EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Barnes	**v**	Marina Developments Limited

Heard at: Bury St Edmunds (by CVP) **On:** 5, 6 and 7 May in Chambers 27 May 2021

Before: Employment Judge M Warren

Members: Ms L Durrant and Mr C Davie

Appearances
For the Claimant: Mr T Goodwin, Counsel
For the Respondent: Ms N Gyane, Counsel

RESERVED JUDGMENT

1. The Claimant's claim that she was discriminated against by reason of her disability succeeds.

2. The Claimant's claim that she was unfairly dismissed succeeds.

3. The Respondent shall pay the Claimant compensation in the sum of **£16,636.30**

4. The recoupment provisions do not apply.

REASONS

Background

1. Miss Barnes was employed by the Respondent as an Administrator between 1 August 2016 and 23 June 2019. After Acas Early Conciliation between 14 and 27 June 2019, she issued these proceedings on 30 June

2019. Miss Barnes' claims are of unfair dismissal and disability discrimination.

2. A Preliminary Hearing was held before Employment Judge Cassel on 23 October 2019. Both parties were represented and at that hearing, the issues were identified, (see below). Case Management Orders were made and the case was listed for a Final Hearing on 11, 12 and 13 May 2020.

3. Unfortunately, it was not possible for the Final Hearing to go ahead in May 2020 because of the Coronavirus pandemic. A Preliminary Hearing by telephone was conducted by Employment Judge Laidler on 11 May 2020 and the matter set down for today. The parties confirmed to Employment Judge Laidler the List of Issues as set out in the hearing summary of Employment Judge Cassel remained agreed, that all orders had been complied with and the case would have been ready to proceed.

The Issues

4. The issues as agreed before EJ Cassel were as follows (cutting and pasting from the Preliminary Hearing Summary of EJ Cassel):

> (3) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
>
> (i) The respondent accepts that the claimant has a disability, severe anxiety disorder, and that the claimant was a disabled person on the dates of all the relevant acts.
>
> (ii) The claimant clarified that there is no claim for a failure to make reasonable adjustments.
>
> (iii) The respondent clarified that there will be submission at the end of the evidence that all acts pre 15 March 2019 are out of time. The claimant will argue that the acts are continuing and it was made clear in tribunal that there will be no preliminary argument as to jurisdiction.
>
> *Constructive unfair dismissal – s.94(1) ERA 1996.*
>
> (iv) Was the claimant dismissed?
>
> (v) Was the dismissal fair and reasonable in the circumstances?
>
> *EQA, s.13: direct discrimination because of disability*
>
> (vi) The respondent accepts that the claimant had a disability at the appropriate time.

(vii) Did the respondent treat the claimant less favourably than it would treat others because of her disability in that it:

a. Did not make sufficient attempts to keep in touch with the claimant during her absence.

b. Did not allow the claimant to return to her previous workstation when she returned to work.

c. Changed telephone extension numbers and removed the claimant's details.

d. Removed the claimant's details from trays at her workplace.

e. Failed to provide the claimant with an adequate workstation when she returned to work.

f. Changed the claimant's work responsibilities when she returned to work (including, but not limited to removing her supervision of an assistant administrator, removing responsibility for berth sales and being asked to complete more menial tasks which the assistant administrator had previously undertaken).

g. Excluded the claimant from office niceties such as treats in the office, making the claimant tea as part of the tea round and not asking her if she wanted to order Chinese food when the staff did so.

h. Did not carry out scheduled reviews when the claimant returned to work.

i. Did not refer the claimant to occupational health despite its own policy stating that it should.

EQA, s.15: discrimination arising from disability

(viii) Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability by:

a. Writing to the claimant to notify her of a change to her hours of work when she was signed off sick.

b. Not making sufficient attempts to contact her when she was off work.

c. Not allowing the claimant to return to her previous workstation when she returned to work.

d. Changing telephone extension numbers and removing the claimant's details.

e. Removing the claimant's details from trays at her workplace.

f. Failing to provide the claimant with an adequate workstation when she returned to work.

g. Changing the claimant's work responsibilities when she returned to work (including, but not limited to removing her supervision of an assistant administrator, removing responsibility for berth sales and being asked to complete more menial tasks which the assistant administrator had previously undertaken).

h. Excluding the claimant from office niceties such as treats in the office, making the claimant tea as part of the tea round and not asking her if she wanted to order Chinese food when the staff did so.

i. Not carrying out scheduled reviews when the claimant returned to work.

j. Not referring the claimant to occupational health despite its own policy stating that it should.

(ix) Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

(x) Did the respondent know, or could it reasonably have been expected to know, that the claimant had a disability at the appropriate time?

EQA, s.26: harassment related to disability

(xi) Did the respondent engage in unwanted conduct that had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment by:

a. Not allowing the claimant to return to her previous workstation when she returned to work.

b. Changing telephone extension numbers and removing the claimant's details.

c. Removing the claimant's details from trays at her workplace.

d. Failing to provide the claimant with an adequate workstation when she returned to work.

e. Changing the claimant's work responsibilities when she returned to work (including, but not limited to removing her supervision of an assistant administrator, removing responsibility for berth sales and being asked to complete more menial tasks which the assistant administrator had previously undertaken).

f. Excluding the claimant from office niceties such as treats in the office, making the claimant tea as part of the tea round and not asking her if she wanted to order Chinese food when the staff did so.

g. Not carrying out scheduled reviews when the claimant returned to work.

h. Not referring the claimant to occupational health despite its own policy stating that it should.

(xii) Was that conduct related to the claimant's disability?

5. At the outset of this hearing I clarified with the parties that unfortunately, the above List of Issues does not make it entirely clear what the basis is of the Claimant's constructive dismissal claim. Mr Goodwin confirmed that she relied upon the implied term to maintain mutual trust and confidence, relying on the alleged acts of discrimination and the act of changing her duties as an act of demotion.

6. I also clarified that the, "something arising" in respect of the claim for disability related discrimination, is the Claimant's absence, anxiety, dealing with customers and the phased return to work.

