EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4116997/2018

Held at Glasgow on 12, 13, 14 February 2019; 19 and 20 March 2019 and 24 May 2019

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Employment Judge I McFatridge

Mrs S	**Claimant** **Represented by:-** **Mr S -** **Husband**
T	**Respondents** **Represented by:-** **Ms R Moffett –** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 **The judgment of the Tribunal is that:**

1) **The claimant was disabled in terms of the Equality Act 2010 at the relevant time.**

2) **The respondents did not know and could not reasonably have been expected to know that the claimant was disabled at the relevant time.**

3) The claims of disability discrimination based on a failure to make reasonable adjustments and discrimination arising from disability are dismissed.

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REASONS

1. The claimant claims that she was unfairly dismissed by the respondents. She also claims that she was unlawfully discriminated against by them on grounds of disability. She claims to be disabled as a result of suffering from hypothyroidism and fibromyalgia. She makes claims of discrimination arising from disability and claims that the respondents failed to comply with a duty to make reasonable adjustments. She also complains of indirect discrimination. The respondents' position is that the claimant was dismissed by reason of redundancy and that the dismissal was procedurally and substantively fair. Their position is that during the redundancy process an alternative role was identified for the claimant but that the claimant refused this. The respondents did not accept that the claimant was disabled at the relevant time and in the event that the Tribunal were to find that the claimant was disabled then the respondents' position was that they had neither actual nor constructive knowledge of the claimant's disability. The claim was subject to a degree of case management and in particular at a preliminary hearing on 31 October 2018 Employment Judge McPherson issued a note to the parties setting out the process to be adopted. This note is dated 6 November 2018. Amongst other things Employment Judge McPherson ordered that a preliminary hearing take place in order to determine the preliminary issues of disability status and the state of the respondents' knowledge of the claimant's disability. At the same time it was ordered that the claimant advise the Tribunal and the respondents whether they wished to amend their pleadings in order to incorporate certain additional issues which they had raised. It was subsequently agreed that this matter would be considered on the papers by an Employment Judge in April 2019 after the judgment of the preliminary hearing had been promulgated.

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2. The preliminary hearing was initially set down for three days however the evidence was not concluded during that period. I should record that on two of the days fixed the claimant who was giving evidence indicated that she was feeling fatigued and I decided that in those circumstances it was appropriate to adjourn the Tribunal slightly early. A further two days were fixed however the evidence of the respondents' witness did not conclude until after 4pm on the final day. In the circumstances both parties agreed that rather than come back for another day they would prefer to proceed by way of written submissions. It was agreed that I allow a slightly extended timetable for submission of written submissions in that the initial submissions would be lodged no later than 10 April 2019 and any other comment that the other party wished to make be lodged no later than 17 April 2019. Thereafter I considered the submissions in private on 10 May 2019. At the Hearing, evidence was led for the claimant from Dr Rosalind Paul a Consultant Occupational Therapist who met with the claimant on 19 December 2018 and spoke to a report which she had produced dated 22 December 2018. The claimant led evidence on her own behalf. Evidence was led on behalf of the respondents from Dr P, the respondents' Chief Executive who was the claimant's Line Manager. The joint bundle was added to by the respondents on the second day of the Hearing to deal with a specific point which the claimant had raised during her examination-in-chief. I allowed the document to be lodged (page 468). Following the break in the case between 19 February and 19 March 2019 the claimant, on the morning of 19 March sought to lodge a substantial bundle of documents which she indicated were to deal with various matters raised by the respondents in cross examination. It included payslips from the claimant's employment with Tesco and a list of encounters with the claimant's GP in 2017 and 2018. I refer more to this below. The respondents' position was that they vehemently objected to these documents being lodged. The respondents had no forewarning. Their position was that if these documents were lodged then they would require to re-open the claimant's cross examination (which had closed at the end of the Hearing on 14 February 2019). Before they could do this they would require a period of some hours to read the documentation and, if necessary, take instructions. Undoubtedly the upshot would be that the Tribunal would not

conclude within the further two days which had been allowed and an additional day would be required. The respondents indicated that in those circumstances they would certainly make an application for expenses. The claimant's position was that the documents were required to refute suggestions which had been made to the claimant in cross-examination. The claimant's representative indicated that whilst the documents could have been forwarded to the respondents' representative during the break he thought the appropriate thing to do was simply turn up with them. I required to consider the application in line with the overriding objective. In the event if there had not been a break then the claimant's representative would have required to complete his re-examination of the claimant without the benefit of these additional documents. I also had in mind that, as noted below, all of the points put by Ms Moffett had been answered by the claimant in cross-examination and by and large they were matters which were solely within the knowledge of the claimant and where, unless I was to hear anything to the contrary I would probably be prepared to accept the claimant's evidence. In particular in relation to the questioning of the claimant regarding the number of times she had encountered her GP it appeared to me that the problem was that the GP records originally lodged by the claimant were, uniquely in my experience, entirely lacking a list of encounters. This was something I had identified and which I had already resolved to ask the claimant about. It appeared to me that having decided to lodge what they had lodged the claimant was stuck with this decision. I also required to bear in mind the whole terms of the overriding objective. If the documents were allowed then I considered that in the interests of justice would require me to allow the respondents time to consider the documents and take instructions on them so I consider that if this happened then undoubtedly the Tribunal would overrun and a Hearing which is already exceptionally long for a preliminary hearing would be extended even further. Obviously there are occasions when if this is something which becomes necessary in the interests of justice then the Tribunal simply has to accede and accept the prolongation. In this case I did not see there was any point in doing this and I refused to allow the documents to be lodged apart from the respondents Equality and Diversity policy which I accepted on the basis that

this was something which the respondents' witness could have been expected to know about and there would be no prejudice to the respondents in allowing it (page 469). On the basis of the evidence and productions I found the following factual matters relevant to the matters to be decided at the preliminary hearing to be proved or agreed.

Findings in Fact

3. The respondents are an agency which provides advice and training on alternative energy and energy saving in Argyll and neighbouring areas. The claimant commenced employment with them as an Education and Skills Development Officer in or about November 2009. Her work involved developing training materials and running courses and presentations including visits to schools and providing presentation to pupils. When the claimant started with the respondents the respondents did not have an office and the claimant's contract stated "home worker". The claimant worked from her home although she also spent time visiting schools and other establishments throughout Argyll.

4. In 2015 the claimant was off work for a time with a frozen shoulder. She also required to have an operation to remove her gall bladder in November 2015. The claimant also considered that she had had more than the usual number of apparently unrelated periods of illness and generalised and apparently unrelated medical symptoms. At some point in 2014 or 2015 the claimant had been diagnosed as suffering from hypothyroidism. She was prescribed Thyroxine replacement but it did not appear to assist. The claimant consulted her GP in March 2016. Prior to this her GP had obtained lab reports which were taken towards the end of December 2015 (page 128-130). The claimant's GP decided to refer the claimant to a specialist and wrote to Steven Gallagher of the Nuffield Hospital on 7 March 2016. Mr Gallagher is a Consultant Physician. The letter to Dr Gallagher was lodged (page 131). It states

> "Many thanks in anticipation for seeing this very pleasant 45 year old lady who has a 3 year history of progressive symptoms all of which have been substantially worse in the last 6 months.

She initially presented with symptoms suggestive of hypothyroidism and indeed this was confirmed biochemically. Unfortunately, despite the normalising of her TFTs, with increasing doses of Levothyroxine (she is now on 175mcg daily) her symptoms of nausea, abdominal bloating, lethargy, significant weight gain, peripheral oedema, sweating, reduced libido and mood swings are failing to resolve and are actually worsening. …. I am at quite a loss to know what to do next with S. She and her husband are becoming quite understandably frustrated with her lack of progress and continuing weight gain. A recent random glucose test has unfortunately been elevated and I am arranging to have this rechecked fasting. …. I wonder also if there is a unifying endocrine diagnosis to explain S's symptoms."

5. Dr Gallagher responded on 17 March 2016. His letter was lodged (pages 132-133). This states he had met with the claimant on 16 March 2016.

"Over the past 2-3 years S has noted a number of general changes as far as her health is concerned. She describes issues with fatigue and nausea with weight gain and fluid retention particularly prominent. Headaches can also be a part of the picture. In the past 6 months, if anything, things have been worse and mood swings have been particularly evident. I note her background of hypothyroidism. There has clearly been some problems in getting optimal thyroxine replacement with the most recent biochemistry available clearly showing sub-optimal replacement. Much of this, I think, may relate to problems that she has first thing in the morning with nausea and vomiting. …. In the past she has been told on ultrasound appearances that she has had polycystic ovarian syndrome although a more recent trans-vaginal ultrasound did not show these appearances. I am not sure whether there has been biochemical confirmation of this diagnosis in the recent past but certainly her phenotype would be consistent with this diagnosis. I note also that she has had borderline fasting blood glucose results with a borderline high haemoglobin A1c.

She underwent an emergency laparoscopic cholecystectomy around November 2015 done in Borders General Hospital which has been a further setback. I understand that bile reflux has been a problem and most recently a suggestion around helicobacter infection."

5 The letter goes on to state

"There is a strong family history of auto-immune disease with her mother having thyroid problems, vitamin B12 deficiency and coeliac disease.

I am not sure that there is a single explanation for all of this woman's symptoms. Things are probably also complicated by the fact that she is
10 likely to be reaching peri-menopause as well which will bring with it further metabolic/body habitus change.

I think in terms of optimising things, the first thing to look at would be to try and improve upon her thyroid function …."

He goes on to state that he considers that the various factors he mentions all
15 point to the claimant having a "strong autoimmune background". He suggests various further tests. He goes on to state

"I think beyond this, it would be important for her to try and build up her exercise levels again. This has certainly tailed off over the past 6 months and I certainly was careful to try and explain that symptoms are going to
20 be multi-factorial and therefore the solutions are also going to have to come from a number of different angles."

6. During the course of 2016 the claimant attended various appointments and various tests were carried out.

7. At some point subsequent to this the claimant's medical advisers advised her
25 that she was suffering from fibromyalgia. The claimant lodged a substantial number of documents relating to fibromyalgia. Fibromyalgia is a diagnosis made by GPs and is generally used when patients are suffering from a wide variety of symptoms which cannot be explained by other means. In the claimant's case one of the issues was hat her symptoms had been originally

attributed to hypothyroidism and if they had been due entirely to hypothyroidism it would have been expected that these symptoms would have reduced or gone away entirely once the claimant was prescribed a Thyroxine replacement at a suitable dose. In the claimant's case despite her dose being increased over the years since 2014 her symptoms did not abate. Again initially the claimant had suffered from shoulder pain in 2015 which had been attributed to a frozen shoulder and then to repetitive strain injury. Normally these conditions would be expected to resolve but in the claimant's case they had not.

8. Unfortunately, for reasons which will be highlighted below, it was entirely impossible to ascertain from the evidence of the claimant the exact date when she was first diagnosed with fibromyalgia. Indeed it may well be the case that this was initially a tentative diagnosis which became more certain over time. From the medical records which were lodged by the claimant (pages 144-146) there is a list of items which are headed Current Problems and Past Problems. The precise date of this document is unknown however it would appear to be an excerpt from the computerised records kept by the claimant's GP. Under "current problems" are listed the laparoscopic cholecystectomy on 26 November 2015 and hypothyroidism dated 13 May 2014. Going back it notes that the claimant had shoulder pain in September 2015 and then migraine in August 2016, bloating symptoms in 2016, myalgia unspecified on 8 February 2017 and "fibromyalgia viral illness" on 20 June 2017. Urinary symptoms and urinary tract infections are noted in the latter part of 2017 and then on 23 July 2018 it is noted simply "fibromyalgia". This is repeated on 13 August 2018. I was prepared to accept as a fact that the claimant had been advised by her GP that she suffered from fibromyalgia in or about June 2017. I also considered it established as a fact that the claimant may have believed she was suffering from fibromyalgia for a few months prior to this and indeed her GP may have suspected that this was the case.

