is not the only reasonable adjustment which the respondent could have made. So, even if we are wrong and if contrary to our decision £12,500 was required and it was an unreasonably high sum, once the respondent had decided that it was not going to set the claimant up fully at home so she could access those systems from home then there are other arrangements they could have made to facilitate and improve the working arrangements fore her to work from home. They could have formalised and regulated the so called 'Buddy system' which they said was in existence to cover absence. The Claimant was not absent (she was working from home) and it would have been reasonably straightforward for the respondent to have a more formal system arranging for vacancy emails from the Trusts to be forwarded to the claimant. The IT department might have been able to do something as simple as setting up an automated rule on an email inbox. But even if it required one of the respondent's employees to personally and manually forward emails to the claimant (once a day, say) then that would have been a reasonable adjustment for the respondent to have had to make in all the circumstances. This would have enabled the claimant to liaise with her doctors and liaise with the Trusts using her personal phone and personal email account which is what she had actually did for the majority of 2017. Whenever the claimant needed anything to be added to the respondent's computer systems then the respondent could have formalised and regulated a specific arrangement so that there was somebody in the office that she could contact in order to do this. Again, in other words, formalise the arrangement that in fact, was operating in practice because in practice during the relevant period Mr Blair-Reid was arranging for job vacancies to be sent to the claimant on an ad hoc basis and as requested by her and then Ms Alani was agreeing to make entries onto the respondent's computer systems on an informal and ad hoc basis.

182. The reasonable adjustments that the respondent had to make included such steps as agreeing with the claimant what her hours would be, how her hours of work would be monitored , what her basic pay would be for those hours if less than 40 per week. It would include things like what her key performance indicators would be and how they would be monitored by the operations manager, formalising any data protection issues and any regulatory requirements and - if the respondent had any concerns about its confidential information - deal ingwith those issues as well.

183. In relation to item 15 in the list of issues, the respondent did have PCP 10.1. This requirement did put the claimant at a substantial disadvantage in comparison with those who are not disabled in that it was significantly more difficult for the claimant to attend the workplace.

184. In relation to point 16 in the list of issues, for reasons that we have just mentioned in answering question 14, the respondent did have a duty to make reasonable adjustments and did fail to carry out that obligation. The respondent did know from no later (as we have found) than 20 March 2017

that the claimant had a disability and the disability had the effect of disadvantaging the claimant in relation to a requirement that work could only be done from the office if the employee was to be paid a basic salary for it.

Victimisation
17. Did the Claimant or her representatives:
17.1 raise allegations of disability discrimination on 20 October 2017;
17.2 raise allegations of victimisation on 2 November 2017;
17.3 raise the prospect of issuing proceedings in respect of the matters detailed in paragraphs 17.1 and 17.2 above through her lawyers on 20 November 2017; and
17.4 make an ACAS notification in respect of her treatment by the Respondent in which her lawyers reiterated the matters at paragraphs 15.1 and 15.2 above.
18. If so, did those complaints amount to protected acts pursuant to section 27 (2) EQA?
19. If not, did the Respondent believe that the Claimant had or may carry out a protected act?
20. If the Claimant did any protected acts or if the Respondent believed that the Claimant had or may carry out a protected act, did the Respondent she subject her to the following detriments because she had done or it believed she had done or would do any protected acts:
20.1 ceased to provide the Claimant with work and ostracised her from the business, its clients and potential candidates on or around 20 October 2017;
20.2 threatened to investigate the Claimant as detailed in paragraph 18 of the Grounds of Claim for Claim 1;
20.3 ceased paying the Claimant commission from 1 October 2017;
20.4 failed to provide the Claimant with a copy of her contract of employment;
20.5 poorly handled the Claimant's grievance; and
20.6 dismissed the Claimant's grievance on or after 8 January 2018.