Evidence

7. The Tribunal had before it the following:

7.1. A Bundle of documents in PDF format (the Tribunal is grateful to whoever is responsible for ensuring that content had optical character recognition, OCR);

7.2. A Bundle containing extracts from medical documents;

7.3. The Claimant's Witness Statement;

7.4. Witness Statement of Mr Sutton for the Respondent;

7.5. Witness Statement of Ms Sharman for the Respondent;

7.6. The Claimant's skeleton argument;

7.7. The Respondent's Counsel's note;

7.8. The Claimant's closing submissions; and

7.9. The Respondent's closing submissions.

The Law

Disability Discrimination

8. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.

9. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting her to any other detriment.

10. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that she had been disadvantaged in the circumstances in which she had thereafter to work.

Direct Discrimination

11. Direct discrimination is defined at s.13 as follows:

> *(1) 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…*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

12. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real or hypothetical comparator.

13. In a case of direct disability discrimination, the comparator would be a person in the same circumstances as the claimant, but who is not disabled as defined in the Equality Act 2010, see London Borough of Lewisham v Malcolm [2008] UKHL 43.

14. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, "on the ground of" the particular protected characteristic. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014]IRLR 448 at paragraph 40 that there was no difference in meaning between, "because of" and "on the grounds of".

15. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

16. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

Disability Related Discrimination

17. Disability Related discrimination is defined at s.15 as follows:

> *(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.*

18. Determining whether treatment is unfavourable does not require any element of comparison, as is required in deciding whether treatment is less favourable for the purposes of direct discrimination. There is a relatively low threshold of disadvantage for treatment to be regarded as unfavourable. It entails perhaps placing a hurdle in front of someone, creating a particular difficulty or disadvantaging a person, see Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] UKSC.

19. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

20. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN)

21. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:

    21.1. The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.

    21.2. Secondly, the tribunal should determine what caused the treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant.

    21.3. Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment was the, “something arising” in consequence of the claimant’s disability. There could be a range of causal links. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator.

22. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

    22.1. Whether there was a legitimate aim, unrelated to discrimination;

    22.2. Whether the treatment was capable of achieving that aim, and

22.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

23. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.

24. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

25. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.

26. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.

27. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.

28. The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

29. The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrrington & Rosedale College [2001] ICR 189).

Detriment and Harassment

30. Section 212, the definitions section of the Equality Act, at subsection (1) provides that, "detriment" does not include conduct which amounts to harassment. This means that it is not possible to have the same conduct

defined as direct discrimination or victimisation and harassment. One might say that harassment has priority; if the conduct is harassment, it is not a detriment and not therefore direct discrimination, disability related discrimination or harassment.

Harassment

31. Harassment is defined at s.26:

> *"(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> *(5) The relevant protected characteristics are—*
>
> *…*
>
> *disability;*
>
> *…."*

32. We will refer to that henceforth as the proscribed environment.

33. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA

34. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

> *"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not*

necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

35. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, "intimidating, hostile, degrading, humiliating or offensive" he said that employment tribunals, "*should not cheapen"* the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Burden of Proof

36. Section 136 deals with the burden of proof:

"(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.

37. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

38. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

Constructive Unfair Dismissal

39. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

40. Section 95 defines the circumstances in which a person is dismissed as including where:

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

41. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

> *" If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."*

42. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347)

43. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

44. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

45. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant…..If conduct objectively considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."*

46. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

47. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

48. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act can not be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

49. A fundamental breach by an employer has to be, "accepted" by the employee, to quote Lord Browne-Wilkinson in the EAT in W.E. Cox Toner (International) Ltd v Crook 1981 IRLR 443 :-

> *"If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end…*
>
> *But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the*

contract; but if it is prolonged it may be evidence of an implied affirmation…

Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation…"

50. HHJ Burke QC in Hadji v St Luke's Plymouth UKEAT 0857/2012 summarised the law on acceptance as follows:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761, [1978] 1 All ER 713, [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p 446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) (iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para 44.

51. The employee must prove that an effective cause of his resignation was the employers' fundamental breach. However, the breach does not have

to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, which must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

52. An employee is perfectly entitled to wait for a period of time to seek alternative employment before resigning, see for example Walton & Morse v Dorrington [1997] IRLR 488.

The Findings of Fact

53. The Respondent owns and runs a number of marinas around the country, including one at Woolverstone in Suffolk. It has approximately 250 employees, 12 of whom are employed at Woolverstone. Human Resources support for the Respondent is provided by two people based at their Head Office in Southampton.

54. No Equal Opportunities Policy or Diversity Policy was produced in evidence. There was no evidence of diversity training for management or staff. There is a reference to an Equal Opportunities Policy in the Terms and Conditions of Employment, (page 60 clause 20).

55. Miss Barnes' employment began on 1 August 2016. Her job title was Office Administrator. Her contract of employment is at page 55. Her hours of work April to October were a weekly cycle of Monday to Sunday and in the second week, Wednesday to Friday. From November to March her hours were Monday to Friday 9am until 5pm.

56. In Miss Barnes' Statement of Terms of Conditions of Employment at page 57, the job title is that of Office Administrator, although the clause (clause 5) states that from time to time, she may be called upon to do any work within her capability. Clause 10 at page 58 reserves the Respondent's right to vary hours of work either temporarily or permanently.

57. The Respondent's Sickness Absence Policy and Procedure begins at page 67. Paragraph 9.3 at page 71 refers to the possibility that it may be necessary to seek a report from a Doctor / Occupational Health Provider as necessary. At 10.1.5 reference is made to the possible need for input from an Occupational Health Provider upon return from long term absence. At 13.2 the Respondent states that it will maintain regular contact in the event of long term sickness absence. At 13.2.9 is a reminder that referral may be made to an Occupational Health Provider, Consultant or Doctor.

58. Provisions for sick pay are set out at page 77 and 78. Relevant to this case is that in the second year of employment, the employee is entitled to 4 weeks full pay.

59. Miss Barnes was line managed by a Ms Sharman, who acknowledged in evidence that she had never received any equal opportunity or diversity

training. Ms Sharman had formerly been the Office Administrator. Miss Barnes herself in turn supervised an Assistant Administrator, Miss Roberts.

