EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mrs C Marshall	ProQual Awarding Body Ltd

Heard at: **CVP** **On:** **22, 23 June 2021**

Before: **Employment Judge Davies**
Mrs J Lee
Mr M Taj

Appearances
For the Claimant: **In person**
For the Respondent: **Mr G Grant (HR and Finance Director)**

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

REASONS

Introduction

1. These were complaints of unfair dismissal, wrongful dismissal (notice pay), disability discrimination (unfavourable treatment because of something arising in consequence of disability and failure to make reasonable adjustments), indirect sex discrimination and failure to provide time off for dependant care brought by the Claimant, Mrs C Marshall, against her former employer, the ProQual Awarding Body Ltd. The Claimant represented herself, and the Respondent was represented by Mr G Grant, HR and Finance Director.

2. There was an agreed file of documents and everybody had a copy.

3. The Tribunal heard evidence from the Claimant on her own behalf. Three statements submitted on her behalf were taken as read because they were not really relevant to the issues the Tribunal had to determine. For the Respondent we heard evidence from Mr G Grant.

The Issues

4. The issues were set out in the case management order of EJ Smith dated 12 February 2021. The complaints of failure to make reasonable adjustments for

disability and unfavourable treatment because of something arising in consequence of disability were clarified by the Claimant in her email of 3 March 2021. In addition, the question whether the Respondent knew about the Claimant's disability also arose for determination. The issues for the Tribunal were therefore as follows.

Unfair dismissal

4.1 Was the Claimant dismissed?

- 4.1.1 Did the Respondent do the following things:
  - 4.1.1.1 Write to the Claimant on 3 August 2020 informing her that she was on unauthorised leave as she had failed to return to work on 1 August 2020, despite notifying the Respondent of her difficulties;
  - 4.1.1.2 Write to the Claimant on 10 August 2020 stating words to the effect that the Claimant's childcare challenges were due to her personal circumstances and both physical and mental health and her absence was causing difficulties for other employees who could not take their holidays;
  - 4.1.1.3 Refuse to allow the Claimant to bring a representative with her to a meeting to discuss her absence?
- 4.1.2 Did that breach the implied term of trust and confidence? The Tribunal will decide:
  - 4.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
  - 4.1.2.2 whether it had reasonable and proper cause for doing so.
- 4.1.3 Was the breach a fundamental one? The Tribunal will decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.
- 4.1.4 Did the Claimant resign in response to the breach? The Tribunal will decide whether the breach of contract was a reason for the Claimant's resignation.
- 4.1.5 Did the Claimant affirm the contract before resigning? The Tribunal will decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach.

Notice pay

4.2 If the Respondent was in fundamental breach of the Claimant's contract of employment and she was constructively dismissed, the parties agreed that the claim for notice pay should succeed and the measure of damages is five weeks' pay. If not, the claim for notice pay fails.

Disability

4.3 Did the Claimant have a disability as defined in section 6 Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

- 4.3.1 Did she have mental impairment of acute stress and anxiety.
- 4.3.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

4.3.3 If not, did the Claimant have medical treatment and would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment?

4.3.4 Were the effects of the impairment long-term? Had they lasted 12 months or were they likely to?

4.4 Did the Respondent know or could it reasonably be expected to know that the Claimant had the disability?

Indirect sex discrimination

4.5 A "PCP" is a provision, criterion or practice. Did the Respondent have the PCP of requiring its employees to work their contractual hours (at work)?

4.6 Did the Respondent apply the PCP to the Claimant?

4.7 Did the Respondent apply the PCP to all employees?

4.8 Did the PCP put women at a particular disadvantage when compared with men in that they were more likely to have childcare responsibilities and be unable to work their contractual hours at work?

4.9 Did the PCP put the Claimant at that disadvantage?

4.10 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were to ensure that work was done promptly and punctually meeting third parties' expectations and to ensure proper staffing coverage to allow others to take annual leave.
The Tribunal will decide in particular:

4.10.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

4.10.2 could something less discriminatory have been done instead;

4.10.3 how should the needs of the Claimant and the Respondent be balanced?

Discrimination arising from disability (s 15 Equality Act 2010)

4.11 Did the Respondent treat the Claimant unfavourably by:

4.11.1 Writing to the Claimant on 3 August 2020 informing her that she was on unauthorised leave, and not entitled to be paid, as she had failed to return to work on 1 August 2020, despite her notifying the Respondent of her difficulties;

4.11.2 Writing to the Claimant on 10 August 2020 stating words to the effect that the Claimant's childcare challenges were due to her personal circumstances and both physical and mental health and that her absence was causing difficulties for other employees who could not take their holiday?

4.12 Did the perception that the Claimant could not make arrangements for the care of her children due to her disability arise in consequence of the Claimant's disability?

4.13 Was the unfavourable treatment because of that?

4.14 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were to ensure that work was done promptly and punctually meeting third parties' expectations and to ensure proper staffing coverage to allow others to take annual leave.

Note: in her email of 3 March 2021 the Claimant said that EJ Smith had not correctly reflected her complaint. She said that the treatment was unfavourable because the Respondent's incorrect and uncompromising stance stressed her out and contributed to her subsequent mental breakdown.

Failure to make reasonable adjustments for disability

4.15 Did the Respondent have a PCP of requiring its employees to return to work in the office?
4.16 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it was difficult for her to return to work in the office because of her mental health difficulties?
4.17 What steps could have been taken to avoid the disadvantage? The Claimant suggests allowing her to work from home.
4.18 Was it reasonable for the Respondent to have to take those steps?
4.19 Did the Respondent fail to take those steps?

Time off for dependants. (s 57A Employment Rights Act 1996)

4.20 Was there an unexpected disruption or termination of arrangements for care of the Claimant's children?
4.21 Did the Claimant tell the Respondent of the reason for her absence as soon reasonably practicable?
4.22 Was the request for time off for a reasonable amount of time?
4.23 Did the Respondent refuse the request?
4.24 If the Claimant establishes her complaint what amount of compensation would be just and equitable having regard to any proven default of the Respondent and any loss sustained by the Claimant attributable to the matter complained of?