185. In relation to item 17 of the list of issues, there are four alleged protected acts.
    a. Re 17.1, rhe claimant, through her solicitors, did send the letter of 20 October 2017 and it did raise allegations of disability discrimination and did so in good faith.
    b. Re 17.2 through her solicitors the claimant did make allegations of victimisation by the letter dated 2 November and that letter again made those allegations in good faith.
    c. In relation to 17.3, the letter largely repeated the earlier allegations. It did refer to the possibility of issuing proceedings although that was in itself, a repeat of the information contained in the earlier letters.
    d. In relation to 17.4, we do not think it is appropriate to take into account the fact that the claimant contacted Acas. That is a relevant step for anybody to take in connection with litigation. It is not appropriate for us to be told what, if anything, was said to Acas about alleged breaches the Equality Act 2010 and what, if anything, from that information was then passed on to the respondent.

186. In relation to 18, the first three things, 17.1, 17.2 and 17.3 do amount to protected acts. The letter of 20 October does fall within section 27(2)(d) of the definition of victimisation in the Equality Act. Likewise, so does the letter of 2 November. In each case the letters make express allegations of contravention of the Equality Act and they are made in good faith. The letter of 20 November is also made in good faith even though the allegations in that letter are implied rather than express and even though the allegations in the letter are repeats of what had previously been said rather than anything new. The letter, in our judgement, still falls within 27(2)(d). There is no reason why simply repeating an allegation is not a protected act. In any case, if we are

wrong that it falls within 27(2)(d) then, in our judgment, the letter of 20 November would fall within 27(2)(c) instead.

187. In relation to number 19 in the list of issues, the respondent did believe that the claimant had done a protected act, namely send the letters of 20 October and 2 November in particular, and the respondent also believed that the claimant was likely to do another protected act, namely issuing legal proceedings. That was expressly mentioned in the letters and there was no reason for the respondent not to believe that it might happen. The respondent does not deny being aware of the protected acts or the potential for litigation. In any case and for completeness, we note that on 24 November 2017 the respondent's letter to the claimant's solicitors referred to employment tribunal claims and suggested that it would be premature to issue proceedings prior to the grievance being resolved. The respondent was clearly aware that the claimant might issue legal proceedings.

188. In relation to paragraph 20 of the list of issues, the first part of item 20.1 is correct in that the respondent did cease to provide the claimant with work. The respondent ceased to provide the claimant with access to the vacancy list which had previously been sent to her. The reason that this stopped is that Mr Blair-Reid was told by the directors that he must not send the lists to the claimant from now on.

189. The respondent has a suggested explanation for this act and that is that they were doing no more than reacting to new information. In other words, their assertion is that they were previously unaware that the claimant was doing any work from home and as soon as they became aware of that fact from 20 October letter, they decided to make sure that they respected the fact that the claimant was signed off sick by her GP and they made sure, they say, that she had no burden of any expectation of work. We reject that explanation in its entirety. The respondent and its directors were fully aware that the claimant was doing work from home. She was in regular correspondence with the operations manager, with the PA to the directors, with Ms Alani, with the Compliance Department and with the Accounts Department. The directors were well aware of this. The only information that was new to them as a result of the 20 October letter, was that the claimant was now for the first time raising an allegation that she should be entitled to basic pay for the period backdated to November 2016 and the letter was also suggesting that as reasonable adjustments the working from home arrangements should be formalised including by paying the claimant a salary as well as commission. The respondent's directors had previously been content for the claimant to do work from home on a commission only basis without their having to pay her any basic salary. It was profitable for them to allow her to do that. They had not sought to liaise with the claimant in any way towards getting her back to the office. In particular, they had not for example, referred her for Occupational Health. They had not sought any information or advice from the claimant's own treating clinicians.

190. While the directors had asked the claimant previously through their PA how much work the claimant was doing at home, we reject any suggestion that either of the directors believed that - once the claimant had given that answer and that once it became clear to the claimant that they were not going to set her up with computer access at home - the claimant had since stopped doing

work.

191. Furthermore, in addition to ceasing to send the claimant jobs, the respondent instructed its staff to contact the claimant's doctors and to have those doctors contact other colleagues, not the claimant, in relation to new work. Ms Alani remembers being given such an instruction and she explained that is why she sent emails in November 2017 to a hospital which had contacted the claimant's work email address.

192. The respondent was influenced to do each of these things by the fact that the claimant had stated via 20 October letter that she was alleging breach of the Equality Act and that she was potentially going to bring a claim. The respondents were not simply seeking to protect its position in the litigation, but they were seeking to cut off the claimant's only remaining income from the respondent, namely her commission.