60. At the end of 2017, Miss Barnes began to feel anxiety about dealing with customers, (there is no suggestion this is the Respondent's fault).

61. In March 2018, Ms Sharman proposed a change in the arrangements that would mean that Miss Barnes and her assistant would spend more time dealing with customers' queries than they had previously. Miss Barnes explained to Ms Sharman that she was finding dealing with customers difficult and asked if her contact with customers could be kept to a minimum. Ms Sharman told her that this was her job and she would need to deal with it.

62. Also in March 2018, Ms Sharman raised with Miss Barnes a proposed change in her shift pattern that would involve during the first week of the two week cycle, working three days on and one day off, four days on and one day off. In the second week of the cycle, six days on and two days off. Miss Barnes objected that because of her mental health issues, she felt that she would not be able to cope with only one day off at a time.

63. The proposed change to the shift pattern caused Miss Barnes anxiety. She spoke to Ms Sharman about how she was feeling and her response was that she could not and would not alter the proposed changes relating to both dealing with customers and the hours of work.

64. Sadly, in March 2018 Miss Barnes' Grandfather died, causing a further decline in her mental health.

65. On 23 March 2018, Miss Barnes was absent from work. The fit note stated the reason for absence was migraine. Upon her return to work on 29 March 2018, the return to work interview note, at page 94, records that whilst her absence on 23 March 2018 was migraine, her further absence on 26, 27 and 28 March 2018 was stress and anxiety caused by various issues, some personal and some to do with work.

66. Upon her return to work, Miss Barnes was directed once again to work on the Respondent's front desk and deal with customers. She became anxious and was signed off work again on 31 March 2018 due to anxiety, stress and depression. She was diagnosed in due course with severe anxiety disorder and remained off work until 22 January 2019.

67. Whilst she was absent from work, on 19 April 2018, the Respondent sent to Miss Barnes a proposed written agreement to a change in her shift pattern as referred to above, (page 96). The author of the letter is Ms Sharman. The letter concludes with a paragraph inviting Miss Barnes to contact her to discuss if she wished. Miss Barnes signed the letter by way of giving her agreement, her signature dated 19 April 2018.

68. On 2 May 2018, a Welfare Meeting with the Claimant took place with Ms Marriott Head of Head Office and Ms Sharman. Miss Barnes was warned that her sick pay was about to come to an end, (she had thought that it was going to last for six months). The notes of the meeting at page 104 and 105 record that Miss Barnes became very upset.

69. Miss Barnes had the benefit of an insurance policy with Legal and General that provided her with financial support during her absence due to ill health and with medical advice and assistance.

70. In July 2018, Miss Barnes had been working on her CV and accidentally copied that to Ms Sharman in an email.

71. Legal and General sent a questionnaire to the Respondent, to a Ms Long, Head of HR, who completed it. In it was a statement that the Respondent would actively encourage a phased return to work with duties adjusted as appropriate, in accordance with GP advice on the Fit Note.

72. A medical triage for Miss Barnes was carried out on behalf of Legal and General. Although as we understand it, this was not copied to the Respondent at the time, there are some points worthy of note:

    72.1. Miss Barnes saw the triggers of her anxiety as a combination of factors including her Grandfather, dealing with her Mother who she had not had any contact with for a few years, separating from her boyfriend and, *"some work stresses"*;

    72.2. Perceived barriers to her return to work were described as dealing with people and everybody at work knowing that she was unwell; and

    72.3. A barrier to her return to work is described by Miss Barnes as her high levels of anxiety and her concern that her role involved dealing with members of the public on a frequent basis.

73. A second Welfare Meeting took place with Miss Barnes on 17 August 2018, attended by Ms Sharman and a Ms Coleman-Powell, (an HR advisor). During this meeting, Miss Barnes said that she would like regular contact with Ms Sharman and to be kept in the loop. They agreed there would be regular fortnightly chats, to start from 31 August 2018. Miss Barnes also agreed that she would give her consent for the Respondent to approach her Doctor. The next Welfare Meeting was set for October 2018.

74. A letter requesting a report from the GP was sent dated 20 August 2018. A series of questions were posed, including for example, what kind of work Miss Barnes would be able to do? Were there any reasonable adjustments that should be considered? Might she be regarded as disabled in accordance with the Equality Act 2010? Was there any additional information that might assist in making an assessment?

75. Miss Barnes and Ms Sharman spoke on the telephone as agreed on 31 August 2018. They spoke about how she was feeling, what treatment she was undergoing and how things were going with the Respondent.

76. The Respondent received a letter from Miss Barnes' GP dated 13 September 2018, in which she confirmed that Miss Barnes was suffering from chronic and severe Anxiety Disorder, she was in the care of the Mental Health Community Team and was receiving therapy. The doctor suggested the Respondent obtain a formal Occupational Health Assessment. That is the extent of the letter, it goes no further towards answering the questions posed.

77. Ms Sharman telephoned Miss Barnes for a Welfare call on 13 September 2018, noted at page 147. They spoke about Miss Barnes' treatment and how she was feeling. Ms Sharman spoke about how things were at the Respondent.

78. There was a further Welfare call between Ms Sharman and Miss Barnes on 27 September 2018, page 150. Miss Barnes said nothing had changed and she talked about things that were going on in her life. Ms Sharman talked about things that were going on with the Respondent.

79. The next Welfare Meeting as arranged, took place on 11 October 2018, attended by Ms Sharman and Ms Coleman-Powell. The note of this meeting is at page 153. They spoke about Miss Barnes' treatment and how she was progressing. Miss Barnes confirmed that she was finding the regular chats with Ms Sharman helpful. Miss Barnes gave an indication she did not think she would be back at work before Christmas. Subsequent to that meeting, Ms Sharman sent Miss Barnes three sets of minutes from previous staff meetings.

80. An Assessment Report for CBT was prepared for Miss Barnes' insurers on 18 October 2018. Again, this does not appear to have been provided to the Respondent at the time, but we note that the report records that Miss Barnes feels the onset of her current problems began in March 2018 following her struggling to adapt to changes in her shift pattern at work, as well as the loss of her Grandfather and conflict with her Mother.