9. In any event, whatever the diagnosis, the claimant experienced a number of symptoms over the years which she now attributes to fibromyalgia.

10. The claimant suffers from constant pain in various joints. She suffers from photophobia which means that bright lights cause her pain. She also suffers from fatigue. The claimant has suffered from migraines for a number of years but now attributes these headaches to her fibromyalgia. She is also sensitive to noise. She suffered occasionally from skin problems and blisters on her skin which were painful.

11. At some point the claimant was tested for osteoarthritis however the markers for arthritis were not present to the extent that a diagnosis of osteoarthritis could be made. The claimant was also diagnosed as suffering from carpal tunnel syndrome at some point subsequent to termination of her employment with the respondents. On 26 January 2018 Mr Canning a Consultant at the Royal Alexandra Hospital wrote to the claimant's GP regarding the results of a cystoscopy which she had carried out on the claimant. He advised that this was normal and was discharging the claimant. The sentence of the letter states

> "Thank you for referring this lady with microscopic haematuria. She has some urinary frequency issues."

12. From around mid-2016 onwards the claimant started making adjustments to her daily routine in order to minimise the pain and stiffness which she felt. She started taking a lengthy bath in the morning. She found this helped with pain and relaxation. She also started doing exercises in the latter half of 2017 after her diagnosis. The exercises were recommended by a physiotherapist. The physiotherapist had not wished to prescribe specific exercises until the claimant had an actual diagnosis as to what was wrong with her given the previous varied diagnosis of her joint pain. On the odd mornings when the claimant does not carry out her exercises then she finds that this does not cause a problem if she is going to be walking about during the rest of the day. If she is going to be sedentary for the rest of the day then she feels that if she does not exercise this causes further stiffness.

13. As a result of her photophobia the claimant wears glasses with photo-reactive lenses which go dark when it is sunny. Her lenses are stronger than normal sunglasses and are designed to exclude all but 5% of the available light.

14. The actual effects of the claimant's conditions of fibromyalgia and hypothyroidism vary over time.

15. The claimant claims she was discriminated against between November 2017 and April 2018. During this period the claimant suffered from fatigue. She dealt with this by herself. Having perused a number of websites about fibromyalgia and having taken advice she became aware of something called payback. This basically means that if one over-exerts oneself one day then one is less capable of carrying out activities the following day. As a result of this people with fibromyalgia are advised to pace themselves so as to ensure that they do not overdo things.

16. The claimant cancelled a number of social activities because she was too fatigued to go. The claimant also ceased to take part in skiing which was something she had previously enjoyed. She would occasionally still give her daughter lifts to skiing but would not take any part in this herself.

17. The claimant on at least one occasion cancelled a holiday. The claimant used to help with teas and coffees at her local church. She ceased doing this. She also used to attend the horticultural society but stopped going to this. She had also been a member of the school board and the congregational board of her local church but resigned from both of these.

18. The claimant has difficulties with dressing however she is able to dress herself without assistance if she thinks about the type of clothing she is going to be wearing and chooses clothes which are easy to put on. This means avoiding clothes with difficult catches or tight fitting clothes which are difficult to get into with stiff joints.

19. The claimant finds it difficult to carry heavy things and when visiting schools would often get others to assist getting things out of her car. At home she arranges for her husband or daughter to bring groceries out of the car and into

the house. Since her diagnosis she has stopped doing a lot of housework, cooking and cleaning and arranges for her husband and/or daughter to do this instead.

20. In December 2018, a considerable time after she had ceased working for the Respondents, the claimant arranged for an assessment report to be carried out on her by Dr Rosalind Paul, a Consultant Occupational Therapist. A report was prepared for these proceedings and was lodged (pages 163-183). Dr Paul carried out an AMPS evaluation. She also looked at the claimant's medical records and carried out a face to face assessment with the claimant and gathered a timeline albeit the timeline related entirely to what the claimant reported of her employment with the respondents and did not provide a detailed timeline of the claimant's presenting symptoms or diagnosis. What she says of the history of the presenting condition is (page 166)

> "Ms S has a complex medical history dating back to 2013. She has confirmed diagnoses of hypothyroidism, fibromyalgia, migraine, bile gastritis, helicobactor pylori and a sliding hiatus hernia. In November 2015 she had an emergency cholecystectomy (removal of gall bladder) and this coincided with the onset of symptoms that were later identified as fibromyalgia. Treatment is ongoing for hypothyroidism, fibromyalgia and migraine. Her rheumatology and endocrinology specialists have confirmed carpal tunnel syndrome (affecting the functioning of her right hand). Elevated inflammatory markers have been associated with her experience of pain in her knee joints; however, to date, they have been unable to confirm a diagnosis of either rheumatoid arthritis or SLE (systemic lupus erythematosus). Ongoing treatment requires to attend hospital and GP surgery appointments from time-to-time."

With regard to fibromyalgia she notes that the cause of this is not known and goes on to state

> "It is speculated that changes to chemicals in the nervous system effect the way that pain messages are processed by the central nervous system leading to increased sensitivity to pain. Low levels of serotonin,

noradrenaline and dopamine may also be factors in that they regulate mood, appetite, sleep behaviour and stress responses."

She then goes on to refer to the NHS website which states

"the two main symptoms of fibromyalgia are fatigue and widespread pain. In addition, it can give rise to problems with mental processes (known as fibro-fog) and this can impact on memory and concentration. Individuals can also be very sensitive to sensory stimuli such as touch and bright lights."

She goes on to state

"The main treatment approach is self-management using strategies such as pacing, rest, use of relaxation techniques and minimising stress. The ability to engage in physical activity can be variable and it is recommended that, within an individual's capabilities, exercise should be incorporated into the daily routine. This should include aerobic, resistance and strengthening exercises in order to avoid muscle stiffness and the exacerbation of muscle pain. Symptoms can be variable and may be affected by stress, changes in the weather or variations in levels of activity. …. For the purposes of the Equalities Act (2010) employers have a duty to make reasonable adjustments for individuals with fibromyalgia and also for those with hypothyroidism."

21. She then refers to the symptoms as reported to her (page 167). She notes on page 168

"Together and individually these symptoms impact negatively on her ability to sleep and, consequently, fatigue can exacerbate her symptoms. She is very stiff and sore first thing in the morning: over the course of the day this can improve; however, it can also worsen.

Ms S uses a variety of self-help strategies including regular use of a tens machine and heat pads; she wears sunglasses when outside; avoids sunlight and takes regular movement breaks; at home, she has a custom-made workstation with a sit-stand desk, positional monitors and hands-

free telephone/dictation equipment. She follows a self-management fibromyalgia programme and takes daily medication. However, with regards to her hypothyroidism, difficulty achieving a therapeutic target of levothyroxine has meant that her symptoms have not been fully ameliorated. This means that she experiences significant discomfort and requires to pace her activity."

22. The AMPS assessment carried out by Dr Paul involved her asking the claimant to carry out the tasks of vacuuming the car and preparing homemade vegetable soup. With regard to the performance of the task she notes (page 172):

"Overall, Ms S demonstrated ability to self-initiate, good organisation and the appropriate use of chosen equipment. She focused on the task in hand and heeded instructions, noticed and responded to environmental cues and did not require any assistance to problem-solve.

The vacuuming task was terminated before completion. The requirement to maintain a grip on the hand-held vacuum cleaner caused her discomfort and she elected, instead, to use an alternative machine. She was observed to have difficulty rising from a crouching position and had to pull on the car to rise to standing. Picking items up from the floor was difficult and, when stooping, there was evidence of discomfort and obvious increased effort.

Ms S carried out the cooking task immediately after vacuuming the car. She was able to complete this task, which she carried out in predominantly a seated position. As noted above, picking items up off the floor was difficult. Moving items (cooking pots, kettle) was carried out using two hands, when it would be expected that one hand would be sufficient. Stooping to retrieve items from low cupboards/drawers necessitated 'propping' or leaning on the work-surface for support.

During performance of these tasks Ms S was noted to adopt inefficient positions (raised elbow) in order to compensate for weakness in her hands and wrists and she frequently stopped in action to release tension in her hand. While she was able to bend and reach into low and high cupboards, or into the car, this was observed to be carried out with effort and the pace

of performance was relatively slow. Her physical difficulties were persistent and were, therefore, considered to interfere with task progression.

5 During our previous discussion, Ms S was observed to frequently shift position and elected to move from sitting to standing at times. In the kitchen she moved out of direct sunlight in order to reposition herself in the shade."

23. The outcome of the AMPS assessment is set out on page 180-181. The claimant scored 1.56 which is below the cut off measure fixed at 2.0. It is noted
10 that 95% of well healthy persons of the claimant's age have ADL motor ability measures between 1.88 and 3.87. This would indicate that the claimant's motor performance was lower than age expectation. The report also goes on to state that the claimant's overall ADL process ability was 2.32. 95% of well healthy persons of the claimant's age have ADL process ability between 1.06
15 and 3.0. This meant that so far as ADL process ability was concerned the claimant's measurement was within age expectations. The claimant also completed a sensory history report form which was input into the assessment. This was lodged (page 182). The claimant noted that most of the factors were impacted. Ms Paul's understanding was that the claimant took around 1½
20 hours in the morning to get out of bed and carry out her daily routines before she was ready to go to work. Dr Paul considered that this was abnormal particularly as it did not include breakfast. She was unable to say whether or not the claimant could have carried this routine out quicker. However she indicated that the claimant would probably not be able to do this. She
25 described the morning routine as a "therapeutic process that couldn't be rushed". She noted that whilst cooking the claimant had difficulty carrying more than one object at a time and that when carrying a kettle she required to carry it in both hands. She also noted that the claimant used voice activated software on her computer to avoid typing. Dr Paul attributed the claimant's difficulties
30 with these areas to the claimant's carpal tunnel syndrome. It is to be noted that this was diagnosed after the claimant's dismissal. With regard to driving, Dr Paul's view was that it would depend on the distance involved and the claimant's driving experience. She indicated that, depending on what the

claimant was driving to, there would be no difficulty with sitting for the period. The claimant would also be able to drive longer distances if she carried out coping strategies by stopping. Dr Paul also observed the claimant had difficulty lifting things out of the car boot although again she attributed this to the claimant's carpal tunnel syndrome.

24. She noted that the general advice for sufferers from fibromyalgia is that patients are encouraged to maintain activity and avoid the vicious circle of avoiding activity to avoid pain which would then be likely to make further movement more painful. She also noted that while sitting for long periods be problematic it could be tolerable if it was immediately followed by movement. She also considered that it was important to consider the totality of the symptoms.

25. In December 2017 the claimant was due a considerable amount of leave from the respondents and decided to take this. She took up a five week contract as a checkout operator with Tesco with effect from 5 December. This was to assist Tesco during the busy Christmas period. At the end of this contract she was offered a continuing part time contract with Tesco which she accepted. During December and January the total hours which the claimant worked per week either for the respondents or for Tesco was around 40. Thereafter the claimant continued to work part time for Tesco as well as for the respondents. I accepted her evidence that over this period she was working around 37 hours per week in total for both employers. Following the termination of her employment with the respondents the claimant continues to work part time for Tesco. She also obtained a part time post with a museum at Kilmartin. Kilmartin is around 35 miles from the claimant's house and it takes around one hour to drive there. The claimant's new job involves her driving there three days per week. The other day she works from home. On the days that she has to drive to Kilmartin the claimant has to stop around half way in a layby and do stretching exercises for 5-10 minutes before proceeding. She does not do this every trip. If she knows that she is going to be active and moving around when she gets to Kilmartin she may not bother with the stop. If on the other

hand she knows she is going to be sedentary most of the day then she will stop and ensure that she does her exercises so as to avoid getting too stiff.

26. The claimant has advised both of her new employers of her difficulties and both have made adjustments. Tesco have a process by which an employee is examined by Occupational Health and given a "disability passport". The claimant has been given this (page 148-149). At Kilmartin her employers carried out a workplace assessment (page 150-155). This was carried out on 23 May 2018 and recommended various adjustments. Neither document provides any statement accepting that the claimant has been assessed as being disabled in terms of the Equality Act.