193. In relation to 20.2, the threat to investigate the claimant for misuse of data was made by the respondent and it was made in bad faith. The respondent was fully aware that the claimant was doing work from home and had been throughout 2017 - other than some exceptions for trips to Canada or for surgical procedure - and the reason that the respondent suggested otherwise was that the claimant had made a threat of litigation based on the Equality Act against them. This was a significant influence on the Respondent's motives for the threat.

194. In relation to 20.3, this was in our judgment, a response to the threat of Equality Act litigation and was made for no good or adequate reason whatsoever. A significant influence on this decision was the fact that the claimant had threated to bring litigation in the employment tribunal alleging breach of the Equality Act and, in particular, that she was alleging a failure to make reasonable adjustments.

195. In relation to 20.4, the claimant has not proved and even taking into account the burden of proof provisions, that the respondent's failure to provide her with a copy of her contract was a decision which was influenced by her protected acts or any potential future protected act The claimant had been seeking a copy of this contract since 2015 and it had not been provided to her. The respondent's letters to the claimant's solicitor stated that they believed that the contract might have been lost and it has not been provided during the course of this litigation.

196. In relation to 20.5, this is very vaguely worded. What we heard during the hearing was that the claimant's suggestions are the poor handling of her grievance related to a combination of the initial suggestion that the directors deal with the matter, a combination that the initial meeting was scheduled for a coffee shop, the later suggestion that Mr Blair-Reid be the person to hear the grievance and then there is also a complaint about the grievance meeting going ahead in the claimant's absence despite her not having been warned about this possibility.
    a. The decision to invite the claimant to a meeting in the coffee shop is suspicious. We have considered the burden of proof provisions in relation to whether the claimant has proven facts from which we might infer that this was an act of victimisation due to the disability

discrimination allegations made in 20 October letter. The logical difficulty that the claimant faces is that if she had not made any allegations at all in 20 October letter then there would have been no need for the respondent to call her to any grievance meeting in any location. We do not think that the claimant has proven facts from which we could infer in the absence of an explanation from the respondent that the choice of location was influenced by the fact that she made allegations of contraventions of the Equality Act as opposed to some other hypothetical issues which might have required a meeting to deal with a grievance. Therefore, this allegation regarding the coffee shop location fails.

b. The suggestion that the directors would deal with the grievance and then the later change to have Mr Blair-Reid deal with it are not in themselves suspicious. The claimant has not proved that these are acts of victimisation.

c. In relation to going ahead with the grievance meeting on 1 December in the claimant's absence, this was the second proposed date for a meeting It is factually correct that the respondent neither told the claimant that the meeting would go ahead in her absence and nor did they offer her the opportunity to make representations without attending in person. However, the claimant has not satisfied us that this was something other than an oversight on the respondent's part and/or a decision made by the respondent based on the advice which they received from its external HR consultant. This new meeting was not of course to take place in the coffee shop. We are not satisfied that the respondent specifically made this decision because the claimant alleged breaches of the Equality Act as opposed to how they would have reacted had the 20 October and the 2 November letter contained different allegations of alleged wrongdoing.

197. In relation to 20.6, the reason the Respondent gave an outcome which denied all elements of the grievance was that the respondent intended to defend those allegations in the employment tribunal. The outcome letter is drafted very poorly. It does not accord with the advice that was given to the respondent by its own HR consultants. It did not provide a full explanation or indeed any explanation to the claimant for the reasons for rejecting particular allegations. Nonetheless, the respondent was not significantly influenced in its drafting of this letter by the fact that the claimant had made allegations specifically of breach of the Equality Act.

Detriment in respect of the National Minimum Wage
21. In the alternative, was the Claimant subject to the detriments at paragraph 20 on the ground that action was proposed to be taken by or on behalf of the Claimant with a view to enforcing her right to receive the National Minimum Wage. The Claimant will rely upon her lawyers' letter of 20 October 2017.

198. In relation to paragraph 21 of the list of issues, our findings mirror the analysis just made in relation to paragraph 20. In other words, in relation to the detriments at 20.1, 20.2 and 20.3, each of those are clearly detriments and, in our analysis, the claimant was subjected to these detriments because the respondent was influenced by the fact that she had made the assertion that she might rely on the National Minimum Wage legislation in order to enforce her rights against the Respondent.