81. A further welfare call took place between Ms Sharman and Miss Barnes on 8 November 2018, noted at page 171. They spoke about Miss Barnes' progress with her treatment and Ms Sharman spoke about the preparations with the Respondent for Christmas.

82. There was a further welfare call on 23 November 2018, noted at page 173. Miss Barnes spoke of how she was progressing with her treatment, in fairly negative terms. She spoke of being worried about what to say to customers when she returned to work and Ms Sharman suggested she talk to her counsellor about that. Ms Sharman spoke about what was

going on at the Respondent and they spoke about a possible visit to the premises by Miss Barnes.

83. That visit took place on 19 December 2018. Miss Barnes has complained that Ms Sharman arranged to meet her in the car park and did not do so. In evidence, she accepted that she knew that Ms Sharman had a meeting first of all and that that meeting overran. Ms Sharman and Miss Barnes began discussing a possible return to work in January 2019. There was subsequently an email exchange on that topic on 29 and 31 December 2018, noted at pages 180 and 181. Miss Barnes wrote to Ms Sharman to say that her therapist suggested she meet again with Ms Sharman regarding a phased return to work in the new year. Ms Coleman-Powell had been copied in on that email and she replied to say that they would take guidance from her, (Miss Barnes) and her doctor on how that phased return would, *"look like"*. She wrote,

> *"Sometimes the doctor provides guidance on a fit-note. You <u>will</u> require a fit-note from your doctor which states you may be fit to return on a phased return".*

84. During January 2019, Ms Sharman and Miss Barnes discussed the phased return to work further. Miss Barnes' insurers provided a Return to Work Plan, copied at page 191. It is detailed, setting out in tabular form tasks to be completed, with columns providing for reviews on a weekly basis. It entailed a six week phased return, with weekly progress meetings and a gradual reintroduction of customer interaction. All that is stipulated to begin with in this first iteration of the document, is what is planned for the first week.

85. Miss Barnes' GP provided a fit-note dated 15 January 2019, recommending a phased return to work in terms of reduced hours and limited contact with clients from week two.

86. Miss Barnes returned to work as planned on 22 January 2019. Ms Sharman completed a Return to Work Interview form, page 195. This records that Miss Barnes was happy with the planned phased return to work, but also that she felt a bit overwhelmed at all the tasks on the Return to Work Plan and was concerned how she would concentrate. We also note that in answer to the question, *"Is the absence related to any disability or pregnancy?"* Ms Sharman has answered, *"No".*

87. Upon her return to work, Miss Barnes focused to begin with on archiving and filing, avoiding customer contact.

88. During her absence from work, Miss Barnes' Assistant Miss Roberts had been acting up. Upon Miss Barnes' return, in so far as she did not immediately resume her duties, Miss Roberts continued with them.

89. The desk / work place arrangement had previously been that there was a desk in the back office used by whichever of Miss Roberts or Miss Barnes

was not sitting in the front, customer facing, office. They had taken it in turns to do so. Upon Miss Barnes' return to work, the back office desk was not available because there was another employee, one Mr Taylor, returning to work on light duties. He needed the use of a desk and he was to have the use of the back office desk. To begin with, Miss Barnes was to undertake training on her laptop and so she was told to sit in the staff room and work which, it was said, would enable her to interact with and re-establish relations with other members of staff.

90. During her absence, Miss Barnes' personal belongings had been moved and preserved by Ms Sharman. They were returned to her upon her return to work. Unfortunately, her work coat had gone missing.

91. During her absence, Miss Roberts' name had replaced that of Miss Barnes as the Administrator to contact at Woolverstone on the Respondent's list of key telephone numbers. The list was maintained by HR and updated from time to time. Miss Barnes' name was not restored to that list on her return to work, or at all.

92. Also during her absence, Miss Barnes' name had been removed from paper trays and was not restored.

93. Miss Barnes complains that upon her return, she found that she tended to be excluded from what has been described during the hearing as, *"cakes and treats"*. She complains of Ms Sharman not making cups of tea for her when she was making the drinks for others. Ms Sharman's explanation is Miss Barnes had said she was on a health care plan diet and did not drink tea.

94. There was a review meeting on the Return to Work Plan on 28 January 2019 and again on 4 February 2019.

95. Ms Sharman kept a log of her interactions with Miss Barnes, which is copied in the Bundle at page 240. This was instructive. On 5 February 2019, she made the following entry:

> *"SB asked me a question about some payments that haven't been allocated on Haven Star as she had started looking at Haven Star and allocating payments she knew nothing about, when asked why she couldn't explain and just said she thought she would. I told her to stick to her Return to Work Plan and not start doing things like that she knew nothing about without checking with Tanya (Roberts) as there may well be a valid reason why they have not been allocated… asked her to sort out the front office and afterwards I couldn't find a current price list and the customer tray was still full of all sorts. Jobs to be done rather than polishing!"*

96. Ms Sharman was absent from work for reasons we do not need to go into, between 11 February and 14 March 2019. During her absence, her Manager Mr Sutton visited the premises once or twice a week.

97. On 14 February 2019, Miss Barnes had a consultation with a rehabilitation specialist provided by Legal and General. This information was not provided to the Respondent at the time. The record of that consultation is relevant in the corroborative evidence that it provides:

    97.1. She spoke of panic attacks at work and feeling nauseous, the main issue she describes as not having a desk and working on a lap top in the staff room;

    97.2. She speaks of not being provided with work and unsure of what she was meant to be doing;

    97.3. She referred to her manager telling her off, which was reducing her confidence; and

    97.4. She said when she returned to work she was given a box of her belongings and her manager commented that her assistant was doing her work and not being paid for it, which made her feel unwelcome.