The Facts

5. The Tribunal found the Claimant's evidence generally credible. It was clear, methodical and consistent. She cross-referred in her witness statement, and in cross-examination, to relevant documents that were consistent with her case. By contrast, we found the Respondent's evidence lacking in credibility. The only witness was Mr Grant, so the Tribunal did not have direct evidence from key people involved in events. Mr Grant's own evidence was inconsistent, and contradictory. He repeatedly gave answers to questions that were obviously incorrect, for example because they were inconsistent with the written documents. When that was pointed out, he simply switched to a different answer or explanation. The impression given was that he was trying to justify his actions and those of the Respondent after the event, giving one explanation after another, many of which simply did not stand up to scrutiny.

6. To give just one example from early in Mr Grant's evidence, the Claimant asked him why in his witness statement he said that the Claimant had never had problems with childcare in the summer holiday but "suddenly it was a major issue." She asked him why he was classing it as a "major issue." He said that it was because she used it as a reason for not turning into work. She put to him that it was for a few weeks only. He replied, "that's what we didn't know" and said that the Claimant "never said it." In answer to the next question he said again that they needed to know how long it was going on for. It was pointed out to him that the Claimant had said in her letter of 20 July 2020 [see below] when she could return to work. He accepted that and agreed that he had no reason to

doubt what she said. He was therefore asked why he kept saying that the Respondent needed to know how long the Claimant needed to be absent for. His answer was that "it wasn't attainable." That was an entirely different point. The Claimant then put to him that she had simply requested to stay on furlough for about three weeks and then use some annual leave. His answer was, "when did you make this request?" The request was clearly and simply made in the Claimant's letter of 20 July 2020, the subject of much of the evidence.

7. Mr Grant is a chartered fellow of the CIPD. However, he appeared to lack knowledge and understanding of basic human resources matters. For example, he wrote in the Respondent's ET3 response form that if the Respondent had known about the Claimant's mental health disability, it is unlikely that they would have considered her for a post. He confirmed that in cross-examination. He confirmed that he had not heard of the duty to make reasonable adjustments before these proceedings and evidently had little understanding of an employer's duties towards a disabled employee.

8. The Respondent company is a qualification awarding body regulated by Ofqual. The managing director is Ms J Grant. Mr G Grant is her husband and is Finance and HR director. The Respondent has 22 members of staff and has been operating for 11 years. The Claimant started work for the Respondent in November 2014, initially unpaid. She started paid work in February 2015 and was contracted to work 17.5 hours a week. She worked in the Central Support Team, helping to produce and print certificates for qualifications and making appropriate checks before doing so.

9. The Claimant has experienced depression and anxiety since 2006. In her statement she gave detailed evidence about her medical history, which was supported by her GP notes and a letter from her GP. Although the Respondent did not concede that the Claimant was disabled within the definition in the Equality Act, Mr Grant chose not to cross-examine her about any of this evidence. Over the years since 2006 she has suffered with anxiety and depression, along with stress. She has good and bad periods, and good and bad days or weeks. She has been on anti-depressant medication for much of the time since 2006, and has received counselling more than once. Her anxiety causes lack of concentration, difficulty sleeping, loss of confidence and a general feeling of not being able to cope with normal everyday issues. She has regular panic attacks which prevent her from doing lots of things. On bad days she cannot even leave the house. Her depression causes her symptoms such as problems sleeping, headaches, stress, low self-esteem and a general lack of interest in things. Sometimes she cannot not leave her house and has to rely on others to help her with taking her children places, getting her shopping and helping her around the house and garden. She has to get her main food shopping delivered and relies on others to take her children to and from school. She cancels plans with family and friends at the last minute and has no interest in things you would normally enjoy doing. She stops communicating as much as she would normally do. On a good day she is able to meet a friend or go to a shop locally. If she needs to go further from home she takes a friend or family

member with her. Her anxiety means that even when she does go out she only goes to places she knows. If the shop is closed or she is unable to park in her usual place, she has to return home without what she needed.

10. It is clear that the Claimant has a long-standing history of depression and anxiety, which has lasted many years. Even with the benefit of anti-depressant medication it has a more than minor or trivial effect on her ability to do normal day-to-day activities such as shopping, carrying out household tasks, travelling and taking part in social activities.

11. During the summer of 2020 the Claimant was affected by depressive symptoms and anxiety at the time of the first lockdown. She was already on medication and also did a course of nine sessions of counselling for generalised anxiety disorder. That ended on 3 July 2020. She felt much better at that stage, although she was still on anti-depressants.

12. The Claimant says that the Respondent knew about her depression and anxiety. She gave evidence that she had told Ms Grant more than once during the previous year about her frustrations with a new member of staff who had started in Central Support and had on those occasions discussed with Ms Grant her general mood, including talking about the medication she was on and the anxieties and stress she had, both related to work and home. Ms Grant asked her whether her medications affected her ability to do her job and she told her that they did not. She had also had a few meetings with Mr Bartle, the Mental Health First Aider, to discuss stress and anxiety caused by a new computer system, stress caused by the new member of staff and general things related to her mental health issues. She said that she provided a sick note in June 2018 so that her hours could be reduced, which said that she might be fit for work if her hours were reduced and gave the reason of “anxiety”. The Tribunal saw that fit note. The Claimant said that in November 2019 she had two or three meetings with her Manager, Mr A Kirk, to discuss a private matter. In the course of those discussions she mentioned that she already suffered with mental health issues and said that the private issue had increased her anxiety and stress.

13. The Respondent did not call Ms Grant, Mr Bartle or Mr Kirk to give evidence, but Mr Grant simply “denied” that these conversations took place. He relied on one note of a discussion between the Claimant and Mr Bartle, made by Mr Bartle on 24 April 2019. The note records that the Claimant told Mr Bartle that she had some anxieties around working systems and felt that she was struggling. It also indicated that after a “lengthy conversation” Mr Bartle recommended some support mechanisms for the Claimant. It said that Mr Bartle met Mr Kirk the following day to discuss the issues about work systems and explicitly recorded that Mr Bartle did not disclose any further information to Mr Kirk. When asked about this in cross-examination, the Claimant said that the account in her witness statement was correct. She explained that she told Mr Bartle on 24 April 2019 that she would discuss her medication with her GP, and she cross-referred to an entry in her medical notes showing that she did indeed see the doctor on 30 April 2019. So far as this specific conversation was concerned, the Tribunal

accepted the Claimant's evidence. Her account was clear and she was able to identify consistent evidence in her GP records. Further, the reference in Mr Bartle's brief note to a lengthy conversation and to information he had not disclosed seems to the Tribunal entirely consistent with the Claimant's account of that discussion. In relation to her account more generally of occasions on which she told senior members of staff about her mental health issues, the Tribunal again accepted the Claimant's version of events. The Respondent did not call any of the relevant people to give evidence. The Tribunal found Mr Grant's evidence generally wholly unconvincing and we had no hesitation in preferring the Claimant's detailed and consistent account to his bald, second-hand assertions that these conversations did not take place. We also noted that in a letter dated 10 August 2020 (see below) Mr Grant volunteered that Ms Grant and Mr Bartle had had several meetings to assist the Claimant with her mental anxiety.