27. Up until September 2016 the claimant's line manager was a Ms M. Since the claimant worked from home Ms M did not see her every day. Much of the interaction between them was via e-mail and telephone. The claimant kept her own work records as to when she was working, when she was taking time off in lieu and when she was ill. She would not necessarily require to contact Ms M regarding every medical appointment she made.

28. On 21 January 2014 the claimant e-mailed Ms M stating

> "Tried to get back to normal yesterday but only managed a few hours before having to go back to bed. Feeling rough this morning, headache, fever, can't keep awake or warm and my muscle aches so not working today. I have a GP appointment today."

Ms M responded later that morning stating

> "OK, hope you feel better soon." (page 292).

29. The claimant e-mailed Ms M again on 31 May stating

> "Hi M,
> Feeling pretty awful I am not shifting this flu. I am so tired sleeping most of the day and having terrible headaches. Saw the doctor today and he wants me to have more time off.

I said I would be back to do the event but I really am not getting better as I expected to by now. The doctor has signed me off for another 17 days. Which means not making the event in Campbeltown on Wednesday. I am so sorry. I would be happy to do it later on in the month anytime that is suitable for the school."

30. The claimant wrote again to Ms M on 4 March. The e-mail deals with work issues but begins with "just a quick update. I am back at work at last." On 13 May 2014 the claimant sent an e-mail to Ms M which was lodged (page 295). It is headed "Re Science in Society bid". It begins

"I have not looked at the final draft yet. I am not feeling the best at the moment this week's blood test results have shown my thyroid is not functioning at all. I am so tired, it is difficult to focus on and remember things."

The rest of the e-mail deals with work matters with the claimant indicating that she had an appointment the following day but "hopefully will have a chance to look at the bid tomorrow afternoon".

31. At the beginning of 2015 Dr P who at that time was not the claimant's line manager was due to attend an event with the claimant. Meeting was not work related but was connected with a church group which both the claimant and Ms P were involved in.

32. This led to her having an e-mail exchange with the claimant which was lodged (page 296).

33. Ms P e-mailed the claimant stating, "Would you like a lift to X's tomorrow". Ms P e-mailed the claimant and others again on 19 January stating "I hear that we are meeting tomorrow am I right I hope the roads are better than last week let me know if you would like a lift if so." The claimant responded on 19 January stating

"Unfortunately I have had a cold/sore throat for about 7 weeks but it got worse over the weekend and I now have full blown tonsillitis and a fever.

To make things worse my thyroid levels are rubbish. Doctor has instructed bed rest for a week to 10 days – I had to miss ski-ing this weekend but will hopefully be back in circulation at the weekend.

Thanks for the offer of a lift".

5 34. Ms P receives a large number of emails every day. She took from this email that the Claimant did not want a lift. She did not pay any attention to what the Claimant said about her medical condition.

35. In June 2015, again prior to Ms P becoming the claimant's line manager, the claimant was again in touch with Ms P regarding the church group. The e-mail
10 was lodged (page 298). It states

"Thanks P, I feel a bit better today after my trip to hospital to get anti-sickness medicine and rehydration last night. First day for almost a week without being sick. I can now keep water down and my thyroid drugs. Still a bit dizzy and weak but I managed to get out of bed this afternoon and
15 sat in the garden (the only upside of this week) the doctor says the sunlight will boost my immune system. Hopefully I will be able to eat something tonight and then I might have the energy to get back to work."

36. On 15 September 2015 the claimant's husband sent an e-mail to Ms M from the claimant's account which was lodged (page 301). This states

20 "Just to let you know that S has been in hospital this weekend with severe pain in her shoulder. Basically it has swollen internally and has trapped a nerve and is severely inflamed. She is on Diazepam and Tramadol for the pain and has been told to keep it immobile. She has an outpatients appointment on Thursday at the trauma clinic at the hospital and has been
25 told that it is likely to be a while before it improves enough to come to work. …"

37. As noted above the claimant was off for a time in 2015 with a painful shoulder which she attributed at the time to a frozen shoulder/repetitive stress injury. She spoke to Ms M regarding making her workspace more ergonomic. Ms M

agreed that the claimant would make an application under the Access to Work scheme which the claimant had identified as something which might provide financial assistance to the respondents in providing a more ergonomic workstation. The claimant sent her Access to Work application to a Mr Crowther at Access to Work on 17 October 2015 enclosing completed questionnaires. The claimant's e-mail of 17 October was lodged (page 308). Copies of the Access to Work questionnaire completed by the claimant at the time were also lodged (page 309-313). Under the heading "Your health condition/disability" the claimant stated

"• What difficulty do you have with meeting the targets.

To meet most of my targets requires a considerable amount of desk time i.e. at the keyboard and this is where I have difficulties I require more adjustable desk, chair etc and better wrist and arm support. I also have to lift lots of kit boxes from a container to the training events.

• How does your disability condition affect your day to day living?

Yes driving has become a bit challenging and lifting heavy objects is difficult. When I get a flare up getting my arms in my clothes can be difficult."

The form goes on to note that the claimant was taking Thyroxine and pain relief and that her employers had agreed that she should have a trolley for moving the kit boxes between storage and training events. In answer to the question whether the claimant had put any adjustments in place herself the claimant answered "no." In answer to the eligibility questionnaire the claimant answered "yes" to the question.

"Do you have a disability, mental ill health or a long-term health condition that affects your ability to work?"

The claimant completed the final section in the form as follows (page 314)

"1. Can you break down the hours and duties you require support for ie: monthly/weekly meetings.

I need aids to ensure I am in the right position at a desk, highly adjustable chairs to ensure my joints are supported and I need equipment and technology to enable me to use a computer for long periods of time.
I am at a desk roughly 20-25 hours per week the remaining hours are in meetings where I do not need help."

38. On 23 October the claimant e-mailed Ms M. The e-mail was lodged (page 315). It is headed "An update":

"Hi M
I thought I would e-mail to give you a bit of an update. I have managed to do a phased return and have been back on a full time basis for the last few days. However, was still having problems with my shoulder, so I have had to make some changes to my working arrangements such as borrowing a keyboard and office chair. I have also connected a mouse to my laptop. However I ran out of USB ports so matrix recommended an extender (£10 which they will invoice for – hope that is okay). I have also put my laptop on a box as a temp measure to increase the height. If Access to work do a work place assessment they will recommend more suitable permanent solutions. I have also borrowed a computer desk as it is at a better height for me than the table I worked on before. Making these changes has meant me moving my study to a different room. I did this and then discovered it was too far from the hub to get wi-fi. Keen to get back to work I spoke to matrix and they gave me a wi-fi booster. They are going to invoice us for this is that okay? I will complete my appraisal documents tomorrow and send them to you."

39. The claimant e-mailed Ms M again on 29 October (page 316). She stated

"Just to keep you up to date.
I have had a few sessions teaching me how to sit correctly - not as simple as it sounds!!! Being so small means I am not in the height ranges used by desk builders. Hence I am constantly stretching or being in the wrong position as everything is too high for me.

As requested M I have researched ergonomic work spaces. I have sourced a few items details of which I have enclosed. You can get cheaper sit stand desks but most are too high for me there is less choice for lower desks.

5 I have been in touch with Access to work again. The process is a bit of a pain and it is a bit time consuming. The process requires you to give them 10 days when you will be able to have you workstation assessment. They will then arrange it for you. If you cancel the assessment your claim is closed and you reply from scratch. However you also need to have your

10 assessment within so many days from applying or your claim runs out. The upshot is that they will do my workstation assessment in the 10 working days from the 16th October. I will have had my workstation assessment by the end of November and should have the recommendations by Christmas."

15 40. On 29 October Ms M e-mailed the claimant stating

"What do you want to do – wait for the assessment or get some things now? Is there a maximum spend through the Access funding and is it a proportion of costs or 100%. If we couldn't get all the items through Access anyway then there would be nothing to lose by getting some of it now."

20 41. On 12 November the claimant's husband sent an e-mail to Ms M from the claimant's account (page 320). This states

"Just to let you know that whilst at the Peebles conference last night S was ambulanced away to hospital. I've spoken to her this morning and it is not clear yet on what is wrong but it appears likely that it is her gall bladder

25 and she might have it removed today/tomorrow."

Ms M responded

"Oh dear – she has had a rough time recently. Please send her our best wishes and let me know how she gets on. I haven't heard back from anyone at the conference today. Tell her not to worry about work - that

30 can wait."

42. As noted above the claimant underwent an emergency laparoscopic cholecystectomy at around this time. The claimant e-mailed Ms M and Cynthia Carswell of the respondents on 14 November advising that her operation had been postponed but was due to take place later that day. She said she would be off for three weeks and had a two week driving ban. She went on to say that "recovery is extremely varied depending on how the op goes". On 27 November 2015 the claimant e-mailed Ms M stating

> "I hope you are well.
> I am emailing to give you an update after my post op assessment yesterday. I am doing well in terms of the wounds they are healing nicely. However the impacts of losing an organ takes longer to get used to - you have flu-like symptoms for 4-6 weeks. I am so tired and I am sleeping so much of the time. My thyroid not working makes the adjustment to losing my gall bladder so much harder and was the cause of the gallstones in the first place. The thyroid dis-functioning has caused some dental problems and I am having to have two more morals taken out next week. I am undergoing lots more tests on my thyroid and it looks like I will have to see a specialist as the implications are becoming more serious losing five teeth and now an organ.
> The doctor has signed me off until the 16th December however if I recover my energy sooner I will return before that. …."

43. On 29 November Dr P, who is still not the claimant's line manager, contacted the claimant about whether she wanted a lift to a church discussion group. She said

> "Just wondering when you're going back to work, I've got in my diary to pick you up tomorrow but maybe not?
> Hope you're feeling better." (page 327)

The claimant responded

> "… Officially I am signed off till the 16th Dec but if I can I will come back before that. The problem is my lack of thyroid function which is causing

problems in other parts of my body. I have to have 2 more molars taken out on Wednesday. It is a bit weird for a few hours a day I feel normal but after an hour or so I am exhausted – I sleep 12 or 14 hours a day. It is like having flu really without the runny nose and sore throat, your muscles and head ache and you feel in a fog and are really shivery and so tired. …. Thanks for the offer of picking me up but I am so tired I am going to give it a miss."

Around this time there was an e-mail correspondence between the claimant and Ms M regarding the amount of sickness leave she had taken as opposed to annual leave and TOIL. It is not necessary to quote all this correspondence. On 7 December 2015 the claimant stated to Ms M

"I hope you are well and things are going well at work.
I thought I would give you an update. I have had my dental surgery and the gallbladder scars are healing nicely. I am signed off until the 16th December and then I am supposed to come back for 6 or so days on a part time basis, then off for the Christmas shut down. I am taking this time as AL and I don't quite have enough to do that. I propose that I work 1 day this week, 2 days next week and 3 the following week this enables me to slowly build up with lots of rest in between as the real problem is that I am so tired. I am no longer allowed to have caffeine so I can't use my usual solution for overcoming the tiredness – 20+ caffeine hits a day."

On 7 January 2016 the claimant e-mailed Ms McLaughlin of Scottish Power with whom the claimant was required to work. The e-mail was copied to Ms M (page 334). The claimant states

"Hi Siobhan
Happy New year. The recovery after my op was going reasonably well and I returned to work for a few weeks before Christmas.
However I spent most of Christmas and New Year in and out of hospital with post op complications. I have had a wide range of tests and the complications have resulted in some liver problems. I was due back to work yesterday but had to take the day off as I was in hospital again. I am

home now but the advice is I rest till Monday and review the situation then. By Monday the medication may have kicked in and I might stop being sick and feel a bit more human again. I will hopefully be back on Monday and I will call you then."