98. On 14 February 2010, Miss Barnes spoke to Mr Sutton about her concerns and handed to him a written note of what they were, copied at page 198. It referred to:

    98.1. Being told that her desk was no longer hers, with the Assistant Administrator using the desk but she was not;

    98.2. Her personal things had been taken from her desk and she had nowhere to put them;

    98.3. Her uniform coat was missing;

    98.4. She had completed everything on her Return to Work Plan but is not sure what happens next;

    98.5. She was told repeatedly that Miss Roberts was on top of things;

    98.6. She feels that she was being told what to do by Tanya rather than vice versa;

    98.7. That Ms Sharman had said that Tanya was being paid as an Administrator, which was not fair;

    98.8. That she had not been given an opportunity to take back her role, and

    98.9. All these things were increasing her anxiety and making her return to work more difficult and she felt unwanted.

99. Mr Sutton spoke to Ms Sharman and wrote her an email later that day, setting out some very sensible suggestions, for example that Ms Barnes should work on the front desk or the back office with flexibility so as to mix her time between doing the work she needs to do and facing customers. Arrangements were made to replace her coat. He proposed to discuss the next day some further areas of work that she could move into. He reassured Miss Barnes that she was a valued member of the team and that Ms Sharman ought to reinforce that message on her return.

100. Mr Sutton spoke to Miss Barnes again the next day, 15 February 2019. He followed that conversation up with an email which is copied at page 202. He told her to make the back office her semi-permanent work place, that she should feel free to take ownership of files, folders or anything else that she needs moving on and to work with other members as a team over where things should be moved to. He confirmed that a new uniform coat had been ordered. In terms of her work, he suggested if she completed her tasks on the Return to Work Plan, she should look to the weeks ahead to see if there were matters there that she could start on. He told her not to feel under pressure, to take breaks when she needed to and he encouraged her to contact him if she wanted to discuss her return to work further.

101. On 18 February 2019, Miss Barnes' GP recommended an extension of her return to work by one further week, page 206. At the instigation of Mr Sutton, that was complied with.

102. Miss Barnes had a further consultation with Legal and General on 21 February. Again, this is a useful document for corroboration. Of note is that:

    102.1. There had been some improvement following open discussions with her employer regarding her lack of meaningful work and area to work;

    102.2. She continued to shake at times, but this was not constant and there was a general improvement;

    102.3. She now had a desk and had started to undertake some meaningful work on systems which she regarded as positive, and

    102.4. She remained anxious, but not as anxious as she was the previous week.

103. Ms Sharman returned to work on 14 March 2019 and on 18 March 2019 met with Miss Barnes to complete her Return to Work Plan. The completed Return to Work Plan is at page 217. This records in the column for 18 March 2019 that Miss Barnes has returned to full time hours and is happy to return to full time Administrator duties. It is said that she is to take responsibility for month end and supplier invoicing going forward, to have overall responsibility for banking but is to share that task with Miss

Roberts. Also, to take back responsibility for debts, direct debits, lifting payments for month end and supplier invoicing, for banking reports and to ensure all events planned are catered for and advertised.

104. Miss Barnes' evidence is that in reality not all of these duties were returned to her. This is corroborated by the content of her letter of resignation which we will come to in due course, at page 233, where she complains two months later of not having been allowed to resume her old role, with a high percentage of her previous duties being reassigned to Miss Roberts. Our finding is that Miss Barnes was not able to resume all of the duties that she had been responsible for before her illness, that many of these continued to be undertaken by Miss Roberts and that there was an ongoing tension in that regard.

105. Four planned 'one to ones' between Ms Sharman and Miss Barnes during March and April 2019 did not take place either because they were both busy or because Miss Barnes was on holiday.

106. On 20 March 2019, Miss Barnes' Doctor recorded on a consultation,

> *"Tired, full week at work, has to pay time back for therapy appointments, struggling with this review, one week not really fitting in with colleagues at work, struggling with Manager".*

107. Ms Sharman records in her diary record for 22 March 2019,

> *"SB has a tendency to start things or ask things but not follow up… Talks to people on the phone but does not always ask who it is!"*

108. At a further consultation with her GP on 27 March 2019, Miss Barnes' GP has recorded,

> *"Hard week, battling through, family say that she is miserable all the time, has applied for a new job… In general getting on well".*

109. In her diary note for 29 March 2019 Ms Sharman records,

> *"Still has issues with prioritising workload, needs direction. Also not keen on sharing front office duties, I shouldn't have to intervene, should be shared 50/50, every other day or week or week off".*

110. On 31 March 2019, Ms Sharman took Miss Roberts out for lunch to acknowledge the end of her period of acting up in Miss Barnes' role. Miss Barnes was not involved.

111. We note the following comments in Ms Sharman's diary notes:

111.1. 5 April 2019: *"Awareness of other people workloads, don't interrupt guys when lifting unless absolutely necessary. Mentioning they were lifting on 05/04 and you said you didn't even notice, saw the*

car park had changed but that's as far as your brain went! There is a big crane in the car park, easy to spot! That's a worry, you need to be more observant and as Administrator you should know what's going on. Sharing of front office duties, shouldn't need to intervene, don't leave it all to TR, need to share 50/50… If you can't sort it out we will have to rota";

111.2. 15 April 2019: *"Concentration and less haste! Think about what you are doing!... Allocated two berths to wrong sized vessels, more training needed! Brought her tablets, can you not do this yourself?!... SB mentioned to SC that she didn't have anything to do? Evers and joiners surveys, what has Tanya got outstanding? Should be able to control your own work load and there is ALWAYS something to do, shouldn't be up to me to continue to give you lists of things to do"*;

111.3. 16 April 2019: *"One to one planned but as TR was off we were busy and SB said she had no real issues, we agreed to put it off until after SB holiday on 30 / 04"*;

111.4. 23 April 2019: *"SB needs to listen. Celebrity service remember, keep the customer happy and they will return… Also asked about electric meter maid and doc line snubbers and was told you would speak to AP, when I spoke to AP he said he hadn't heard from you. Now you're on leave, it leaves them a week without a response! Celebrity service!!! Did you look for the electric lead? It was simply in the middle office section with his name on it! Patronising email to TR, has been doing job, be careful how you speak to people so as not to upset them… Please don't send me 101 emails, please send all in one, think how many I have and try to limit my work load not increase it!"*, and

111.5. 30 April 2019: *"Got to Twilights confused, if not sure who talking to check to ensure errors are not made, one to one rearranged again due to work load and short staffed, as agreed by SB".*

112. On 1 May 2019, Ms Sharman received a reference request for the Claimant from the Norfolk and Suffolk Constabulary. They discussed this and agreed to postpone a one to one that was due that day. They agreed that Ms Sharman would forward the request to Human Resources. It was clear that Miss Barnes had been offered a job with the Constabulary, subject to satisfactory references.