14. The Tribunal therefore found that the Respondent's managing director and the Claimant's line manager knew from 2019 at the latest that she had mental health issues including anxiety and stress of some duration, and that she was on anti-depressant medication as a result.

15. That brings us to the events of summer 2020. Along with most other staff, the Claimant was furloughed from 6 April 2020. She is a single parent with children of secondary school age. Mr Kirk kept in touch with her by ringing her every couple of weeks to check how things were going. His last contact was on 9 July 2020.

16. On 14 July 2020 Mr McDonald, the Company Accountant, wrote to the Claimant to say that the Respondent would like her to return to work from 1 August 2020. The letter was signed by Mr McDonald and ended "p/p Jan Grant", which the Tribunal assumed was intended to mean that Mr McDonald was sending it on behalf of Ms Grant.

17. On 20 July 2020 the Claimant replied to Mr McDonald by email. She wrote, "Please find attached a letter in response to the letter I received from ProQual dated 14 July 2020. I have addressed the letter to Jan." The attached letter explained that it was a response to the request for the Claimant to return to work. The Claimant said that she currently had no option for childcare and had to stay home to care for her children until the schools opened in September. She requested to remain on furlough until the end of August then to extend the annual leave she already had booked by an additional 11.5 hours, so she would return to work on Monday, 14 September 2020. If this was not possible, she asked what other options were available to her.

18. Mr McDonald replied thanking the Claimant and saying, "I have no doubt that Jan will be in touch." The Claimant did not receive any other response to her letter. Mr Grant's evidence was that Mr McDonald interpreted the Claimant's email as suggesting that the letter had been sent directly to Ms Grant and was simply being copied to Mr McDonald.

19. On Monday, 3 August 2020 Mr Grant wrote a letter to the Claimant headed "Absence Without Permission", which said:

> As you are aware from our recent letter sent to you by Andy McDonald you were required to return to work today and have failed to do so, without informing any member of ProQual staff as to your reason for not doing so.
> You should be aware that the furlough scheme no longer applies to you and your continuing absence without any reason will not attract any form of payment from today's date unless there is an authorised reason to indicate otherwise.
> I would be obliged if you could let me know by return as to your intentions with regard to your work position so that from a business perspective we can arrange to manage your continuing or permanent absence going forward.
> If I do not get a response from you by Monday, 10 August 2020 I will assume you no longer wish to fulfil your contract of employment with ProQual.

20. The Claimant had never previously failed to attend work without telling anybody. Mr Grant could not explain why nobody had called or texted her to find out where she was, check that she was okay or even confirm that she had received Mr McDonald's letter. He said that he had "asked around" but nobody had heard from her. He suggested in evidence that he did not have time to call her, but that was plainly not correct given that he had time to write the letter above. He was asked again why such a formal letter was written without anybody even trying to contact the Claimant and he said, "because we felt the Claimant had let us down." It seemed to the Tribunal that this was indeed Mr Grant's response and that this affected his approach from that point on.

21. The Claimant replied to Mr Grant, copying in Ms Grant, in an email on 4 August 2020. She wrote that she was extremely upset to have received Mr Grant's letter in the post that morning. She was awaiting a response to her letter requesting to be kept on furlough and then take some annual leave because she currently had no childcare. She had received an email on 21 July 2020 from Mr McDonald saying that Ms Grant would be in touch so she was awaiting a response. As mentioned in her letter, if remaining on furlough was not possible, she requested information about her other options.

22. Mr Grant replied the following day. He apologised for the delay in replying but said that he needed to discover what the circumstances were regarding her recent communication. He said that Mr McDonald "quite rightly assumed" that the Claimant's email was a copy for his information and said that Ms Grant had not seen the Claimant's letter until yesterday. Had the letter been sent to her directly she would most definitely have responded. He said that moving forward, because nobody was fully aware of the circumstances surrounding the Claimant's childcare difficulties, it would be best if she could attend the office as soon as possible to discuss them. They could examine what options were available currently and in the future. He asked the Claimant to telephone Ms Grant to arrange a meeting.

23. Again, the Tribunal was struck by the tone of Mr Grant's communication. The Claimant had written to the Respondent and was waiting for a reply. Her email to Mr McDonald did not say she had sent the letter to Ms Grant, it said she had addressed it to her. That was in the context that Mr McDonald had written requesting her return to work, but apparently signed it on Ms Grant's behalf. Mr McDonald may have misconstrued it, but that was not the Claimant's fault. It seemed to the Tribunal surprising that Mr Grant did not apologise for the misunderstanding and for the rather heavy-handed letter he had sent on 3 August 2020. He was asked in his evidence why he did not apologise and he had no explanation. He said, "I didn't that's a fact."