5 44. In January the claimant wrote again to Ms M relating to the Access to Work application (page 338). It stated

"I am still having physio and my therapist is convinced that my problems are due to:

- being too small for a standard workstation set up and
- using a laptop.

The above is placing too much pressure on my shoulders and arms resulting in the pain."

The claimant goes on to advise that the Access to Work process is not going well. The claimant wrote again to Ms M on 29 February 2016 regarding Access to Work application (page 345). She stated

"Still have not heard back from access to work despite having chased them. I am going to ask my physio to write a letter to them hopefully that will generate a response. However, it is difficult to keep at it as I have so much going on in my projects at the moment.

I have spoken to my physio and carried out research to find out the specifications for my height. Enclosed is the information I have gleaned from a variety of sources. Basically there are very few chairs and desks which are at the right height for me. The reason for this is that I am smaller than the person the average petite chair and desk has been designed for. The result is despite searching many many desks and chairs specs there is very little choice."

45. The claimant met with Ms M on 10 May 2016 and following this Ms M produced a note. This was lodged (page 356). There was no mention on this note of the claimant suffering from hypothyroidism. There is no mention in this note of the claimant suffering from fibromyalgia which had not yet been diagnosed. Most

of the meeting refers to work issues. There was discussion around the fact that the maximum TOIL accrual is four days without prior approval and that "large blocks of time cannot be accrued or taken without first discussing or agreeing with Ms M". It was noted that the respondents required to find ways of managing the TOIL situation for all staff. There was then a discussion where the claimant indicated that she would be requiring to take time off for medical reasons. The note of meeting on page 356 states

> "S confirmed that a significant amount of time off may be required for hospital treatment, with two weeks' maximum involved per treatment."

In fact the claimant had seen Dr Gallagher a couple of months previously and, as previously noted, Dr Gallagher had recommended a substantial number of tests be carried out.

46. In any event Ms M is noted as stating "M will look at TOIL allowances on this occasion but it wouldn't be possible to take more than eight days' TOIL accrued – to be confirmed asap." She goes on to state

> "M confirmed that [*respondents'*] staff get six weeks' sick leave on full pay and statutory sick pay after that.
> If evidence of the health condition and requirement for treatment/recovery time/hospital appointments etc can be produced via a letter from relevant health professionals then it might be possible for the Board to grant a longer sick leave allowance as a special case but this cannot be guaranteed and this would only be considered if the usual sick leave allowance is likely to be exceeded."

47. These meeting notes were sent to Ms S by Ms M on 10 May 2016 by e-mail (page 358). The claimant responded to Ms M on 12 May stating

> "OK – no comments except – Do we get time off to go to doctor/hospital appointments? (The Council has this arrangement). It is a bit academic as I need to make up the time I use going to medical appointments otherwise I would not be able to deliver the project. I am using TOIL to cover all medical appointments. However it is very difficult if only 4 days'

TOIL is allowed in a month as some months I have 6 or so days of appointments/treatment/illness and others I don't have any. It would be helpful ONLY FOR MEDICAL appointments to be able to use an average of no more than 4 days per month which could be spread over the year. My difficulty is I am at the mercy of the NHS as to when my treatment is and I am not able to dictate only four days per month as they often want or need to do more than 4 days in a month with nothing for 6 weeks to see the impacts. If we get time off for medical appointments then I could use this instead."

Ms M responded on 13 May (page 357). She stated

"Ok let me think about it – we allow folk to take one off appointments without needing to make provision as we can work flexibly around it but when they are regular then it eats into time. Will take advice and get back to you next week."

The claimant responded later that day stating

"M. Just to clarify I don't take any (zero) time off to go to medical appointments if there are pressing deadlines then I work evenings and weekends to ensure I meet deadlines. If not then I allow myself to recover and work the hours the week before or the week after.
[*Respondents*] requires me to work flexibly to get to a workshop in Campbeltown for 9am and I need to be able to work flexibly to manage medical appointments. It is difficult being ill and working full time and it is even more difficult being stressed by worrying if you can attend treatment/and worrying about if appointments are going to be spread over 5 weeks which is okay or condensed into 4 weeks which is not with only 4 days' TOIL."

48. On 1 June 2016 the claimant e-mailed Ms M. This e-mail was lodged (page 361). I accepted that this was probably in response to a request from Ms M to provide more information regarding her health condition and requirements for

treatment as had been mentioned in the note of the meeting of 10 May. It states

> "Enclosed is a scanned letter from my GP along with a few other scanned letters from my consultants.
> I have enclosed first appointment letters with most of the consultants. However follow up appointments and treatment dates were agreed either at the clinic or on the phone, therefore no further letters were provided. I have enclosed the first ultra sound letters again follow up appointments were arranged over the phone. I can't find the ultra sound letters relating to digestive or gallbladder treatment, despite having searched for them, I have probably thrown them out after the appointment as I thought I no longer needed them.
> In addition the Private Sector consultations were booked over the phone and no letters were provided. A&E visits which there have been a fair few do not have letters as these were emergency appointments. GP, nurse and Physiotherapy appointments were arranged over the phone and hence I do not have any evidence of these. I met with my GP to discuss all of these types of appointments and he considers his letter covers these appointments.
> I am sure you are aware of this but I really want to keep all of the enclosed private and confidential. I do not want any of this information to be discussed or viewed with **anyone** else. Thanks.
> To summarise the following people make up my medical team.
>
> - Dr Gallaher - Auto-immune - no letters provided
> - Mr Creel - Surgical Consultant - Gastropathy - letter enclosed
> - Dr Fattah - Medical Consultant – letter enclosed
> - Mr Young - Surgical consult - no letters provided
> - Dr Ming - Digestive - no letters provided
> - Mr Das - Repetitive strain – letter enclosed
> - Gemma Bruce Physiotherapy – repetitive strain – no letter provided
> - Dr Flynn GP – letter enclosed

- Catriona MacLennan - Nurse to manage auto immune and other chronic conditions - no letter provided
- Neil Robinson – Registered with him because of auto immune and chronic illness no letter provided
- Ultra sound – repetitive strain and pcos ultra sound letters enclosed. The letters relating to stomach and gallbladder ultra sounds have been lost.
- X-ray telephone appointments so no letters provided

Hope this clarifies things a bit."

49. Various appointment letters were lodged (pages 363-369). There is a document lodged at page 366 which on the balance of probabilities I accepted as being the letter from Dr Flynn she refers to in her e-mail of 1 June. It is undated. It is not on headed paper but is stamped with the stamp of Dr Flynn at Taynuilt Medical Practice. It appears to be either on the claimant's headed paper or on paper which has had the claimant's address atop. It states

> "I can confirm that over the last year S has been admitted to hospital, visited the Accident and Emergency Department on a number of occasions and has attended a number of hospital and GP surgery appointments. The purpose of these appointments have been to diagnose and treat various medical conditions.
> S will continue to regularly attend hospital and GP surgery appointments. The number and type of appointments is dependent on investigative findings and how S responds to treatment. Unfortunately I cannot provide a timetable for treatment but Dr Stephen Gallagher one of S's consultants has stated that it will not be a quick fix. There will be many treatment phases and treatment is likely to take considerable time."

It is noteworthy that the claimant did not include either a copy of the GP letter to Dr Gallagher of 7 March 2016 or Dr Gallagher's response of 17 March 2016.

50. On 7 June 2016 the claimant was signed off with stress by her GP. She e-mailed Ms M on 7 June in the evening to advise her of this. At this time her husband was having an operation in hospital.

51. On 1 July the claimant e-mailed Ms M regarding the Access to Work application which had still not been processed. It is as well to set out this e-mail at length.

"Hi

Following on from various e-mails and various discussion. I have spoken to the Access to work people again to try to get some help with funding but they say I had been in work for too long and my employer is responsible for Health and Safety requirements. Access to Work pointed out the programme is only for people with a disability who have just secured work with a new employer, the employer also has to have a very small turnover. Therefore I would not qualify under the scheme as I have worked for T for 7 years.

Not having a desk and chair for a petite person is causing me to have a lot of pain. As you know I have had physiotherapy but this has stopped because you can't resolve the problem without tackling the root cause which is not having a desk and chair that fits a very petite person correctly. T has only supplied me with laptops and not any other equipment such as a desk, a chair, a monitor or docking station or keyboard or mouse supports. I bought my own desk and chair off the shelf but using equipment not suitable for me for 7 years has caused huge problems. I have been off sick due to the repetitive strain injury for a number of weeks. I can't afford to be off any more so I am taking very strong pain relief (Tramadol) and muscle relaxants to manage the pain. However these make me very tired and not very alert which is having an impact on productivity.

I would be extremely grateful if T could purchase a desk and chair for me that would be suitable for a petite person. I found an online calculator which worked out all the measurements and heights for me and it has come to the same conclusion as my previous research that I need considerably smaller desks and chairs than the standard ones as I am only 4ft 11 inches tall. I have done another comprehensive search to try to find cheaper options but have had no success (see enclosed). You have said we cannot afford to buy all the equipment and I am sympathetic to that position. The chair is absolutely essential as is the desk but we could cut

costs by having a small rather than medium workspace if that helps and I have chosen the cheapest specs fabric/table tops/castors etc. I will do without the monitor, adjustable monitoring arm, docking station and keyboard/mouse supports if you can't afford them."

5 As will be noted below I am unable to make any specific findings as to why the Access to Work application was not proceeded with. Suffice to say that shortly thereafter the respondents purchased a desk for the claimant. The claimant was e-mailed on 13 July 2016 by Cynthia Carswell to advise that this had been ordered (page 377). The respondents also subsequently ordered a chair on 10 18 July 2016 at a cost of £687 plus VAT and shipping.

52. Ms M ceased to be the claimant's line manager about September 2016. Ms M left the respondents employment shortly thereafter. The precise circumstances under which she left were not the subject of any evidence at the hearing. On 31 January 2017 the claimant e-mailed her new line manager 15 Ms P stating

"I am still feeling pretty awful but I have to wait for the blood work to come back. But I know it is just another flare up of the condition – I have been overdoing it so maybe I should have expected it.

I am e-mailing you to let you know that M has asked me to go with her to 20 her appeal hearing. I am rubbish at saying no to someone who needs my help. I feel strongly I should do what is right and not what is easy – I suppose this is a faith principle. I also feel strongly about being a friend when someone is in need. So I am going with her. However I don't want you to find out second hand or behind your back."

25 Ms P responded on 31 January

"Hi S

Thanks for letting me know.

This is not a problem between you and me. It is between M and the Board.

I am not sure I even know all that is going on.

I will take whatever God provides and do my best for all concerned and I am sure you will too.
P." (page 384)

53. Although she was the claimant's line manager she did not as a matter of course deal with most HR matters. The respondents as a small charity are run by a Board comprised of volunteers. The Board of Directors have appointed a company known as EVH to deal with all HR matters. Neither Ms P nor the board itself had any input into HR matters. Ms P would report to the board by giving them a written report once a month. She would also attend board meetings once a quarter to provide them with her report on everything she had done and everything the organisation had done. At these meetings Ms P would flag up anything which the board needed to know. The board's role as governance and they are not in any way involved in the day-to-day activities of the company. As at the date of hearing there were seven board members. One of the board members was Mrs X who was a person with whom the claimant had been on friendly terms for a number of years. The claimant and Ms X attended the same church. The claimant lodged a number of e-mails between herself and Ms X which pre-dated her appointment to the board. I have not set out the detail of these e-mails in my findings in fact for the reasons which are set out below.

54. As with Ms M the bulk of the communication between Dr P and the claimant was by e-mail or telephone. Fairly early on in the managerial relationship Dr P became concerned that she had little idea what the claimant was doing on a day to day basis. The claimant was not good at completing time sheets or reports relating to days off sick and TOIL. This became a cause of concern to Dr P.

55. When Dr P took over from Ms M there was no opportunity for any handover. Since the circumstances under which Ms M were known within the company, Dr P knew that the claimant was aware of this. Dr P went through the T server to see if there were any e-mails relating to the claimant's health but the only e-mail which she came across was the e-mail already referred to (page 361)

which she found unhelpful. From the outset she found that the claimant appeared unwilling to discuss personal issues and she had difficulty getting information from her.