113. Also on 1 May 2019, a Mr Glanville, someone senior with the Respondent, visited the Woolverstone Marina to discuss progress on annual berthing renewals. This was something that would usually be within the ambit of Miss Barnes' duties. Mr Glanville spoke to Miss Roberts rather than Miss Barnes, who felt excluded.

114. On 3 May 2019, Ms Sharman made a further diary note,

> *"Gave you an invoice to check if paid, but all you did was check in the file, said it had been paid (without checking with Katy) and shredded it!!!! … Need to be more on top of these things".*

115. On 23 May 2019, Miss Barnes informed Ms Sharman that she had accepted the job offer from the Norfolk and Suffolk Constabulary and would be resigning her employment. She did so on 24 May 2019, handing over her letter of resignation giving one month's notice. The letter reads,

> *"Since I have returned to work at the Marina from long term sickness I have not been allowed to resume my old role as Site Administrator. Instead of that a high percentage of my previous duties have been reassigned to Tanya and I no longer have any supervisory role on site. In addition I am now expected to perform a very different role to that which I had prior to my illness and am effectively being treated as an Assistant Administrator.*
>
> *I consider that my treatment since I returned to work has been unreasonable and there are no signs of any improvement. In view of that I have no choice but to submit my resignation. My last working day will be Sunday 23 June 2019."*

116. Ms Sharman noted in her diary that she had been handed the resignation letter, she completed the Leaver form and had sent it to Human Resources.

117. That day, Miss Barnes noted that Miss Roberts remained listed as the Administrator on an internal system of the Respondents know as 'Pro Proffs'.

118. On 7 June 2019, the staff at the Marina ordered a Chinese takeaway and Miss Barnes was not consulted about whether she wished to take part and join in, until after the order had been placed.

119. Miss Barnes' notice expired on 23 June 2019 when her employment terminated.

Conclusions

Harassment related to disability

120. In case of discrimination where there are overlapping allegations of harassment and direct discrimination, the allegations of harassment should be considered first, because anything which is found to amount to harassment is not, "a detriment" and not therefore, direct discrimination.

121. Ms Sharman writing to Miss Barnes on 5 April 2018 whilst she was off work through ill health, calling upon her to sign her agreement to the shift pattern change, was unrelated to her disability; it was something that had

been discussed and flagged up as pending before Miss Barnes' illness. Miss Barnes consented to the proposal and in that sense, it was not unwanted, although we accept it was something that Miss Barnes was not enthusiastic about. It could not be said to create the proscribed atmosphere.

122. The allegation that the Respondent made insufficient attempts to contact Miss Barnes during her absence is not well founded. There were many successful attempts to communicate with Miss Barnes during her absence, including the three Welfare Meetings on 2 May 2018, 17 August 2018 and 11 October 2018. After the second Welfare Meeting on 17 August 2018, by agreement and at Miss Barnes' request, fortnightly contact was made with her by Ms Sharman. From the notes of those conversations, we can see they were substantial conversations and not mere tokens. The fortnightly calls cannot, in our view, simply be dismissed because they were made at the request of Miss Barnes. It is to Ms Sharman's credit that when Miss Barnes indicated that she would find fortnightly calls helpful, Ms Sharman obliged.

123. We find that the scheduled reviews that were not carried out following Miss Barnes' return to work, were cancelled either because Miss Barnes and Ms Sharman agreed that they were too busy, because Miss Barnes was on leave, or because there were other matters which made it inconvenient. Cancellations were by mutual agreement and were not unwanted conduct, nor did they create the proscribed atmosphere.

124. There is no requirement to refer an employee absent from work on long term ill health to Occupational Health; there is no such requirement in the Respondent's procedures, nor is there any such requirement as a matter of law. It might be said that an employer who does not refer a long term absentee to Occupational Health might be asking for trouble, in that it would be laying itself open to accusations of a failure to make reasonable adjustments, if that employee is disabled, so as to facilitate their returning to and remaining at work. It is noteworthy that there is no allegation of failure to make reasonable adjustments in this case. The Respondent had information from Miss Barnes' GP, from her insurers and from Miss Barnes herself, about what arrangements ought to be made to accommodate her return to work.

125. The Respondents not referring Miss Barnes to Occupational Health Advisors is not unwanted conduct, for she did not protest about it at the time. Further and in any event, not doing so did not create the proscribed atmosphere.

126. For reasons which will become apparent, we consider the remaining allegations of harassment together. They are in summary:

126.1. Not allowing Miss Barnes to return to her previous work station;

126.2. Removing Miss Barnes as the Administrator from the key telephone number list;

126.3. Removing Miss Barnes' name from her paper trays;

126.4. Failing to ensure that Miss Barnes had an adequate work station on her return to work;

126.5. Changing Miss Barnes' responsibilities when she returned to work, and

126.6. Excluding her from, *"office niceties"*.

127. We accept Miss Barnes' evidence that she genuinely sensed an air of hostility toward her, that she felt unwanted and excluded. In reaching this conclusion, we have had regard to the content of what we have referred to as Ms Sharman's diary entries, the document at page 240. We acknowledge that we see there a contemporaneous record of Miss Barnes making mistakes in her work. What we also see is a reflection of Ms Sharman's attitude toward Miss Barnes. She is unsympathetic as to the obvious difficulties Miss Barnes is experiencing in returning to her work and her responsibilities given her mental health. Her irritation with Miss Barnes is very apparent. In our judgment, that is very likely to have been reflected in Ms Sharman's behaviour towards Miss Barnes, in the atmosphere at work that was created for Miss Barnes and it is instructive as to the significance of some of the things that Miss Barnes complains about and their effect.

128. Thus, whilst one might at first blush think it was not unreasonable of the Respondent to make the Administrator's desk in the back office available to another person who was on a flexible phased return to work. However, we were given no detailed information about what that person's needs were. It seems to us insensitive when dealing with a clearly apprehensive individual returning from a period of absence due to mental illness, not only not to allow them to use the desk they had been used to using before their absence, but also to tell them to go off to the staffroom to work on their laptop.