24. The Claimant was extremely upset when she received the letter dated 3 August 2020 and her anxiety increased. When she received Mr Grant's response of 5 August 2020 she felt that it was blaming her for the situation. She responded in writing to Mr Grant on 6 August 2020. She again explained that having been told by Mr McDonald that Ms Grant would be in touch, she thought that the Respondent was considering her request and that she would hear about it in due course. She now understood that there seemed to have been a misunderstanding but reiterated that she did inform the Respondent of her inability to return to work on 3 August 2020. She explained that prior to the pandemic her children attended summer camps or courses during the school holidays, failing which she could make other temporary arrangements where necessary. The pandemic meant that everybody was in very challenging circumstances with regard to childcare. Schools were closed until September and she had no childcare options available. Her children's father worked full-time in haulage and was often away overnight and unable to provide childcare support. She said that she was deeply upset that the firm had chosen to communicate with her in such a formal manner rather than calling her to discuss things, given her length of service. This had caused her significant anxiety on top of the mental health issues they were already aware of. She had never been absent without authorisation. She was looking forward to returning to work once her children returned to school. Now that she had provided more detail about her childcare challenges, she asked for a response to her previous request to remain on furlough and extend annual leave, returning to work on 14 September 2020. She also asked for confirmation that she would continue to be paid. She said that given the anxiety the Respondent's correspondence had caused her, her preference was to conclude the matter in writing. However, if a meeting was required either in person or by telephone she requested that a third party participate for emotional support.

25. Mr Grant replied on 10 August 2020 in writing. His letter included the following:

> "…
> The only confusion was unfortunately caused by yourself sending an email to Andy McDonald with your letter attached addressed to Jan and not informing him to give a copy to Jan. As the letter was addressed to Jan it should have been sent to her. Also, you could have phoned Jan at any time to check on the progress of your request.

Your Childcare difficulties are clearly down to your personal circumstances both physically and mental health wise. Whilst we are very sympathetic to your situation we cannot operate a system of furlough just designed for yourself. …

Your options were foremost in our mind when we invited you to attend a meeting at our new offices which comply totally with all the current conditions to ensure staff safety. We also do not feel it appropriate for you to attend a meeting having someone accompanying you from outside of ProQual, the meeting is not in any form of a disciplinary nature. We are prepared if you so wish to have Mr Bartle our Mental Health First Aider present to support you if you desire? In the past both Jan and Mr Bartle have had several meetings with you to assist you with your mental anxiety and adjusting your hours of work to fit your personal needs in a totally supportive way.

ProQual's current position is that on 3 August all staff were recalled to work from furlough due to the level of business that required managing. As part of this the central support team had a major role to perform to ensure that the hundreds of people who rely on us get their qualification certificates issued so that they can commence work themselves.

Your continued absence has and is causing a lot of difficulties as your colleagues are struggling to not only cope with the workload but in addition they and ProQual are finding it difficult to take their holidays because of the lack of cover in part due to your absence. Some of your colleagues also have dependents and if we treat you differently from them we would be breaching equality laws.

Finally, the only solution I can offer you at present, is to seek medical assistance to see whether you can obtain a doctor's authorisation to be absent on sick leave which can be paid in accordance with your contract of employment.

26. Mr Grant was asked in his evidence about his response, and why it was that the Respondent had not allowed the Claimant to remain on furlough for three weeks (17.5 hours per week) and to use an additional 11.5 hours' annual leave. He said that it took 6 months to train somebody to do the Claimant's job and that nobody else could do it. He accepted that contrary to what was said at the time and in the ET3 response, in fact one person did remain on furlough. He said that that person did a completely different role and could not do the Claimant's job. The Tribunal found his evidence about this unconvincing. It was difficult to see how somebody who was computer-literate could not provide some administrative assistance to help with covering the Claimant's short-term absence. Mr Grant accepted that the staff who were helping to cover the role were not trained in it. Mr Grant said that the other 4 staff who had children returned to work at the start of August. None of them told him that they had any difficulty with childcare and none of them requested to remain off work. Nonetheless, he insisted that the Respondent had to treat everybody the same and could not allow the Claimant to remain on furlough. He was asked what he expected the Claimant to do to arrange childcare. He said that in the past it had never been a problem. He was again reminded that in the past there had not been a pandemic. He was asked if he understood that childcare was a problem because of the pandemic and he said he did not. That was plainly nonsense, not least because the Claimant spelt it out in her letter.

27. Mr Grant also said that they had to run the business properly otherwise all 22 jobs would be at risk. In that context, he was asked why it was preferable for the Claimant to be signed off sick, which was what he suggested she do on 10 August 2020, than to be on furlough and annual leave. He could not provide a rational explanation. Mr Grant then said that the Claimant did not have enough annual leave to cover what she was asking for. He said that she only accrued it month by month, although he accepted that her contract did not say that. He was asked if he had considered whether in the circumstances of the pandemic he should be flexible. He said, "We try to be as flexible as we can." He was therefore asked how he had been flexible in relation to this request from the Claimant and he said, "It's the rules we followed for eleven years." That, plainly, was the opposite of flexibility.

28. Mr Grant was also asked why it was not possible to have a telephone discussion with the Claimant with a third party present to support her. He said it would have been if they had known that was an option. His attention was drawn again to the Claimant's letter, offering precisely that option. Then he said that they wanted to see the Claimant personally, which they had done for five years. It was put to him that there had not previously been a pandemic, and then he simply said that they wanted to see the Claimant personally.

29. This evidence suggested that no proper consideration was given to the Claimant's request, or the need to be flexible and try to accommodate the difficulty she was facing because of the pandemic. It appeared to the Tribunal that Mr Grant took the view at the outset that the Claimant had let the Respondent down and was unwilling to look for any solutions. For example, no consideration appears to have been given to extending furlough, unpaid leave, whether home working was possible, or whether the Claimant could work a reduced number of hours.

30. The Claimant replied to Mr Grant on 13 August 2020. She pointed out that the letter informing her of the return to work was signed by Mr McDonald on Ms Grant's behalf and suggested that it was perfectly reasonable for her to address her letter to Ms Grant but reply to Mr McDonald. She said that she was confused that Mr Grant had said in his letter that her inability to return to work was down to her personal circumstances both physically and mental health wise. She reiterated that her inability to return to work was down to the fact that the schools and holiday clubs were closed and that she was required to stay at home to look after her two children during the working week. She looked forward to receiving a reply.

31. The Claimant explained in her evidence that Mr Grant's comment about her childcare issues being related to her mental health were very hurtful and caused increased stress, depression and anxiety. So too did the comments about her absence causing difficulties to her colleagues. She did not feel that a meeting was appropriate because she had explained her childcare issues in two letters and they were not accepted. She did not feel comfortable attending a meeting with Mr Bartle because he had a close personal relationship with the Grants.

32. Mr Grant replied to the Claimant's letter of 13 August 2020 on 14 August 2020. He said that he was away on leave and would reply when he returned on 24 August 2020.