56. Prior to becoming the claimant's line manager Dr P had no management responsibility for the claimant whatsoever. She had been a member of a church group with the claimant and had occasionally given the claimant a lift there. Her recollection regarding the e-mails which were sent to her before she was the claimant's line manager was vague. She received a very substantial number of e-mails each day. She would be looking at the e-mail to determine whether the claimant wanted a lift or not. She had no recollection of the claimant discussing hypothyroidism with her although on at least one occasion she had had a lengthy wide ranging conversation with the claimant on a train journey when they were both going to the same conference. Prior to the preparations for the hearing Ms P had no concept of what hypothyroidism was. She was aware that various of her friends had thyroid issues which appeared to show absolutely no symptoms and did not in any way interfere with them leading a perfectly normal life.

57. As noted above the claimant was on a home working contract. Up until 2017 the respondents had an extremely small office which no more than four people could fit into. As a result of this many of their staff were home-based. The respondents found this unsatisfactory from a point of view of having day-to-day knowledge and control of what their employees were doing. They began to look for other premises. In May 2017 Ms P wrote to the claimant (page 389). The letter stated

> "Hi S
> As a home worker based near Oban I'd like to know your opinion about home working v office working. If we were to invest in a nice new office in the Oban area, would you be happy to change to office based work?
> Let me know your thoughts?"

The claimant responded on 15 May (page 388), she states

"Hi P

Thanks for asking. Do you have an office space in mind?

Homeworking really suits the job I do and allows me to do things as efficiently as possible with virtually no desk time wasted. I can also effectively manage my medical condition by setting up my home office to deal with some of the issues which would otherwise result in me being ill more frequently. I can also park right outside so I don't have to carry huge amounts of equipment a long way nor do I have to get people to help me with doors going in and out 5 or 6 times with kit. Also my job is very self-contained in relation to T and I don't really work with anyone internally although I'm in daily conversations with education professionals.

I don't think office work would be suitable for me for the following reasons:

1. I am really struggling to fit everything I have to do into my day. Adding an extra 45-50 minutes every single day would mean reducing the list of things I can do or generate huge amounts of TOIL (not keen on that as it is too hard to take).
2. I have so little desk time and so much desk work to do so I have to work flat out when I'm at my desk. If I was in the office I would have to take time out when people talk to me even if I avoided small talk I think that I would not be as focussed or able to concentrate as well with the radio on and people talking so my productivity would decrease thus increasing my TOIL.
3. I discuss child protection and issues regarding support needs for children. This needs to be done in a confidential area which I would need provided (at home I have my own office with a door).
4. I design experiments and would need a lab space/sink/a large working area and a large area to store lab type equipment.
5. I make up very large display boards and this needs a huge space to do this which I have in my home office and are not a trip hazard for my ??
6. Due to lack of time I am printing off class materials the day before a workshop and have all three of my printers going at the same time so I would need space for these printers.

7. I also design activities using my own or family equipment so I would constantly be carrying equipment between two work spaces and I would be bound to need the stuff in the other area.
8. I am an auditory worker which means I find it very hard to read research, design activities and other creative things if there is noise or talking.
9. Due to one of my medical conditions I would need to have a custom made chair. These are around £12,000 and a sit/stand desk (£700) and two screens on a stand like I have at home (£700) in the office too. I just don't have the budget for that.
10. The other medical condition requires me to lay down flat regularly. At home this is fine I do phone call, read materials or watch education videos for follow up work for students but not sure how I would do this in an office.
11. I have to go for regular medical treatment or tests and that is ok when working at home as I work at night to make up the time – not so keen to work late into the night on my own in an office plus it would require travelling twice a day.
12. I don't have budget to pay for office accommodation.
13. I don't have the budget for the parking costs or the mileage costs either.

So I don't think I could do all the things I need to do and need to use my very limited budget to deliver any materials to help me to do that."

58. Dr P took from the claimant's e-mail that the claimant did not want to stop being a home worker since being a home worker suited her well very well.

59. The claimant was off sick in June 2017. On 19 June she e-mailed Ms P stating

"I was unwell yesterday and am worse today so I am off sick. I have a doctor's appointment tomorrow." (page 391).

60. On 20 June 2017 she e-mailed Ms P stating

"Doctor signed me off until the 27th June to ensure I rest."

61. On 30 June 2017 the claimant sent an e-mail to Ms P stating

"Hi P

I am feeling pretty bad today. I've been to the doctor. He thinks another flare up has occurred. I am having blood tests tomorrow morning. I will do as much work as I can this week fortunately I am not going to Islay this week just Dunoon. I will use TOIL to cover any time I don't work which means I will have to use some AL to cover Feb half term holiday that we agreed. I might feel better having a slower couple of days things have been pretty manic recently." (page 383)

62. On 20 September 2017 the claimant's husband e-mailed Ms P using the claimant's e-mail address stating

"I am letting you know that S has been suffering from pain, fever and vomiting. Her doctor has diagnosed a kidney infection and a flare up of her auto immune disease. Hence she is on anti-sickness medication, strong painkillers, antibiotics and is unable to work. We do not know how long it will take for her to recover as it is dependent on whether the antibiotics clear up the infection or whether she will need further treatment. I will keep you informed."

It appeared that the claimant was due to attend a work-related interview that day. Dr P e-mailed her stating that

"We hope to offer you a telephone interview shortly with the same panel. Do let me know your prognosis."

63. An additional interview date was fixed and the claimant's husband e-mailed again on 22 September 2017 stating

"S is still really unwell and had to have a consultation with the doctor yesterday. She spent most of yesterday asleep. Today she is still very disorientated and in considerable pain but hopefully she will improve as the medication she has prescribed has a chance to work. I have spoken to about your wish to interview her next week and she hopes she will be recovered by the 26th so the interview should be pencilled in. However the

doctor said it might take longer than that, so we will just have to wait and see how her recovery goes." (pages 395-394)

64. On each and every occasion the claimant was off ill she would have a telephone return to work interview with Dr P. On each occasion Dr P asked her if she was recovered from what had caused her absence. Dr P gave her the opportunity to provide more information but on each occasion the claimant declined to do so. Dr P was aware that it was the claimant's right not to give any more medical information than she was giving and did not press the issue at that time. Dr P formed the view that it was a subject the claimant was sensitive about and since she knew she could not demand information.

65. As noted above it would appear that the claimant was diagnosed with fibromyalgia at some stage around the summer of 2017. At no stage did she advise Dr P of this or indeed mention the word fibromyalgia to her. The reasons given for the claimant's various absences were diverse and apparently unrelated and many of them minor.

66. On 2 November 2017 Ms P met with the claimant at her home so that she could carry out her annual appraisal. Whilst visiting the claimant showed Ms P the chair and desk which the respondents had purchased for her. She did not discuss the medical reason for the purchase and Ms P remained under the impression that the reason the chair and desk had been purchased was the claimant's small stature. The appraisal form was lodged (pages 63-65). Under successes/difficulties the following was noted (page 64)

> "S clearly enjoys working in schools delivering workshops and this aspect of her work has been very successful with excellent feedback from schools.
>
> S worked on an application to the climate challenge fund for further funding for next year, which was submitted recently. The Robertson Trust application is still to do.
>
> However, S has been spending too much time on delivery in schools at the expense of other, minor but very necessary tasks relating to her employment at T. For example, monthly activity reports to line manager

have not been received since June. Quarterly reports to Board have not been forthcoming for the last three board meetings. These reports only need to be very brief (less than one page) so they are not particularly onerous. Sick leave forms and doctor's notes are missing and correct leave request procedures have not been followed.

Due to working at home or in schools, S has very little contact with the rest of the T team. Weekly plans show frequently unavailability for reasons A/L, TOIL or sick leave although time sheets (received retrospectively) can show hours were in fact worked, including at evenings and weekends. Therefore, the line manager and office manager may not always know where S is, what she is doing, or whether she is working, at any given moment in time. Lone working issues are a concern.

S has been allowed to miss T team meetings due to lack of time/unavailability, but this further alienates her from the rest of the team. This needs to be addressed, and her work integrated better with that of all of her colleagues and the organisation as a whole.

It is hoped that the move to a new office will help with team interactions generally. There will be room there for all Oban based staff and for remote staff to visit more frequently. However, S says that she would have difficulty working in an office due to her health problems. (HR advice on this kind of situation is to request an Occupational Health report in order to help clarify and understand the special circumstances and support needed. Then if a person is office based but has medical reasons for not being there they can be allowed to work from home as necessary based on the medical recommendation).

A concern raised by S during this past year is the container where the educational resource materials are stored. It is in a dark container yard and there are concerns for reasons of health & safety and lone working. This is being addressed – following entry into the new office, this equipment can be moved to our old office where we will then have available space for educational resources."

67. At this meeting the claimant and Dr P discussed the claimant going to Occupational Health. At that point Dr P was aware that the claimant had been

off work with a number of unrelated issues. She was concerned that the claimant was not complying with the respondents' policy in relation to sickness absence. Sometimes the claimant's sick forms were handed in very late after the event. Sometimes Dr P would try to arrange something with the claimant but then find that the claimant had a medical appointment she had not told Dr P about. On these occasions she would either not be able to meet with Dr P or would, after the event, tell Dr P that she had had to cancel a medical appointment. Dr P's view was that sometimes she was being told about sickness absence and medical appointments and sometimes not told at all. She wanted to get a handle on what was happening but knew that if she asked the claimant she would not get any information. She indicated to the claimant at the meeting that the claimant would have to provide her with full information about any absences she had had during September and October. This was on the basis that from what the claimant said she had been absent but Dr P did not have the paperwork for this. On 3 November she sent an e-mail to the claimant confirming this stating

> "Please could you send me a list of the days during September and October when you were off sick.
> The council has just phoned me checking this information and they need it today – I expect Cynthia has the record but she is not in until Tuesday and I can't access her computer." (page 399)

68. On 3 November the claimant signed a notification of sickness absence form in respect of an absence she had had between 18 September and 25 September 2017. This was lodged (pages 78-79). Dr P had been aware of this at the time. The form confirmed what the claimant had said at the time which was that the reason for absence was a "UTI and kidney infection – fever. Following this Dr P had as usual completed a return to work interview with the claimant. At this interview Dr P had as usual run through the form with the claimant. This includes a section "Find out about their absence and whether there are any implications for their role." As usual the claimant had not advised of any ongoing issues. Dr P had as usual asked the question whether she was fully recovered and whether there were any further issues and the claimant had said

she was recovered and there were no issues. As usual Dr P went on to ask about a phased return. On this occasion the claimant did get a phased return. On no occasion at any of these return to work interviews did the claimant advise Dr P that she had hypothyroidism or fibromyalgia. None of the return to work forms mentioned fibromyalgia or hypothyroidism. No further action had been taken.

69. Following her meeting with the claimant on 2 November Dr P discussed the issue of obtaining an Occupational Health report with EVH the respondents' HR advisers. She also spoke to the claimant. On 7 November she e-mailed the claimant (page 400) stating

> "Hi S
> Thanks for all the various things you sent through yesterday.
> I'd like to refer you for an occupational health consultation (by phone). The reason for this is to obtain a report that justifies your home working, because it can't be due to lack of office space any more. This also gives us proper evidence on record if anyone else complains that it's not fair.
> OK?"

She also e-mailed the claimant later on that day (page 401). She stated

> "Hi S
> If there are any HR issues that you'd like to discuss with EVH, their Lorna MacIntyre will be available at the end of lone working training on 16th. This could include: home working/office working issues; protected salary issues (as mentioned at appraisal it was noted that you are paid at team leader level but the decision was not to reduce it but to protect it); health issues; anything else you may want to talk about.
> Let me know if you'd like an appointment because it's possible you may not be the only one."