129. It is understandable that during the period of long term absence, the Respondent will have amended its list of key telephone numbers so that the number given for the Administrator at Woolverstone should be that of Miss Roberts rather than Miss Barnes. However, at some point not long after her return to work, certainly as she began to resume her new normal duties, one would expect that to be reversed. Ms Sharman would have appreciated that Miss Barnes was sensitive about the role of Miss Roberts going forward, in that she had acted up into her role for so long. With that in mind, it was insensitive for Ms Sharman to have thought that Miss Barnes should once again be shown as the Administrator contact on the key telephone number list.

130. It is understandable that during Miss Barnes long term absence, with Miss Roberts having exclusive use of the Administrator's desk in the back office, that paper trays might be taken off the desk or put out of the way. It is insensitive and inconsiderate for that step not to have been reversed upon her return to work, particularly bearing in mind her obvious sensitivity and apprehension.

131. With regard to Miss Barnes' responsibilities, it is of course right and appropriate and beyond criticism that in accordance with the agreed Return to Work Plan, her duties were not immediately restored to her. However, after 18 March 2019, Miss Barnes was to have been restored to her usual duties as the Administrator, with Miss Roberts as Assistant Administrator reporting to her. We accept Miss Barnes evidence that what the Return to Work Plan at page 217 says should have happened, it is not what in fact happened. If it was the case that Ms Sharman felt that Miss Barnes still was not up to the full job, (and that is not Ms Sharman's evidence), then there should have been conversations with her about modifying her duties and explaining why. There was no explanation. As far as Miss Barnes was concerned, she saw her former subordinate taking over parts of her role and indeed, that the subordinate felt that she could give direction to Miss Barnes rather than vice versa.

132. Having regard to Ms Sharman's apparent attitude towards Miss Barnes, we think it more likely than not that there is something in Miss Barnes' complaint of her being left out of the so called *"office niceties"* and we so find.

133. Taken individually, any one of these matters might be regarded as trivial, might be something for which it would not be reasonable of the employee to regard as creating the proscribed atmosphere. However, taken together we find that in all the circumstances surrounding the events, these matters created for Miss Barnes the proscribed atmosphere. It was reasonable of her to perceive that to be so.

134. These incidents are all connected to Miss Barnes' mental ill health, to her disability. The attitude toward her and the insensitivity is connected to her ill health.

135. The exclusion of Miss Barnes from her responsibilities and from, "office niceties" continued until her employment ended. The harassment, taking the allegations upheld together, were a continuous course of conduct by one person. Her employment ended on 23 June 2020 and these proceedings were issued on 30 June 2020. This claim is therefore in time.

136. For these reasons, Miss Barnes' complaint of harassment related to disability succeeds.

Direct Disability Discrimination

137. For reasons explained, where allegations of harassment have been upheld, those allegations fall away in the direct discrimination case. We consider the remaining allegations.

138. We have already explained that we have found the Respondent did make sufficient attempts to keep in touch with Miss Barnes during her absence.

139. We have already made a finding that the scheduled reviews which did not take place were by agreement. There was no detriment and therefore no direct discrimination.

140. We have explained that there is no procedural or legal obligation to make an Occupational Health referral. The information which the Respondent needed to accommodate Miss Barnes' needs and to facilitate her return to work were provided by her GP, Legal and General and Miss Barnes herself. There was therefore no detriment. Furthermore, had Miss Barnes' illness not amounted to a disability, (we know that Ms Sharman thought that Miss Barnes was not disabled), she would have been treated the same way and there would have been no Occupational Health referral. There are no facts from which we could conclude that the reason for not obtaining an Occupational Health Report was Miss Barnes' disability, the burden of proof does not shift to the Respondent.

141. For these reasons, the complaint of direct discrimination because of disability fails.

Disability related discrimination

142. Unfavourable treatment contemplated by Section 15 of the Equality Act 2010 is not necessarily by definition a, "detriment" in the terms of the Act and therefore any harassment allegations upheld are not necessarily excluded in the same way as they are for direct discrimination. We consider each of the allegations of disability related discrimination in turn.

143. Writing to Miss Barnes to procure her agreement to change of hours while she was absent from work is not related to her disability in any way. There is nothing arising from her disability which caused the Respondent to write to her.

144. We have explained the Respondent did make sufficient attempts to contact her during her absence.

145. The fact that Miss Barnes was allocated to work in the staff room and was not able to work at her usual desk was because she had been absent from work and therefore arose from her disability. It was unfavourable treatment. The question then arises whether it could be justified? We do not have any information on the other person being accommodated to determine whether that was sufficient to justify the measures taken, no

evidence about why it would not have been possible to provide a further desk to be worked at, which would have been a simple solution. It is also notable that when Miss Barnes complained to Mr Sutton, he was very quickly able to take steps to sort it out and make arrangements for Miss Barnes to resume using the back office desk. We find that this step was not justified and in this regard, Miss Barnes' complaint of disability related discrimination succeeds.

146. Similarly, Miss Barnes' telephone number was removed from the list of key telephone numbers because of her absence and that was because of her disability. Certainly from the point when she was to resume normal duties, that is unfavourable treatment. It arises from her disability. The question then is whether it is justified? Once she has returned to full duties as an Administrator, her name and number ought to have been restored and a failure to do so cannot be justified. Indeed, she would not be able to resume her full duties unless and until she became a point of contact at the Woolverstone Marina for administration matters.

147. Miss Barnes' name was removed from her trays because of her absence and that arose because of her disability. Failing to restore them on her return was unfavourable treatment which cannot be justified. We see no reason, no justification, for not doing so. This allegation therefore succeeds.

148. Miss Barnes' responsibilities were removed because of her absence from work and her ill health and are therefore related to her disability. Initially, that is justified by the need to provide a phased return to work. However, once the phased return to work was over and Miss Barnes understood that she was to have returned to her normal full duties, that justification comes to an end. This allegation therefore succeeds.