33. The Claimant was signed off sick on 19 August 2020 with anxiety, initially for two weeks and then for a month.

34. Mr Grant did not reply to the Claimant's letter, so she emailed him on 8 September 2020 requesting a response. She said that she felt the original situation needed to be addressed even though she was on sick leave. Mr Grant replied the following day. He said that he had not replied to the Claimant's letter because she had been signed off sick and he did not want to add to her anxiety. However, he was now responding as requested by the Claimant. He said that nothing in the Claimant's letter of 13 August 2020 changed any of the circumstances already supplied to her. The fact of the matter was that whatever interpretation she put on the events leading up to her absence, she did not have permission from any member of ProQual staff not to attend work when required. Even if she had sought permission to be absent on parental leave it would have been unpaid. She had been signed off on sick leave for a further month which "confirms my opinion that your personal issues are of concern to all of us."

35. The Claimant said that she was again left upset after the email because she was getting the blame for the whole situation. The Respondent did not accept that anything they did was wrong and did not acknowledge that any of their actions or comments had affected her mental health. The Claimant had a further course of talking therapy and remained off signed of work with anxiety. After 8 September 2020 it appears that the Respondent did not contact the Claimant at all for keeping in touch, welfare reasons or any other matter.

36. The Claimant's evidence was that she might have resigned at that point. She felt that the Respondent had treated her so badly and it had made her really ill, but she did not want to take the decision at that point when she couldn't think straight. After she had been at home for a few weeks and once her therapy had started again, it became increasingly clear that she could not return to the Respondent. If they had apologised for their letters, maybe they could have straightened it out, but after the 9 September email it was very clear that nothing was going to change. She decided to talk to her doctor about it. After a discussion with the doctor on 25 November 2020 she decided that it would be best for her to hand in her notice at work to help with her mental health issues. Her doctor's view was that continuing to work there would be detrimental to her mental health. She felt that she was left with no choice but to leave a job she had loved for five years.

37. On 30 November 2020 the Claimant emailed a resignation letter to Mr Grant. She resigned with immediate effect. She said that she was resigning because of the way she had been treated and the effect it had had on her health. She did

not feel she had been given much choice in coming to the decision because she did not feel able to return to work.

38. Mr Grant replied on 3 December 2020 accepting the resignation.

Legal principles

39. The right not to be unfairly dismissed is contained in s 98 Employment Rights Act 1996. Section 95 of that Act defines what is meant by dismissal. This includes what is usually called constructive dismissal, i.e. where the employee terminates the employment contract, with or without notice, in circumstances where he or she is entitled to so without notice by reason of the employer's conduct.

40. It is well-established (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221) that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:
    40.1 Was there a breach of the contract of employment?
    40.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?
    40.3 Did the employee resign in response and without affirming the contract?

41. It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v BCCI* [1997] IRLR 462. This is a demanding test. The employer must in essence demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract: see *Frenkel Topping Ltd v King* UKEAT/0106/15/LA at paragraphs 12-15. Individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal.

42. The essence of constructive dismissal is fundamental breach (repudiation) by the employer, which is accepted by the employee. If there has been a repudiation, the Tribunal must ask whether the employee has accepted it by treating the contract of employment as being at an end. The employee's resignation must be in response (at least in part) to the repudiation, which must be the effective cause of it: see *Nottinghamshire County Council v Meikle* [2005] ICR 1, CA.

43. Mere delay in resigning does not, of itself, amount to an affirmation of the contract. The question is whether the employee has made the choice to affirm the contract or to accept the employer's repudiation and resign. Affirmation is an issue of conduct not time: there is no set time after which the contract is deemed to have been affirmed; it all depends on the context. The employee's own position is relevant in considering whether his or her conduct amounts to affirmation – the more serious the consequences of resigning, the longer the employee might take to make the decision. Whether the employee is actually at work during the interim is also relevant. Where an employee is on sick leave it is not so easy to infer that he or she has affirmed the contract: see *Chindove v William Morrisons Supermarket plc* UKEAT/0201/13; *Bournemouth University Higher Education Corporation v Buckland* [2010] ICR 908.

44. In this case, both the unfair dismissal and wrongful dismissal (notice pay) claims turn on the question whether the Claimant was constructively dismissed.

45. Claims of sex and disability discrimination are governed by the Equality Act 2010.

46. Disability is defined in section 6 and schedule 1. A person has a disability if s/he has a mental impairment that has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities. The effect of an impairment is long-term if it has lasted for at least 12 months or is likely to do so. If an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if the effect is likely to recur.

47. Discrimination arising from disability and failure to make reasonable adjustments for disability are governed by s 15, and s 20-21 and schedules 1 and 8, of the Equality Act 2010 respectively. Those sections provide, so far as relevant:

> **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.
> **…**
>
> **20 Duty to make adjustments**
> …
> (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.
> …
> …
>
> **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.
> …

48. Under s 15, if there is unfavourable treatment, it must be done because of something arising in consequence of the person's disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. While the words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", the difference (if any) will be small. The unfavourable treatment will be "because of" the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment:

Charlesworth v Dransfields Engineering Services Ltd [2017] UKEAT 0197_16_1201.

49. It is a defence for the employer to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory effect and the need for the treatment: see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, SC. The EHRC Code advises that a legitimate aim is one that is legal, not itself discriminatory, and one that represents a real, objective consideration: paragraph 4.28.

50. In a complaint of failure to make reasonable adjustments, the Tribunal should identify the PCP, and the nature and extent of the substantial disadvantage. It must identify with precision the step the employer is said to have failed to take: see *Environment Agency v Rowan* [2008] ICR 218 EAT; *HM Prison Service v Johnson* [2007] IRLR 951 EAT. The question of what is reasonable is an objective question for the Tribunal to decide: see *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. Paragraph 6.28 of the EHRC Code provides helpful guidance. The same approach to justification (whether the treatment is a proportionate means of achieving a legitimate aim) applies.