70. By November 2017 the respondents had opened a new office situated around 10 miles from the claimant's home. Dr P was aware from her e-mail correspondence with the claimant in May that the claimant was not keen on

moving to that office. Dr P was aware that the claimant's contract stated that she was a home worker and that the respondents would not be able to change this without the claimant's consent.

71. On 16 November the claimant attended a workshop day at the new office. Dr P was also present. The claimant was wearing a TENS machine on the workshop day. There was some general discussion about TENS machines which certain other employees had used during childbirth Ms P did not take part in these discussions but may have overheard them.

72. During the course of the meeting the claimant indicated that she was bothered by the light flowing in through the windows of the new office. Dr P arranged for some screens, which had formerly been used as part of a static information display, to be moved so that they screened the claimant from the windows.

73. Following the invitation from Ms P, the claimant arranged a meeting with Lorna MacIntyre of EVH which was to take place at 3:15 on the afternoon of 16 November. The claimant met with Dr P and EVH after the training and confirmed that she had experienced discomfort with the sun throughout the meeting. The claimant would not say what the reason was. The claimant was asked if she could provide a simple letter from her doctor but she declined to do this and Ms P accepted it was her right not to disclose information. EVH confirmed that the claimant had the right not to disclose but the appropriate course would be to go through an Occupational Health process. The claimant provided her verbal agreement that she would attend an Occupational Health consultation. She had not responded to the e-mail sent to her by Dr P on 7 November asking her to confirm her agreement.

74. Lorna MacIntyre of EVH explained to the claimant the whole Occupational Health process. She explained how Occupational Health could report to an employer about adjustments without the employer necessarily needing to know about the underlying medical condition. It was clear to Dr P that the claimant had serious issues about confidentiality – although Dr P did not know the reason for this – and Dr P and Ms MacIntyre suggested this as a way of

allowing them to have information without infringing on the claimant's right of confidentiality.

75. At around this time the respondents and EVH were preparing new contracts of employment for all staff. There was a template. On 17 November Dr P sent a copy of the completed template to the claimant. Her e-mail was lodged (page 404). She stated

> "I have filled in most of your details in the attached template. I have said to some staff that those of us who live close enough to the new office are expected to work there (hugely advantageous for all sort of reasons) – unless they have a valid reason not to such as a medical report. This is so that people don't see it as unfair.
> As explained to us by Lorna, the OH report only needs to address issues that affect work, I do not need to know any more and I can assure you that whatever it says will be treated in strictest confidence."

76. The position regarding the new contract was that the respondents had been advised by EVH to offer this to all members of staff. If any member of staff did not accept it then they could not be forced into taking it.

77. Very shortly after the meeting on 16 November the claimant applied for several weeks of annual leave. She was to be off from 27 November until 5 January. Dr P decided that she would not be able to progress the Occupational Health referral until the claimant returned to work on 5 January.

78. The claimant's post was funded by various grants. Primarily this had been a grant from SSE Renewables and a core funding grant from Argyll & Bute Council. The Argyll & Bute core funding had ceased in or about April 2017. After that the claimant's post had been subsidised by other business. Dr P attended the board meeting on 8 January and at that meeting was told that a decision had been taken that the claimant's post would be redundant. The claimant was advised to commence a redundancy consultation process in consultation with EVH. At that point Dr P's understanding was that the claimant's employment would be ending and in those circumstances she did

not consider that it was necessary to proceed with the Occupational Health referral.

79. The respondents commenced a redundancy consultation with the claimant. I have not made any detailed findings relating to this since this will no doubt be something referred to at a future hearing. Prior to that the claimant requested various postponements of the consultation meeting. Dr P became concerned that due to the delayed meeting the respondents would become liable for additional wage payment. The redundancy consultation meeting eventually took place on 1 February 2018. The claimant was advised following that meeting that she was at risk of redundancy.

80. The claimant submitted another application for grant funding. Discussions with the funders were ongoing in January however it would appear that the respondents' view was that if they obtained this funding they would still not be able to continue with the claimant's full time post although they may be able to offer her a part time post. The claimant was involved in preparing the application which appears to have been sent to Dr P for comment. Dr P responded to the claimant on 22 January (page 409) with the Subject RE: Proposal:-

> "Thanks S
> It's well thought out and thorough.
> BUT I am disappointed to see that you have not addressed the following points that we discussed and I was quite clear that:
> In the budget – Management/Admin/Overheads must be 20% of salary costs within the £35k.
> Your timely monthly reports, timesheets, reports to board etc are still required on an ongoing basis even in 'delivery phases'. They can be brief but they must be done.
> There's no point arguing about these things, they come from the Board.
> Delivery phases – should not be limited to 3 months.
> Delivery in September and March should not be ruled out because a report is due. Writing a report does not take a whole month. I don't believe you

need to rule out the entire months of January, April and May because of exams when working with P7/S1. You don't need to rule out all of Oct because it contains a 2 week holiday, etc.

Your TOIL allowance will go back to 4 days at the end of March in line with everybody else – you have flexibility within that limit. Long days/short days are fine within that limit.

Looking at the budget, your full staff cost calculations should add an estimated 2% increase for cost of living on to this year's cost (I am not sure exactly what the Board will award in April). This year's cost is £34,012, therefore use £34,692.

Unfortunately, if we are limited to £35k and you need a reasonable amount for travel etc, I cannot see how you can get more than 0.75FTE out of this budget.

0.75 FTE KJS full staff costs – 26,019

T&S, equipment etc – 3,777

Management/Admin/Overheads – 5,204

Total 35,000".

The claimant responded on 23 January (page 408).

"I worked all weekend and started at 5am on Monday to meet the lunchtime deadline on Monday. I am exhausted. I can't work any more today without exceeding TOIL allowances. I have done my absolute best and developed three different time options and this is the best I can do. I have cut it to 1min per assessment (which is very ambitious) 1 hour prep for a half day teaching session (which is well below the recommended amount) and 2hrs travel time to Campbeltown (I will have to go like the wind as it takes longer than that) and 1 hour for meetings including travel which is very ambitious (we were on the phone for over 1 hour on Friday) I have only allowed 1 min per email. This one has exceeded that. I can't make it work. I just can't cut it down any more and actually meeting the targets if is no movement on T processes and SPR and Education have no movement on any of their tasks then it is impossible and that is based on 0.86FTE. If you cut it to 0.75FTE you would have to cut out a delivery project.

I am writing the risk register on Wednesday. I have my postponed hospital procedure from last Thursday to this and can't postpone again. I will be off on Friday to recover. I don't know what to do to make it work I am at my wits end trying to square it but no one is compromising and I just can't do it quicker.

EG On delivery days (in reality it takes 2.5hrs to Campeltown (5 hours round trip)

- I have to pick up kit at LH and it takes 10 mins to park and do 4 trips in and out of the building with kit each way so that is 5hrs and 20mins.
- I have to park, report to reception, sign in at the school, introduce myself to the teacher 8mins allowed for all of this
- 12 mins to do 4 trips from car park to the classroom (3 mins per trip it can be a long way from the classroom to the car park!)
- Set up time of kit 12 mins.
- Rearrange the classroom 7 mins, making 6hrs 40mins
- 2 x 2.5 workshops (due to the make up of the school day) (5hrs) Totalling 11 hours and 40 mins
- Education want initial assessments 1 min per child (100 children) and summative 1 min per child (100 children) is 15hrs 40mins
- 8 mins health and safety per event this is to comply with legal requirements
- 7 mins cleaning
- 5 mins slippage in case the travel time is longer, the room is further away from the carpark or the teacher asks a question.
- Each day is 16 hours
- Transition weeks in a school are only on for one week so can only be delivered in that week (Education want transition events!!!)
- Doing 3 of these in the transition week is 48 hours per week.
- It is impossible to stay in the TOIL rules and that is without admin

You suggested that I multi task but in this week I can't do admin (when face to face with class, while doing face to face assessments or while carrying/cleaning equipment doing a risk assessment. I could try and

phone it in when driving and get someone else to type it up but that is the only way I can multi task in these weeks.
I don't know what else to do!"

81. Dr P responded stating "As I said – take something out." Dr P was concerned because part of the claimant's proposal involved the claimant in working her compressed hours of 26 hours per week over three days rather than the suggested four. She felt at the time this was unsustainable and could not understand why the claimant wished to do this. Dr P subsequently discovered that the Claimant had started a new part time job with Tesco at around this time (without telling the respondents) and believed with hindsight that that was the reason.

82. On 2 March 2018 Dr P wrote to the claimant confirming the redundancy decision. The letter was lodged (page 424). It is as well to quote it in full.

"**Redundancy Decision Letter**
Following our consultation meetings and as previously advised, the funding for your area of work, recently confirmed for the financial year 1st Apr 18-31st Mar 19, from SPR, (Scottish Power Renewables) is not adequate to cover your full time post. An application to the Climate Challenge Fund for additional funding was unsuccessful. If no further funding is found, your existing full time post will become redundant. Unless this situation changes, this letter confirms that your full time post with T will terminate, for reasons of redundancy, on Friday, 27th April 2018. Should you wish to leave earlier, we would be happy to consider this option.
We believe that a suitable alternative can be offered. This is a new part-time post within T. If you choose this you are entitled to a period of up to 4 weeks to reconsider, and if during this time you decide that the new job is not suitable, you retain your right to redundancy payment.
Should you choose not to accept this offer, upon termination we will pay Statutory Redundancy Pay of £5379. It would be necessary to return all property belonging to T back to our offices by the termination date. You should ensure that all outstanding annual leave or TOIL is taken before

the termination date. You will continue to receive normal pay and benefits up to the termination date.

The sums set out above would be made in full and final satisfaction of any claims which you may have against the organisation with regard to your employment and its termination.

If you wish to appeal against this decision you may do so by writing to Chairman of the Board within two working days of receipt of this letter.

Please let me know if there is any further assistance which I can offer."

83. It would appear that the claimant had various contacts with Ms P in relation to her redundancy and sent at least one e-mail. Again I make no findings in fact in relation to these. Dr P wrote to the claimant on 12 March 2018. This e-mail was lodged (page 426-427). On the issue of location stated at paragraph 3

"3. New potential part time contract – location (Malin House) wrong.

No – as discussed at length at our meeting with Lorna MacIntyre from EVH in November. Now that we have plenty of space, in order to improve team working, communications, and integration of projects, all new T contracts will be office based unless the staff member lives so far away that this is not practical.

If an employee claims that they can't work in the office for health reasons, the procedure is that we would get this verified by an occupational health consultation. (You agreed to this and seemed confident that OH would verify your case). On receiving verification, we would let the employee work at home for as long as necessary despite having a normal office based contract. If you would like to trial the new contract, but still feel that you can't join the rest of the team in the office for health reasons, let me know and we will organise an OH consultation for you straight away.

4. Your request to work 26 hours over only 3 long days, instead of 3.7 normal days.

There is uneasiness about this. It would require you to be at work for over 9 hours (including lunch) every single working day. The important thing is that you do your 26 hours per week, and if long days are sometimes necessary that is fine within the flexibility of the TOIL system. There is

concern that always working very long days might affect health and wellbeing. If for whatever reason you didn't manage your 26 hours in the 3 days, you would have to make it up at other times. This could be a problem if you make yourself unavailable on all the other days.

Another possibility if you take the new part time option is that we could look at full time 35hrs/week in term time and agreed corresponding days off in school holidays.

In either case, it would not affect your contract but would be an agreement with your line manager that could be revoked if not satisfactory.

5. Trial period – running from 1st April for 4 weeks.

The idea of this is to give you the opportunity to try a new job which is different from your existing one in some significant way. For instance, if the OH consultation does not verify your health claim. Then you could try working in the office for 4 weeks and see how it goes.

If the OH consultation verifies your working from home for health reasons then I can't really see that there is anything very significantly different in the new contract for you to try. The work is the same.

6. Dates

Currently, your redundancy date is as set out in your redundancy notice letter, and if you don't want the new contract you would simply keep working full time until then (or sooner if you wish).