149. We have found that Miss Barnes was excluded from *"office niceties"* by Ms Sharman. That was borne out by her irritation with Miss Barnes, caused by her apparent failings, which arose from her mental ill health, her disability. This treatment cannot be and was not justified. This allegation also succeeds.

150. We have already explained that we find that the reviews following Miss Barnes' return to work were cancelled by mutual agreement and does not therefore amount to unfavourable treatment. This allegation is not made out.

151. Also, for the same reasons we have already explained, we do not regard the failure to order an Occupational Health Report an instance of unfavourable treatment. This allegation also, is not upheld.

152. As with the harassment claim, the unfavourable treatment in relation to the office niceties and exclusion from responsibilities continued to the end of Miss Barnes' employment on 23 June 2020, the allegations upheld are part of a continuous course of conduct and the claim of disability related

discrimination is in time. In so far as the allegations are upheld, the claim of disability related discrimination succeeds.

153. We would like to add before we move on to unfair dismissal, that Ms Sharman appears to have been promoted from Administrator to Marina Manager without having been provided with Equal Opportunities and Diversity training. It comes as no surprise therefore, that she had dealt with Miss Barnes inappropriately, in contrast to her manager, Mr Sutton. It is not the fault of Ms Sharman, it is the fault of the Respondent for failing to ensure that its managers have appropriate training.

Constructive Unfair Dismissal

154. Miss Barnes resigned because she had been discriminated against in the harassment she had been subjected to related to her disability and because of the disability related discrimination. This is a breach of the fundamental implied term in every contract of employment that an employer will not discriminate against an employee and that an employer will not, without reason and proper cause, conduct itself in such a way as to undermine mutual trust and confidence.

155. Miss Barnes did not affirm the contract by waiting until she had secured alternative employment. She had financial constraints which meant that she could not afford to give up her employment until she had found something else. It was also important for her mental wellbeing that she remained in employment if she could and that she did not resign without something else to go to.

156. For the same reasons, we find that Miss Barnes did not affirm the contract by giving notice to terminate her employment, nor does that undermine her case that the Respondent's breach was a fundamental breach. She had to remain in employment during her period of notice until she was able to take up her appointment with the Norfolk and Suffolk Constabulary.

Remedy

157. The Claimant's Schedule of Loss is not disputed, in that her claimed loss of earnings are a mere £1,016.59 and her claim for loss of statutory rights is £500. The area of disagreement between Claimant and Respondent's Representatives is the appropriate level of award for injury to feelings. Mr Goodwin argues that the award should be in the upper half of the middle Vento band, Ms Gyane says that it should be at the bottom of the middle band.

Law in Injury to Feelings

158. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

158.1. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

158.2. Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

158.3. Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.

158.4. In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

158.5. Tribunals should bear in mind the need for public respect for the level of awards made.

159. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were as follows:

159.1. The top band should normally be from £15,000 to £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

159.2. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

159.3. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

160. Those bands were subsequently amended to take into account inflation, see the case of Da'Bell v NSPCC [2010] IRLR 19 and in the case of De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 uplifted by 10% in line with a Court of Appeal decision in a personal injury case known as Simons v Castle [2012] All E R 90. In De Souza the Court of Appeal invited the Presidents of the Employment Tribunals in England & Wales and Scotland to issue fresh guidance, adjusting the Vento figures for inflation and the Simmons 10% uplift. On 5 September 2017 the Presidents of the employment tribunal's for England & Wales and Scotland issued such guidance and have done so each year since. The relevant

Presidential guidance for the purposes of this case, (April 2019) sets the Vento bands at:

Top: **£26,300 to £44,000**

Mid: **£8,800 to £26,300**

Bottom: **£900 to £8,800**

161. Tribunals may uplift or reduce any award by up to 25% where a party has unreasonably failed to comply with an ACAS Code of Practice, (see section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A).

Conclusions on Remedy

162. Miss Barnes did complain by writing a letter of grievance, the letter handed to Mr Sutton on 14 February 2019. Whilst Mr Sutton took some measures to deal with her concerns, they did not endure Ms Sharman's return to work and did not deal with all of the matters Miss Barnes had raised. In the circumstances we do not find it just and equitable to make any deduction to compensation to be awarded by virtue of a failure to follow the Acas Code in relation to grievances.

163. The Tribunal has considered the examples of other cases provided by Mr Goodwin in his written submissions at paragraph 28.3. However, we approach them with considerable caution. They are all tribunal cases, (as opposed to appeal cases) and it is trite to say that every case is different. The summaries are very brief. As is usual with these sort of examples, there is a tendency to focus on what has happened, rather than the effect of what has happened on the claimant. An injury to feelings award is compensation for the injury to the claimant's feelings, not for how many months' of discrimination she has endured or how overtly serious the allegations are, although those may be indicators.

164. There is no doubt and we accept that Miss Barnes has been greatly upset by the atmosphere that she encountered at the Respondent's Woolverstone Marina upon her return to work. It was sufficiently serious and upsetting that she resigned employment she had hitherto very much enjoyed. There can be no doubt that the events following her return to work and her feeling compelled to resign, will have impacted adversely on her mental ill health. Miss Barnes felt isolated and unwanted whilst she was at work.

165. Having regard to these matters, to the level of awards made in personal injury cases and to the every day value of the sum we have in mind, we concluded that an appropriate award for injury to feelings would be £13,000.

166. Although we do not have the power to make general formal recommendations that do not relate to a specific claimant, (section 124(3)) we would venture to suggest that it would be a good idea for the Respondent to arrange training for its management in equal opportunities and diversity and in particular, managing mental health issues.

167. Miss Barnes is entitled to interest on her compensation. The rate of interest is 8%. The relevant period is from the date of termination of employment, being 23 June 2019, to the date of calculation, being 27 May 2021. That is 703 days.

168. The midway point for the financial loss calculation is 352 days.

- £1,516.59 x 8% = £121.32 ÷ 365 = 0.33 per day x 352 = interest of £116.16

- £13,000 x 8% = £1,040 ÷ 365 = £2.85 per day x 703 = £2,003.55

169. The total interest payable is therefore £2,119.71.

Employment Judge M Warren

Date: 10 June 2021

Sent to the parties on: 24 June 21

For the Tribunal Office