51. Claims of indirect discrimination are governed by s 19 Equality Act 2010, which provides so far as material as follows:

> **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.
> (3) The relevant protected characteristics are -
> …
> sex;
> …

52. The proper approach to such claims was recently addressed by the Supreme Court in *Essop v Home Office (UK Border Agency)* [2017] ICR 640. The Tribunal paid careful regard to the principles in that case. In the very recent case of *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] UKEAT 0220_19_2228 the EAT reaffirmed that Tribunals should continue to take judicial notice of the childcare disparity – the fact that women still bear a greater burden of childcare responsibilities than men. The EAT also reiterated the proper

approach to the pool for comparison, the starting point being that the proper pool is likely to be those to whom the PCP applies.

53. Time off to care for dependants is governed by s 57A Employment Rights Act 1996. The case law has emphasized that the right is for time off to deal with an unexpected event by making necessary arrangements for care. It is to deal with urgent cases of real need, and it is not a right to take time off to provide the care oneself, beyond the reasonable amount necessary to deal with the immediate crisis: see e.g. *Qua v John Ford Morrison Solicitors* [2003] IRLR 184, EAT. In *Cortest Ltd v O'Toole UKEAT/0470/07*, [2008] All ER (D) 220 (May) the EAT held that a month's absence would almost never be a reasonable period of time off to make the necessary arrangements. The purpose of the leave is to provide an opportunity to make alternative arrangements, not to undertake the provision oneself, and over a relatively lengthy period, of the care.

Application of the Law to the Facts

54. Applying those principles to the detailed findings of fact, the Tribunal's conclusions on the issues were as follows. In many respects the claims turn on the detailed findings of fact, so the conclusions can be more briefly stated.

Unfair dismissal

55. We start with the unfair dismissal complaint. The first question is whether the Respondent's actions breached the implied term of mutual trust and confidence. We have found that they did. That started with Mr Grant's letter to the Claimant on 3 August 2020 telling her that she was on unauthorised leave and had failed to return to work, despite the fact that she had told Mr McDonald about the childcare issue and requested an extension of her furlough and annual leave. The Tribunal proceeded on the assumption that Mr Grant was correct in saying that Mr McDonald had misunderstood and had not forwarded the Claimant's letter to Ms Grant. Even in those circumstances, Mr Grant's letter was extremely heavy-handed. The Respondent knew that the Claimant had mental health difficulties. It had not been in touch with her since 9 July 2020, apart from sending her the letter asking her to come back to work on 3 August 2020. Mr Grant said that he was unaware of the Claimant's reply to that letter. He had not made any welfare call or any attempt to contact the Claimant to find out why she had not come to work on 3 August 2020, nor had he asked anybody else to do so. He did not even know whether the Claimant had received Mr McDonald's letter or not. The Claimant had never failed to attend work without explanation before. She was known to have anxiety and mental health issues. To go straight in with a formal letter warning such an employee that her employment was at risk for failing to turn up at work, without making a simple enquiry about why she was absent seemed to the Tribunal to be behaviour without reasonable and proper cause that was likely to undermine mutual trust and confidence. It was not necessarily a fundamental breach of contract by itself, but it was capable of contributing to such a breach.

56. The second aspect is Mr Grant's letter of 10 August 2020. The context is that between sending his letter of 4 August 2020 and his letter of 10 August 2020, Mr Grant had become aware that the Claimant had requested a short extension to her furlough leave, an additional 11.5 hours of annual leave and a return to work

on 14 September 2020. She had sent that request to Mr McDonald, who had signed the original letter requiring her to return to work. She had clearly explained that because of the pandemic her usual childcare arrangements were not available to her and that she had an obligation to care for her children. She had reminded Mr Grant about her mental health issues. She had made a simple request setting out a short-term solution and had requested a response to that proposal. As set out above, the Claimant had drawn Mr Grant's attention to this on 4 August 2020, he had written in terms that essentially blamed the Claimant for the misunderstanding on 5 August 2020, and the Claimant had provided a further, detailed explanation on 6 August 2020. Mr Grant knew all of this when he wrote his letter of 10 August 2020.

57. What caused the Claimant particular offence was Mr Grant's assertion in that letter that her childcare challenges were caused by her personal circumstances both physical and mental health. The suggestion that the Claimant's childcare challenges were caused by her mental health was completely without foundation and was a wholly inappropriate thing for Mr Grant to write. Mr Grant stuck to this line in his evidence and maintained that it was his belief that the Claimant's childcare problems in August 2020 were caused by her mental health at least in part. The Tribunal considered more generally that the tone of the letter of 10 August 2020 suggested that it was the Claimant who was to blame for the whole situation. That was reflected in the comment that her absence was causing difficulties for other employees. The Claimant's request was refused, and no sensible option was offered to her. She was told that she could not be given furlough because that would not be fair on everybody else and she was told that she had to attend a meeting at the offices, and could not bring a person of her choosing but could have Mr Bartle present.

58. The Tribunal found that elements of the letter amounted to conduct without reasonable and proper cause that was likely to undermine mutual trust and confidence. In particular, telling the Claimant that her childcare difficulties were caused by her mental health when she had clearly explained how her short-term childcare problem arose from the exceptional circumstances caused by the global pandemic was plainly such conduct. More generally, the tone of Mr Grant's correspondence, which sought to "blame" the Claimant for the situation; his lack of flexibility; and his intransigence about finding a sensible short-term solution to a problem that was nobody's fault were in the Tribunal's view likely to undermine mutual trust and confidence. As his answers in cross-examination made clear, there was no reasonable or proper cause for his approach.

59. The Tribunal noted that there was no substantive response from Mr Grant to the Claimant's letter of 13 August 2020 before she chased him on 8 September 2020. The Tribunal gave Mr Grant the benefit of the doubt about this, accepting his explanation that once the Claimant was signed off sick with anxiety he did not want to give her a response and make matters worse. When she made clear that she did want a response he provided one. However, the Tribunal considered that Mr Grant's letter of 9 September 2020 again amounted to conduct without proper cause that was likely to undermine mutual trust and confidence, by making clear that there was no change in position, that no thought had been given to how these circumstances had arisen and what could be done to put matters right and that no thought had been given to whether there were

shortcomings in the Respondent's approach for which it ought to be apologising or seeking to find a solution.