If you do want the new contract, and it is deemed that the new contract is significantly different from the old one such that a trial period is necessary, you would move onto the new contract on 1st April and have to decide within 4 weeks of that date whether it's suitable. If it is not, you could revert back to your old contract for a further 8 weeks of full time work, from your decision date, if you wanted to, and still get the redundancy payment. If you don't decide until after the 4 weeks that you don't want it, then you wouldn't get the redundancy payment.

Please let me know your decision as soon as possible."

84. On 6 March the claimant e-mailed Dr P and Cynthia Carswell the Office Administrator with her leave sheet. She said

"Sorry previous sheet wrong as new contract from 1st April – only 26hrs so will not need leave I will just not work the days I planned to be off so I have amended the leave sheet accordingly." (Page 428)

85. Dr P responded on 13 March stating

5 "Do I take it from this that you have decided to accept the alternative part time contract, could you please confirm?
Anyway, in the light of your needing to amend your AL/TOIL after removing the redundancy related activities (apart from the two consultation meetings) from your timesheet, I'll wait for the corrected version."

10 The claimant responded on 13 March (Page 432). She said

"I am not able to accept the location of the post we will have to wait on OH report exempting me from changing my location from home. I am seeking advice on this."

86. Dr P responded stating

15 "Hi S, I'll arrange OH if you want to keep working for T. Obviously there's no point if you don't. So, can you confirm that you are sure that you want to?"

87. On 15 March Dr P completed a referral to Occupational Health. This was lodged (page 434-436). Under reason for referral is stated

20 "When S was first employed in 2009, her contract was home based by necessity due to shortage of office space. We have found that there has been a lack of integration and communication with the rest of the team. She works alone, takes advantage of flexible working and often works odd hours. We also believe that she has other employment, although we have
25 not discussed this, and she has had quite frequent medical appointments and days off sick over the years. Reasons for sick leave in the last 3 years have been UTI kidney infection, fever, viral illness, stress related problem. S's full time post has recently been made redundant due to shortage of

funding and she is in her notice period. However we are offering her an alternative new post - new contract from 1st April with reduced hours.

In the meantime, we have moved into a large open plan office with plenty of space. In order to improve team working communications and integration of projects we intend all new posts to be office based and working together unless the employee lives too far away. S lives close to the office. However although it's not ideal we would consider allowing employees to work from home if necessary for health reasons as long as this is a genuine need backed up by an OH report.

S claims that she wouldn't be able to work in our office for health reasons, however we do not really understand these reasons or how any health issues may affect her work. In the past, T provided S with special made-to-measure office furniture adjustable sit stand desk because she said she needed it and she currently has this at home, but there is space for it in the office and indeed a couple of other staff in the office also have sit stand desks. She has recently claimed to be allergic to sunlight. Our office is bright and open plan so this can't be changed. We would like to know whether S has a genuine need to work from home and if so, to understand better what her problems and needs may be. We hope it is possible to receive the OH report in time before 1st April. It looks as if S should be available working from home on 20th, 21st, 22nd, 28th or 29th March."

88. At this stage Dr P was of the view that in order to meet the terms of their grant funding the respondents had to have someone in place doing the claimant's job by 1 April. If the claimant did not want the job then she would have to find someone else to do the work as soon as possible. Dr P could not see any reason why the claimant would not wish to take on the job for a trial period since there was effectively no detriment to her in doing so. At this point whilst Dr P suspected that the claimant might have another job she was unaware that the claimant had taken on a part time job with Tesco at the beginning of December.

89. Dr P's position was that, for the reasons given in the Occupational Health referral, she would prefer the claimant to be office based unless the claimant

had a medical reason for working from home. Dr P had taken advice from EVH and understood that if OH said that there was a medical reason for the claimant requiring to be home based then there was no question but that the respondents should allow this.

5 90. At around this time there was another employee who had previously been a home worker but whom the respondents had wanted to become office based after they obtained their new office. This employee had previously advised the respondents of her medical condition. Dr P considered that, in glaring contrast with the claimant, this employee had been open with the respondents and 10 divulged her medical condition to them. At the respondents' request she had produced a letter from her GP confirming her diagnosis and the reason why it would be difficult for her to work from the office. The respondents agreed that this employee should remain home based.

91. Dr P understood that the OH provider would set up a telephone appointment 15 with the claimant. She understood from EVH that telephone appointments were the norm in this type of situation. She was also aware that when she had discussed the matter with the claimant the previous November the claimant had agreed to a telephone appointment.

92. On 20 March the OH provider e-mailed Dr P at 10:23. This stated

20 "Thanks for your referral on your member of staff. One of my colleagues has today spoken with the employee to offer her an appointment on Thursday 22nd March – which would be a telephone appointment. The employee has requested that she is seen face to face as opposed to via telephone, the challenge we have is that our next available local face to 25 face clinic would be Friday 27th April, which is clearly outwith the agreed KPI and also not likely to meet the timescales you are keen to meet.

I really wanted to check with you whether you are happy for the consultation to be in April or whether you wanted to speak with the employee about a telephone appointment. I have attached the guidance 30 information that I believe may have been provided to EVH about effectiveness of telephone appointments. …."

93. Dr P responded at 12:27 that day stating

> "Many thanks Debbie
> I am happy for the consultation to be by telephone on 22nd and keen for it to take place quickly. The employee does not want to discuss any medical conditions with me, so I doubt she will tell me why she feels the need for a face to face consultation, but note your document which says that very few health conditions need to be seen face to face. Can we go ahead on 22nd? Would you be able to contact with S again and ask if she would be willing to carry out this telephone consultation, because that is most likely to be enough? I will also contact her."

94. On 21 March the OH provider e-mailed Dr P stating

> "I'm sorry coming back to you again. Wonder if you have a work e-mail address for the employee so I could send the information leaflet about telephone appointment and re-offer appointment for tomorrow."

95. Dr P responded stating

> "Thanks for arranging this Debbie, hopefully the telephone appointment will suffice. We could consider face to face if the medical consultant says it is necessary after telephoning but it sounds as if that is rarely the case."

96. On 22 March at 09:32 the Occupational Health consultant e-mailed Dr P stating

> "We have received an e-mail this morning from the employee to say that she has e-mailed you with reasons for requesting/requiring a face to face appointment and that you would be in touch with us. We are at this point assuming that she will not engage in the telephone appointment today?"

Dr P responded stating

> "Hi Debbie
> Sorry, I've never done this before so not sure what to expect. I'd like to offer her the normal procedure and only take on the extra expense and delay of a face to face if it is medically necessary. Only the consultant can

judge that, not me? I asked her to accept the appointment offered today and if the consultant thinks a face to face is required in her case we could then consider that, but I've been told by both yourselves and EVH that face to face is rarely needed?"

5 97. The Occupational Health nurse responded at 09:48 on 22 March stating

"No problem thanks. Yes, a tricky one.
Our triage process has identified that telephone would be ok in this circumstance, what I will do is forward to the Doctor who is due to have the consultation with her today and then come back to you once he has
10 given his thoughts."

The Occupational Health nurse e-mailed again stating

"Dr Hilditch has come back to me, he has recommended it is probably best to wait for the face to face clinic at end of April. I explained the situation to date. Our clinic is in Fort William on 27th April. An appointment will be
15 sent in due course to the lady and you will receive a copy of this also."

98. Dr P responded stating

"Just out of curiosity, on what basis do they decide it's best to wait for face to face?"

The Occupational Health nurse responded stating

20 "On this occasion I think it is simply down to engagement of the employee.
Dr Hilditch's response is below.
I would go face to face. However, at the end of the day it is for the employee and the employer to mutually agree on what they want. Doing an OH consult in a method against an employee's wishes has too much
25 scope to go awry."

99. Whilst these e-mails were going on Dr P was also in contact with the claimant. These e-mails were referred to during the hearing but will no doubt also be the subject of any future hearing in relation to the constructive dismissal claim. I

have therefore not set them out in full. One that I consider to be particularly relevant is the exchange between the claimant and Dr P on 21 March. The claimant states

> "You told me you were going to organise an OH consultation in November and yet I was only asked yesterday if I would accept a phone consultation. This is totally inappropriate way of making an assessment such as this as it is like a driving tester asking someone over the phone if they can drive, and then making a decision on whether they should have a driving licence. It is not possible to come to a reliable decision. If telephone consultations were adequate, the NHS would not make me travel to Glasgow (and pay me to do so) to see a consultant if it was possible to decide by talking to me on the phone. I have sought medical advice on this and the doctors who know about my condition consider that I would have to be seen in person to enable a reliable diagnosis to be made. As I've made you aware of for almost a year now, this is a critical issue for me and not just a tick box exercise. You have stated that you will use this OH report to decide whether to take away my long established reasonable adjustment which enables me to do my job. Without this reasonable adjustment you would be pushing me out of my job. I told you in an email in May 2017 why I could not move to an office – you said don't worry. Then in November 2017 you said you would arrange an OH appointment and then my contract location would be decided. If you had done what you promised then there would have had plenty of time to carry out an OH assessment properly, you can't expect me to accept an inappropriate telephone consultation just because you did not organise the appointment in time." (page 445)

100. Dr P's response was

> "EVH members are always offered a telephone consultation as first option. OH will discuss the telephone v in person assessment differences with you if you need clarification on the process. They will decide whether telephone is enough, not me."

At 16:37 that day 21 March the claimant responded (page 447). She said

"As I've stated to you previously, the nature of my condition makes it vital that OH see me and examine me in person. If this were not the case the consultants I see would just call me rather than provide payments for me to travel to a face to face appointment. I therefore insist that I have a face to face appointment with OH so an accurate diagnosis can be made.
As you know, you asked me in an email in May 2017 if I would like to give up working from home. I explained I could not give up working from home as I consider this to be a reasonable adjustment to cater for my health issues. At this time you told me not to worry. In November you again told me that you wanted me to give up my reasonable adjustment, working from home, but promised you would not ask me to do so until I saw OH. In February 2018 you sent me notice of redundancy. You then offered me my existing job but with a new contract removing my reasonable adjustment, working from home. I told you that I still had not seen OH so it was inappropriate to take away my working from home reasonable adjustment. You told me last week that you were organising an OH appointment. I found out yesterday it would be a telephone appointment. I explained my situation to OH over the phone and discussed why I felt a telephone appointment was not appropriate and as a result OH offered a face to face appointment in Fort William on the 27th April at 2.30pm. The findings of this report will determine if I can continue employment with T or not and hence it is vital to me that an accurate diagnosis is made. I do not think I should risk facing losing my job just because T and OH are unable to give me a face to face appointment within your timescales. If you had organised it in May 2017 there would have been adequate time. I've emailed OH to say that you will be in touch with them on this matter."

The occupational health providers had also been in email contact with the claimant. At 11:55 on 21 March the Occupational Health providers e-mailed the claimant stating

"Please find attached some information regarding OH telephone consultations. I let your manager know that we were unable to carry out a face to face consultation until the end of April which would take us out of

our KPI range. Your manager has asked that the telephone consultation goes ahead on Thursday 22nd March at 3.30pm. I believe your line manager has left a message for you regarding this.
Therefore, Dr Mark Hilditch will call you at 3.30pm on Thursday 22nd March on ……" (page 448)

On 22 March at 09:26 Dr P e-mailed the claimant stating

"S, the medical consultant who will speak to you today will determine whether a further face-to-face consultation is needed in your case, this is the procedure, it is not my decision as I'm not a medic. The conversation you have today may well be all that is required to achieve the outcome that you are looking for."

Following her discussions with Occupational Health Dr P e-mailed the claimant later on 22 March stating

"Hi S, further to that, they have got back to me to say they can override it and go straight to face to face on 27th Apr, so you don't need to talk to them today."

101. At 10:29 on 22 March Dr P e-mailed the claimant

"Just to clarify,

- You still must let us know by tomorrow if you want the new contract, or we will take it that you don't
- It will start on 1st Apr and be office based with allowance for home working to be determined by OH
- In any case, T will let you continue to work at home until OH result is known
- Hopefully on 27th Apr you will get the result you are looking for and all will be sorted."