199. As per our analysis in relation to 20.4, 20.5 and 20.6 in relation to victimisation under the Equality Act 2010, for similar reasons, we are not satisfied that those are detriments on the ground of proposed action under the National Minimum Wage legislation either.

200. Paras 22 to 25 of the list of issues will be dealt with at the remedy hearing.

Claim 2 – Time Limits – Early Conciliation

201. Before we move on to consider the list of issues for Claim 2, the first early conciliation was 18 December 2017 to 18 January 2018 (page 42 of bundle). The claim was issued on 16 February 2018. The claim form referred to various matters which had occurred after early conciliation had commenced or indeed finished. However, our findings were that the decision to resign itself was not taken until after 16 February, so in other words, after Claim 1 had been issued.

202. The claimant came to a decision to resign either on or immediately before 22 February and, as mentioned, the claimant is likely to have taken legal advice before deciding to resign.

203. In due course, the claimant and/or her legal advisors made a decision that her resignation was (or might be) a fresh matter which required a fresh early conciliation period. It is potentially true that she might not have needed to do so. Rather than issue a new claim form, perhaps the claimant could have made an application to amend Claim 1. Had she done so, then maybe that application might have been granted, maybe it would have been refused. It is not possible for us to say for sure and it is not appropriate for us to indulge in speculation about what might have happened in hypothetical circumstances.

204. Where a claimant has an existing claim and wishes to add to it by way of amendment, then it is not necessary to go through the early conciliation process again. Adding new causes of action, or new respondents, by way amendment is different to the presentation of a new claim form. (See, for example, Science Warehouse v Mills [2016] I.R.L.R. 96).

205. If a claimant seeks – rather than making an amendment – to present a new claim form, then that might be permissible (and, in fact, is not uncommon). In some circumstances, it might be an abuse of process, but is not inevitably so. In any event, if presenting a new claim form, it will have to comply with Rules 10 and 12 of the tribunal rules, and the early conciliation rules. However, that leads to the question of whether the Claimant must start early conciliation again (and put the new certificate number on the new claim form) or should re-use the early conciliation certificate number from the existing claim.

206. The provisions in the Employment Tribunals Act 1996 do not allow for more than one early conciliation certificate per matter to be issued by ACAS. Accordingly, if a second certificate is issued for the same matter, it has no impact on the limitation period as it does not trigger the modified limitation regime in the Employment Rights Act 1996 s.207B or Equality Act 2010

s.140B. (Revenue & Customs v Garau [2017] I.C.R. 1121). Furthermore, if a claimant sought to rely on the number of a certificate which was invalid, in circumstances in which they ought to have put a different number on the claim form – the ECC number of the original valid ECC then that could potentially lead to issues about whether the claim should be rejected once the issue came to light. Rejection can potentially take place even at a hearing after the claim has been accepted and a response issued; see EON Control Solutions v Caspall [2019] 7 WLUK 319.

207. In section 18A(1) of the Employment Tribunals Act 1996, the words "relating to any matter" are ordinary English words that have their ordinary meaning. Parliament deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and any matter and by reference to the word "matter" itself. As stated in Compass Group UK and Ireland Ltd v Morgan [2017] I.C.R. 73, [2016] 7 WLUK 653:

> *Ultimately, we can see no reason artificially to restrict the scope of the phrase "relating to any matter". That does not mean that an EC certificate affords a prospective claimant a free pass to bring proceedings about any unrelated matter; it does not. In our judgment, it will be a question of fact and degree in every case where there is a challenge (and we hope and anticipate that there will be very few such challenges) to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to ACAS. In circumstances where the only requirement is to make contact with ACAS but do nothing more and the information required to be provided is limited as it is, we do not consider that this construction defeats the object of the EC process at all.*

208. We are satisfied that the claimant and her advisors made the correct decision to treat this as a new matter which did require a new early conciliation certificate. The new claim form was not rejected by the tribunal when it was presented and it was not rejected by Employment Judge Henry at the preliminary case management hearing in December 2018 and this was despite the fact that the full details of the early conciliation certificates and the periods of them, and the respondent's argument in relation to them, was set out in is summary from that hearing.