60. The Tribunal was satisfied that each of these elements amounted to conduct that was likely to seriously damage trust and confidence and that there was no reasonable or proper cause for it. The next question is whether it amounted to a fundamental breach of contract. The Tribunal reminded itself that this is a high threshold. The Tribunal is essentially asking whether the employer has, by its conduct, demonstrated that it is abandoning or refusing to perform the relevant elements of the contract. The Tribunal concluded that taken as a whole the Respondent's conduct did meet that high threshold. Through nobody's fault, the Claimant could not make her usual summer holiday childcare arrangements. In those exceptional circumstances she offered a solution for the three-week period, which would have her partly on furlough and partly on annual leave. Fundamentally, Mr Grant was not willing to engage flexibly in finding a pragmatic solution. He was not trying to find a way to keep the Claimant at work and in employment. Further, a consistent theme was Mr Grant ascribing blame or fault to the Claimant. Finally, Mr Grant knew that the Claimant had mental health difficulties. Far from taking any steps to make allowances for that, Mr Grant made the wholly baseless allegation that this was the reason for the Claimant's childcare difficulties. The Respondent was demonstrating an intention not to be bound by its obligations under the contract and it was in fundamental breach of the implied term of mutual trust and confidence.

61. The next question is whether the Claimant resigned in response to that breach. As explained above, the resignation must be at least in part in response to the fundamental breach of contract. The Tribunal found that the Claimant did resign in response to that breach. There was a delay, but the Claimant's explanation for that delay, which the Tribunal accepted, is set out in the findings of fact above. She could have resigned in September when it was clear that nothing was going to change, but she did not want to make a hasty decision at a time when her mental health was poor. Once that had improved and she had re-gained some of her mental health and felt more able to make a sensible decision she spoke to her doctor about it and took the decision to resign. The reason for her resignation was still the Respondent's conduct, culminating in the email on 9 September 2020 making clear that nothing was going to change.

62. The last element is whether the Claimant affirmed the contract before she resigned. As outlined above, the case law makes very clear that affirming the contract is not just about delay, it is about conduct and whether, by conduct, the employee has shown that they intend to carry on with the contract in any event. As *Chindove* makes clear, when the employee is on sick leave it is more difficult to infer that they have affirmed the contract. In this case, all that happened between September and the Claimant's resignation was that she remained signed off sick with poor mental health, she provided the occasional sick note and she received statutory sick pay. There was no ongoing "conversation" with the Respondent, and the matter that had led to her going off sick remained wholly unresolved on both sides. That was not conduct from which the Tribunal concluded that the Claimant was demonstrating an intention to continue with the contract. The Tribunal therefore concluded that the Claimant had not affirmed the contract when she resigned.

63. That means the Claimant was constructively dismissed. The Respondent did not advance any case that there was a potentially fair reason for dismissal or that the Respondent acted reasonably in all the circumstances and it follows that her dismissal was therefore unfair.

Wrongful dismissal

64. Turning to the question of notice pay, as Employment Judge Smith recorded in his case management order, the parties agreed that if the Respondent was in fundamental breach of contract and the Claimant was constructively dismissed, she was entitled to treat herself as having been dismissed without notice and for that reason she is entitled to her notice pay.

Indirect sex discrimination

65. We deal next with the indirect sex discrimination complaint, which is concerned with whether the Respondent was applying a policy that had a disadvantageous effect on women.

66. Although EJ Smith referred to a PCP requiring employees to "work their contractual hours", it is clear from the claim form that the disputed requirement was a requirement to "attend work" and work contractual hours. That was reflected in the evidence and the parties' approach to the case, and that is the PCP the Tribunal considered. As the findings of fact make clear, the Respondent was from 1 August 2020 imposing a requirement that all employees except the one person who did a unique role return to work in the workplace, i.e. attend work, and work their contractual hours.

67. That PCP was applied to the Claimant and all her male and female colleagues except the one unique role. It was applied to 21 people in total. Although Mr Grant's initial communications suggested a meeting to consider the situation, the Tribunal was quite satisfied that this would not have entailed a flexible consideration and attempt to find a solution for the Claimant. His position was amply demonstrated in his letter of 10 August 2020. The requirement applied to everybody and the Respondent was not prepared to make exceptions.

68. The next question is therefore whether that requirement put or would put women at a particular disadvantage compared with men. The starting point is the decision of the EAT in *Dobson* referred to above. In the light of that, the Tribunal took judicial notice of the fact that there is still a childcare disparity. We take it as a given that women still bear the greater burden of childcare responsibility and that can limit their ability to work certain hours. Recognising that, the question is whether a PCP requiring everyone (except one) to return to work at the premises and work their contractual hours from 1 August 2020 put or would put women at a particular disadvantage. The Tribunal found that it would. The context was, of course, that it was the summer holiday in the middle of the pandemic. Childcare arrangements for school age children were not in place in the way they usually would be. Summer holiday clubs and camps were not available and very many grandparents, friends and relatives who would normally do so were not able to look after their grandchildren or other children because of health concerns, being located a long way away or other pandemic-related reasons. That all meant it was more difficult, if not impossible, to find childcare during the summer holiday for many people and those people could not physically attend work for that

reason. If the burden of childcare still falls more on women, then a requirement to attend at work from 1 August 2020 would therefore put women at a particular disadvantage. Although the evidence before the Tribunal was that the other four actual female employees with children were able to return to work, the Claimant was not, and a hypothetical female employee with school age children who had no alternative childcare arrangements would not have been able to either. The Tribunal was therefore satisfied that the PCP would put women at a particular disadvantage compared with men.

69. The Tribunal found that the Respondent had a legitimate aim in wanting its employees back to work to ensure that its work was done promptly and that it met third party expectations, and to ensure that there was proper staffing coverage to allow others to take annual leave. That was plainly a legitimate aim. The issue was therefore whether a requirement that everybody (except one) attend work from 1 August 2020 and work their contractual hours was a proportionate way to achieve that aim. That entails consideration of whether it was appropriate and reasonably necessary, whether something less discriminatory could have been done and how the needs of the Claimant and the Respondent could be balanced. The Tribunal concluded that it was not proportionate to insist that everybody including the Claimant attended work from 1 August 2020. The question whether something less discriminatory could have been done instead was clearly not considered at the time and no convincing evidence was presented to the Tribunal to suggest that the Respondent could not have done something less discriminatory. In reaching this view the Tribunal placed considerable weight on the fact that what Mr Grant suggested on 10 August 2020 was that the Claimant should go on sick leave rather than have her furlough extended and being allowed to take an extra 11.5 hours' annual leave. Whether she was on furlough and annual leave or on sick leave, the Respondent would still have had to deal with her absence. The absence would have had the same impact on its ability to get work done and meet third party expectations, and on its ability to provide staffing cover and allow other staff to take leave. The Tribunal was certainly not persuaded that the need to treat everybody the same was a reason for insisting that the Claimant return to work. Nobody else had asked to remain on furlough and nobody else had said that they had childcare difficulties. If that had arisen, then it would have had to be dealt with on a case by case basis, but it had not arisen. The fact that nobody else had the same problem ought to have made it easier for the Respondent to accommodate the Claimant's difficulty.

70. The Claimant had made a simple proposal. She had worked for the Respondent for five years. The proposal was for a period of around three weeks of additional furlough (bearing in mind she worked 17.5 hours a week) and an additional 11.5 hours of annual leave. In balancing the needs of the Claimant and the needs of the Respondent, the short time frame and limited number of hours are relevant. So too was the context of the pandemic – the other staff and the third parties would have understood that context if the Respondent had been more helpful towards the Claimant. The Tribunal concluded that something less discriminatory could plainly have been done. There was a whole range of options that could have been explored but was not: considering whether the employee who was on furlough could help with some of the administrative tasks; considering whether the Claimant could do anything from home; considering whether the Claimant

could attend the office for an hour or two a day (with or without her children); checking whether others were willing to do overtime or additional hours for the temporary period of weeks; asking whether others were willing to rearrange their annual leave, in the context that they had just spent several months on furlough. The Tribunal was quite satisfied that if proper consideration had been given to finding an alternative for this short-term problem during an exceptional global pandemic, something less discriminatory than insisting the Claimant attend work for her full hours could have been done. Requiring the Claimant to attend work and do her contractual hours was therefore not a proportionate way of achieving the Respondent's aims. The indirect discrimination claim therefore succeeds.

Disability and knowledge

71. Turning to the complaints of disability discrimination, the Tribunal had no hesitation in finding that the Claimant met the definition of disability. As the findings of fact above make clear, she had the mental impairment of depression and anxiety. It had a substantial (more than minor or trivial) adverse effect on her ability to carry out day to day activities, for example shopping, caring for her children, socialising and housework, as set out above. It had those effects even with the benefit of medication. Using the Tribunal's experience and knowledge we can be satisfied that the effects would have been worse if she had not been taking the medication. The effects were clearly long term: they had lasted substantially longer than 12 months.

72. For the reasons explained in detail in the findings of fact above, the Tribunal found that at all the material times the Respondent knew or could reasonably have been expected to know that the Claimant had the disability, because of what she told Ms Grant, Mr Bartle and Mr Kirk. The Respondent knew that she had mental health issues of some long-standing; it knew that she was on anti-depressant medication and it knew that her mental health issues affected her mood, led to issues at work and at home; and had necessitated a reduction in her working hours in June 2018. At the very least, this put the Respondent on notice that the Claimant's mental health issues amounted to a disability for the purposes of the Equality Act. That was information on the basis of which it ought to have made enquiries, if it did not in fact realise that this amounted to a disability.

Unfavourable treatment (s 15 Equality Act 2010)

73. When the Tribunal discussed this complaint with the Claimant at the start of the hearing in the light of her email dated 3 March 2021, it was clear that her real complaint was that the way she was treated made her disability worse. We explained to her that section 15 does not apply to complaints about conduct that is unfavourable *because* it makes something worse, it applies to complaints about unfavourable conduct that is *caused by* something arising from the disability. EJ Smith had set it out in that way in the case management order, but the Claimant said that this did not accurately reflect her complaint. She wanted to complain that Mr Grant's letters were unfavourable treatment because they made her mental health worse. That complaint does not fall within section 15.

74. In any event, the Tribunal considered that to characterise Mr Grant's misplaced view that the Claimant's childcare issues were linked with her mental health as something arising in consequence of her disability would have been stretching

the statutory language. Accordingly the Tribunal would not have found that the writing of the two letters was because of something arising in consequence of the Claimant's disability and this complaint therefore would not have succeeded in any event.

Failure to make reasonable adjustments

75. There is no doubt that the Respondent had a PCP of requiring its employees to return to work in the office. The issue is therefore whether that put the Claimant at a substantial disadvantage in comparison with people who do not have anxiety and depression, in that it was difficult for her to return to the office. As the findings of fact above make clear, the difficulty for the Claimant is that she was adamant at the time and in her evidence to us that the reason she could not return to work in the office was *not* her disability it was her childcare problems. Those childcare problems were caused by the exceptional circumstances of the pandemic and had nothing to do with her disability. That means being required to return to work did not put her at a substantial disadvantage compared with someone who does not have anxiety and depression, it put her at a disadvantage because of her childcare issues. The complaint of failure to make reasonable adjustments does not succeed for that reason.

Time off for dependants

76. The last complaint is about failure to allow time off to care for dependants under s 57A Employment Rights Act 1996. As explained above, s 57A gives a right, where there is an unexpected disruption or termination of the arrangements for childcare, to unpaid leave for as long as is necessary to deal with that unexpected disruption or termination. The usual scenario is when somebody's childcare arrangements fall down at short notice or their child is sick at short notice and they need time off to deal with that and put in place longer term arrangements. While the right is not strictly time limited, that is the thrust of the protection and the case law makes clear that it is to enable the person to put better arrangements in place. It is emergency leave in that sense. Once the immediate emergency has been overcome, the employee can be expected to look at a different arrangement, for example a period of unpaid parental leave or a period of annual leave.

77. In this case the Tribunal found that the Claimant did not make a request for time off to look after dependants under section 57A. She was not asking for emergency unpaid time off to make arrangements. She was asking for an extension of her furlough and then some more annual leave. By definition she was not asking for unpaid leave, she was asking for an arrangement that would enable her to carry on being paid throughout, and she was not asking for time to make arrangements, she was asking for time to cover the entire period of childcare. The Tribunal concluded that this was not a request that fell within s 57A and this complaint does not succeed.

Employment Judge Davies
11 August 2021