209. The second ACAS certificate (page 73 of bundle) had Day A 21 May 2018 and Day B 21 June 2018. Claim 2 was presented on 20 July 2018. So Day was less than 3 months after the termination of employment and the claim was presented less than one month after Day B. So, if a valid certificate (and we have found it was) then Claim 2 was presented in time in relation to the alleged dismissal.

Constructive Unfair Dismissal
26. Did the Claimant terminate her contract of employment in circumstances in which she was entitled to terminate by reason of the Respondent's conduct in accordance with section 95(1)(c) of the Employment Rights Act 1996 ("ERA")? Specifically did the matters at paragraphs 18 or 19 of the Claimant's Grounds of Claim for Claim 2, individually or cumulatively amount to conduct which (without reasonable or proper cause) was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent (i.e. the implied term of trust and confidence)?
27. If so, did the Claimant, by her actions or words, waive any such breach by the Respondent and/or affirm her contract of employment?
28. Did the Claimant resign in response to the alleged breach?

29. If the Claimant was dismissed, was there a fair reason for her dismissal, namely the Claimant's conduct?
30. Was any dismissal fair in all the circumstances of the case?
31. If the Claimant's dismissal was not fair, had the Claimant contributed to her dismissal by her conduct?

210. Moving now on to paragraph 26 of the list of issues. We note that paragraph 18 of Claim 2 refers to the respondent's conduct and, in particular it says, the mismanagement of the claimant's grievance. It says that that amounted to a breach of the implied term of trust and confidence and that that breach was sufficiently serious as to constitute a repudiatory breach of the contract.

211. In relation to paragraph 19 of Claim 2, the claimant refers to the mismanagement of her grievance again but this time as a final straw and she refers to a course of conduct that set out in different places, namely what has been described in paragraph 7 to 17 of Claim 2 but also what is set out throughout Claim 1 in its entirety.

212. The conduct referred to in Claim 1 of course includes the entire history of the matter from November 2016 onwards, failure to pay the claimant her alleged entitlement to basic salary, the way that the respondent reacted in relation to 20 October 2017 letter, including ceasing to send work to the claimant and ceasing to pay the claimant's commission and bonus payments.

213. Our decision is that the respondent did breach the implied term of trust and confidence by acting in a manner calculated to destroy the employment relationship by ceasing paying commission payments in October. The claimant did not do anything to affirm this breach because at the time the respondent had stopped sending her work. Nor was it paying her.

214. Similarly, the respondent's decision to stop sending job vacancies to the claimant to help her to do work form home and create new assignments was also a breach of the implied term requiring trust and confidence. For the same reason, she did not affirm this breach either as she received no payment and did not work for the respondent after the breach occurred.

215. The fact that the claimant was potentially willing to attend a grievance meeting subject to the conditions laid out by her solicitors does not indicate that she was waiving the breach or affirming the contract. She was entitled for the respondent to deal with the grievance one way or the other before making her decision.

216. There are also come features of the grievance process which we find also amount to breach of the term requiring trust and confidence. There is the suggestion that the meeting take place in a coffee shop despite the known content of the proposed meeting and the fact that the grievance outcome letter itself was so incomplete and inadequate that it made clear to the claimant that they were not interested in addressing any of her complaints or engaging with her. There was a complete failure to give any reasoned justification for the respondent's position arguing against any points the claimant had made. In particular, the respondent simply ignored the suggestion that the respondent should make reasonable adjustments for the claimant.

217. Furthermore, the respondent deceived the claimant in that the respondent gave the claimant the impression, and did so deliberately and consciously, that Mr Blair-Reid had drafted the grievance outcome letter. They gave her the impression that they had agreed to her earlier objection to the directors' dealing with the grievance. However, in reality, that is not what happened, and, in reality, it was Mr Karshe who drafted the grievance outcome letter despite the fact that it was Mr Blair-Reed's signature at the bottom. The claimant only found out about this deception on 5 February and she resigned 17 days later without having received any further payments from the respondent or done any further work for them.

218. The claimant did resign in response to the breaches of contract. The specific trigger for her decision on 22 February was the claimant's realisation that she had been deceived in relation to the grievance outcome letter.

219. Furthermore, our finding is that there were breaches of trust and confidence in relation to the cessation of work and cessation of commission and the claimant was entitled to and she did treat those matters as a repudiation of her contract, and she did resign without having affirmed any part of those breaches.

220. In the alternative, if we are wrong about that, then we find that there was a last straw in that the decision to deceive the claimant was not innocuous. She found out about that deception on 5 February and resigned promptly after that last straw. It was not unconnected with the earlier repudiatory breaches as it was the Claimant's grievance on 20 October 2017 which caused the Respondent to cease sending her work and to cease paying her commission.

221. For these reasons the claimant was dismissed within the meaning of s.95(1)(c) of the Employment Rights Act.

222. Contrary to paragraph 20 of the list of issues, the respondent suggests that it had a fair reason for the claimant's dismissal, namely the claimant's conduct.

223. When considering a constructive dismissal, the respondent's dismissal reason as per section 98 the Employment Rights Act 1996 is the reason for the conduct which led to the claimant to resign and treat herself as having been constructively dismissed. The respondent's conduct mentioned above (deceiving her as to the author f the grievance letter; ceasing sending work and commission) was not caused by the claimant's conduct. The things that led the claimant to resign were things that the Respondent did because the claimant had caused her solicitor to write to the respondent in relation to her rights under the Equality Act and the National Minimum Wage. We therefore reject the Respondent's argument that it had a potentially fair reason (conduct) for the dismissal.

224. The claimant was constructively dismissed. It was not for a fair reason and the constructive dismissal was unfair.

225. In relation to paragraph 31, that is a matter that can be addressed at the remedy hearing.

Direct Discrimination
32. The Claimant alleges that she was constructively dismissed. In respect of her dismissal, because of a protected characteristic, namely disability, did the Respondent treat the Claimant less favourably than the Respondent treats or would treat a hypothetical comparator?
33. If so, was the reason or reasons for the less favourable treatment disability?

226. In relation to paragraph 32, the claimant would have to prove that somebody who had the same attributes as her but who did not share the same disability as her would have been treated differently, either an actual comparator or a hypothetical comparator. In other words, the claimant would have to prove that somebody who was not attending the workplace but for a different reason so not diarrhoea, IBS, incontinence and polyps, would have been treated differently.

227. Even applying the burden of proof provisions this element of the claim fails as the respondent did not dismiss the claimant because she was not coming into the office because of her diarrhoea. The respondent was happy for the claimant to remain away from the office provided she did not ask for basic pay. They would have let the situation carry on indefinitely had the claimant not had her solicitor send them the letter of 20 October.

Discrimination for a reason arising from a disability
34. Was the Claimant treated unfavourably because of something arising in consequence of the Claimant's disability? The Claimant says that she was away from the Respondent's premises as a result of her disability and that the treatment described at paragraphs 18 or 19 of the Claimant's Grounds of Claim for Claim 2 was because of this absence.
35 If the Claimant was discriminated for a reason arising from her disability, was the treatment a proportionate means of achieving a legitimate aim?

228. In relation to paragraph 34, the reference to paragraphs 18 and 19 of claim " is a reference to the paragraphs which allege constructive dismissal.

229. That treatment was because of something that was arising from her disability. The causation sequence was that because of her disability, she could work from home, but not in the office. Because she worked from home, but not in the office, the Respondent did not pay her basic salary. Because the Respondent did not pay her basic salary, she had her solicitors write to the Respondent. Because she had her solicitors write to the Respondent, they stopped paying commission and stopped sending her list of vacancies (for her to use to place her doctors). This treatment was a breach of contract and was part of her reason for resigning. In other words, it was part of the reason for (what we have found to be) the dismissal.

230. The respondent's treatment of the claimant was unfavourable and was not something that was justified; it was not a proportionate means of achieving a legitimate aim.

Wrongful Dismissal
36. Is the Claimant entitled to be paid for a period of notice? If so, for what period?

231. In relation to paragraph 36, the claimant was entitled, it would appear, to nine weeks' notice. In any event she was dismissed without notice on 22 February 2018 and that is wrongful dismissal in that she did not receive the notice

period. Arguments about the notice period and the damages for lack of notice period can be addressed at the remedy hearing.

232. Paragraph 37 of the list of issues, in relation to holiday pay has been resolved and we need to make no findings about it.

Time Limits
38. Were any of the Claimant's claims issued out of time?
39. Without prejudice to the generality of 38 above, was the Claimant's second reference to early conciliation effective to extend time for the purposes of section 207B of the Employment Rights Act 1996 for the matters in the second claim, or had the matters (or any matter) in the second claim been covered by the first reference to early conciliation?
40. If so. in respect of;
40.1 any claims under EQA would it be just and equitable to extend the time limit?
40.2 any claims under the Employment Rights Act 1996, if it was not reasonably practicable for any claim to have been presented inside the primary time limit (insofar as it was modified by early conciliation), was that claim presented within such further period as the Employment Tribunal considers reasonable?

233. In relation to time limit issues, we have mentioned already that we are satisfied that the dismissal claims in relation to the Claim 2 were in time for the reasons that we have given.

234. In relation to the respondent's apparent refusal to make specific adjustments so that the claimant could be set up with access to the respondent's computers systems when working from home, on the respondent's case that is a decision that was made specifically around June 2017 on costs grounds and therefore would potentially out of time subject to the tribunal's ability to extend time on just and equitable grounds.

235. In relation to the other matters referred to in the first claim, we are satisfied that they were in time as they were acts which continued up until the relevant period. The relevant period being on or after 19 September 2017 in relation to Claim 1 (taking account of the early conciliation).
    a. All of the victimisation complaints were in time as they relate to the period after 20 October 2017.
    b. We are also satisfied that the section 15 claims are also in time as continuing acts of unfavourable treatment which lasted until after that date.

236. In considering whether to extend time we have borne in mind that we have a broad discretion. The default position would be that time should not be extended because time limits are there for a reason and it is the claimant's responsibility in each case to satisfy the tribunal that in particular circumstances of the case it would be just and equitable to extend time.

237. In this particular case, it is our finding that the claimant was suffering significant ill-health and from November 2016 onwards, and in particular she had a surgical procedure on 8 September 2017, and it is legitimate for us to take it into account.

238. It is important for us to consider to what extent, if any, the respondent would be prejudiced if time was to be extended and to balance that against the potential prejudice to the claimant if time was not extended. In the

circumstances of this particular case we note that the bundle of documents was 3,463 pages and we note that there was another 880 pages potentially available. The respondent seemed to have the documents that it needed to defend itself. Indeed, somewhat surprisingly, it had not disclosed the absence records until we ordered it to do disclose them during this hearing but when we made that order they were able to access those documents fairly quickly and provide them to the claimant.

239. We take account of the fact that Ms Alani no longer works for the respondent. and we were told that she left last year, so 2020. That being said, had the hearing gone ahead in 2019 as originally scheduled, she would still have been working for the respondent. In any event, she did attend and give evidence and was questioned on the basis of her written statement. We have not had our attention drawn to any witness that the respondent might otherwise have wanted to call but been unable to do so. It did have both directors available to it, the PA to both directors and it also had the claimant's line manager available, albeit the line manager gave evidence on the claimant's side.

240. Even if – contrary to our decision – the time limit for presenting a claim about the dismissal was 21 May 2018 (ie no extension for early conciliation), the Respondent would suffer no prejudice – in terms of its ability to defend itself – by the grant of an extension. By the time of the resignation, a claim had already been issued, and that is mentioned in the resignation letter. It can have come as no surprise to the Respondent – given the contents of the resignation letter – that the Claimant wished to argue that her resignation was an alleged constructive dismissal and that it was unfair and discriminatory.

241. We find that the claimant's claims do have merit. She has been able to demonstrate them on the basis of evidence provided to us. It is our decision that we are able to make a decision that is fair to both sides based on the available evidence and that any prejudice to the respondent from extending time does not outweigh the prejudice that would be suffered by the claimant if we refused to extend time. Therefore, to the extent that it is necessary, we extend time in relation to all of the claims brought within Claim 1 and all of the claims brought within Claim 2.

242. Paragraphs 41, 42 and 43 of the list of issues will be dealt with at the remedy hearing, so that is the end of our reasons.

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Employment Judge Quill

Date: 7 June 21

Judgment sent to the parties on

11 June 21

For the Tribunal office