102. In the event the claimant did not take up the offer of the alternative role. Her employment with the respondents terminated on 28 April. The claimant did not

attend the Occupational Health assessment which had been arranged for 27 April.

Matters Arising from the Evidence

103. I found the evidence of Dr P to be both credible and reliable. Her evidence was generally in accordance with such contemporary documentary evidence as existed. She gave her evidence in a patently straightforward and honest way. During cross examination which was intense and at times unfair she made concessions where appropriate but otherwise remained firm in her evidence. There were areas where her evidence differed from that of the claimant and I preferred Dr P's evidence in each case. In particular I accepted that Dr P had asked the claimant on various occasions for more information regarding what the claimant described as her health problems and that the claimant had declined to provide this information. Dr P's evidence on this subject was internally consistent and logical and entirely in accordance with such e-mails as existed. It is also in accordance with what she put in the Occupational Health referral.

104. With regard to Dr Paul I have no doubt she was genuinely seeking to assist the Tribunal by giving truthful evidence. I was somewhat frustrated by her evidence as it was clear that very little of what she could say was helpful to me in determining the issue before the Tribunal.

105. The respondents' representative in submission was critical of the fact that the Tribunal did not see the letter of instruction from the claimant to Dr Paul which prompted the Occupational Health report. I would agree with the respondents that it does seem to have been a subjective request. That having been said I accepted that Dr Paul had carried out the tests she indicated and that the results were as she stated. One difficulty so far as the claimant was concerned with Dr Paul's evidence was that Dr Paul had not seen the claimant or produced her report until December 2018 which was some eight months after the relevant period in which the claimant claims that she was discriminated against on the grounds of disability. In addition, she did not see the claimant's medical records and was reliant entirely on what the claimant told her.

Furthermore, Dr Paul attributed many of the problems which she observed the claimant to behaving to the claimant's carpal tunnel syndrome. The claimant's evidence was that she had been diagnosed with carpal tunnel syndrome after she left the respondents' employment. It was also clear to me that Dr Paul's understanding of the Equality Act and the law on the definition of disability was not clear. On page 167 it states

> "For the purposes of the Equalities Act (2010) employers have a duty to make reasonable adjustments for individuals with fibromyalgia and also for those with hypothyroidism."

It would appear that at least to some extent Dr Paul believed, just as the claimant initially did, that fibromyalgia and hypothyroidism were conditions which were automatically classed as disabilities under the Equality Act. Dr Paul was questioned about this in cross examination and during the course of cross examination it seemed to me that she realised that this was incorrect and somewhat withdrew from this position although at the end of the day her position was still not entirely clear. All that I could really get from Dr Paul's evidence was that some eight months after the period in question Dr Paul had carried out certain standard tests. The result of these tests was that the claimant's ADL process was well within normal whereas her ADL motor skills score was in the lowest 5% albeit some of this was attributable to a condition which the claimant developed after she left the respondents' employment. Dr Paul also provided some general information regarding hypothyroidism and fibromyalgia which, along with the various internet pages lodged I found to provide some helpful background.

106. With regards to the claimant's evidence I found myself in some difficulty. It was clear that she believed absolutely that she was someone who suffered from a range of medical issues which she herself considered to be disabling. Certain passages of her evidence had a definite ring of truth about them. That having been said other parts of her evidence were full of contradictions and in my view could not be relied upon. A serious difficulty was that much of her evidence did not accord with such limited contemporary documentary evidence as was

available. This was compounded by the fact that the claimant was on various occasions perfectly happy to mis-quote documents which were sitting in front of her and clearly did not bear the meaning which she contended. This did not enhance her credibility.

5 107. The respondents have been critical in their submissions of the way in which the claimant approached the case. I have to say that practically all of this criticism is justified however before I go on to be more specific about what I took from the claimant's evidence I think it is as well at this stage to say that I am also aware of the particular difficulties which the claimant as an 10 unrepresented party, represented by her husband faced in this type of case.

108. Neither the claimant nor her husband are legally qualified although the claimant's husband indicated that he has appeared before other types of Tribunal in the past. They live in a rural area with little access to legal representation and what legal representation there is, they indicated they were 15 not in a position to afford. They have tried to do their best using information available on the internet. It is clear that in many instances, as detailed by the respondents in submission, the claimant and her husband have misunderstood what was required of them and much of the evidence which they sought to lead was of a very doubtful relevance.

20 109. One particular difficulty is that as became clear on the first day of the hearing the claimant and her husband were relying upon what they had found on the internet and in particular certain pages from the EOC website. These were lodged at pages 279-282. The EOC website states at page 281

> "Conditions That Are Automatically Treated As Disabilities Under The
> 25 Equality Act
> There are a few conditions that are automatically treated as disabilities under the Equality Act. These include:
>
> - Conditions that affect certain organs such as heart disease, stroke and asthma
> 30 - Problems with sight or hearing

- Progressively deteriorating conditions such as muscular dystrophy, motor neurone disease, HIV, multiple sclerosis and forms of dementia
- Recurring or fluctuating conditions such as fibromyalgia, osteoarthritis, ME (Myalgic Encephalopathy) and rheumatoid arthritis, in which the severity of the symptoms may vary at different periods of time
- Learning disabilities and learning difficulties such as dyslexia, dysgraphia and dyspraxia
- Diagnosed mental health conditions such as schizophrenia, depression, obsessive compulsive disorder, bipolar affective disorders and eating disorders
- Impairments due to injury to the brain or body
- Cancer
- HIV infection

If you suffer from any one of these conditions and experience discrimination because of it, you may be entitled to *make a claim for unlawful discrimination*.

If you do not have one of the above conditions but you want to make a claim for disability discrimination, the onus is on you to show you have a disability that meets the definition as laid down in the Act."

It appears to me that anyone reading this advice may well come away with the view that all they require to do is to prove that they have one or more of the listed conditions and they have demonstrated that they are disabled in terms of the Equality Act. As will be noted below that is simply incorrect. It became clear to me as I listened to the case develop on the first day that for this reason much of the documentary evidence presented by the claimant and much of the claimant's evidence in relation to the issue of disability was focused on presenting the clinical progression of her illness and effectively asking the Tribunal to confirm the diagnosis of fibromyalgia and hypothyroidism. Blood test results were lodged which may mean something to a clinician but were not at all helpful to me in trying to determine the issues I had to determine. It

is clear to me that the page referred to on the EOC website is very capable of misleading potential claimants in the position of the claimant in this case and I have asked the Tribunal administration to bring this judgment to the attention of the EOC so that it can be changed.

5 110. When I realised the misapprehension under which the claimant and her representative seemed to be labouring I brought to their attention the correct definition and set it out at some length what the Tribunal would actually be looking at and what evidence might be relevant. I stressed that primarily what the Tribunal would be looking at would be whether the impairment had a
10 substantial effect on the claimant's ability to carry out day to day activities. Having raised this with the claimant's representative during his examination in chief of Dr Paul I had occasion to raise it to mention it again several times during the course of the hearing. The findings in fact which I have made are based generally on what the claimant herself said in evidence which was
15 usually given immediately after I had made such an intervention. The claimant's direct evidence regarding the effect of her impairments was extremely limited and fairly imprecise. In general terms I was prepared to accept her evidence that she had cut back on social activities and that she had stopped skiing. I did not entirely accept her evidence about the effects on her
20 ability to dress herself. The claimant's evidence in chief was to the effect that she could not dress herself at all and would need some-one to help her. In re-examination she accepted that on occasion she required to travel to Islay and other distant locations where she would require to stay in a hotel. It was then put to her that this would be difficult if she was unable to dress herself. The
25 claimant then withdrew her previous evidence and said that "obviously" she could dress herself but that it was more difficult for her. She then gave the evidence which I have reflected in my findings in fact about having difficulty with certain types of fastener. The evidence regarding cooking was given by the claimant and Dr Paul. I accepted that the claimant could in fact cook a
30 meal if she had to. I also accepted her evidence that, as is common with sufferers from fibromyalgia and hypothyroidism, there are fatigue issues and that whilst the claimant might be able to prepare a meal for herself if she

needed to the upshot of this would be that she would be fatigued and suffer from “payback”.

111. The quality of medical evidence in the case was also extremely frustrating. The sum total of the relevant documentary evidence produced by the claimant was pages 23-37, pages 40, 41, 43, 44 and 45 of the bundle together with the Occupational Health report produced by Dr Paul. The claimant also sought to rely on the disability passport which had been produced after her employment with the respondents had ceased in connection with her employment with Tesco and a note regarding reasonable adjustments made in connection with her new employment with Kilmartin Museum. I did not find these latter documents of any evidential use whatsoever. Much of the medical evidence provided is simply a note of appointments. The GP medical records which were lodged (page 144-146) were clearly incomplete. There was no list of encounters such as one would usually find in such a document. There is no document which actually clearly sets out that the claimant was diagnosed with hypothyroidism and fibromyalgia during the period of her employment with the respondent.

112. There was a document in the bundle at page 140. This is undated but bears the stamp of the claimant’s medical practice and appears to be signed by a doctor. It states

> “To whom it may concern,
> S suffers from the following:
> - Fibromyalgia
> - Migraine
> - Hypothyroidism
>
> S manages her conditions outlined above by following a self-management Fibromyalgia program and taking daily medications.”

113. The claimant did not at any point in her oral testimony give evidence that as to what this document was or whether it had been provided to the respondents at any point. During cross examination of Dr P this document was put to her. During the course of objection the claimant and her husband gave an

explanation as to what this document was that I did not entirely understand. At its highest it appeared to be suggested that the claimant had obtained this document from her GP practice after the commencement of these proceedings and that it represented the type of letter which her GP would have been happy to give to the respondents at any point had they asked for it. I have not made any findings in fact regarding this letter since it does not appear to relate to the period in which the discrimination has been alleged to occur and the circumstances of its production are somewhat dubious.

114. The claimant's own oral testimony regarding the process which came to her being diagnosed was in some respects very detailed but in one particular respect – the timeline of events – extremely vague. In my findings in fact I am prepared to accept that the claimant was diagnosed with fibromyalgia in or about 2014. This is confirmed by Stephen Gallagher's letter and the letter of instruction from the claimant's GP. The diagnosis of fibromyalgia was much more difficult for me to be specific about. The claimant's evidence on the subject was unhelpful and given in a form which jumped from one time period to another without any distinction. I have put together a date of some time in the summer of 2017 on the basis of the fact that this was a date the claimant gave when I specially pressed her on it. She also confirmed this later on when she said that she only started doing the fibromyalgia exercises in mid-2017 after her physio had been given a diagnosis and so could give her the exercises. There is also reference in an e-mail which the claimant sent to an acquaintance (unconnected with the respondents) on 31 August 2017 where she states

> "…. I was not very well for a while as I have been diagnosed with another auto-immune disease. …."

115. During cross examination the respondents' representative sought to pin the claimant down as to specific periods to which her symptoms related but it appeared to me that the claimant's answers were unhelpful. By this point it seemed to me that the claimant was trying to give whatever answers she thought would best advance her case rather than truthfully give a

straightforward answer to the question. I should say that in general the claimant did not react well to cross examination. It was clear to me that the claimant had not anticipated being questioned in detail on the documents which had been submitted. She and her husband were clearly resentful about what they saw as accusations of dishonesty. I have to record, in fairness to the Respondent's agent that in my view the Respondent's representative did not in any way behave inappropriately during cross examination and the questions asked were entirely proper. It is an unfortunate fact that legal proceedings often require unpleasant allegations to be made and things have to be said which are not usually referred to in such blunt terms in ordinary conversation. It must also now be clear to the claimant that in a case where one is trying to prove disability, if one has lodged emails where one is discussing the ski forecast for the coming weekend, that is likely to be seized upon by the other side. Also, if one has only lodged partial, and apparently highly selective medical notes it may be suggested on the basis of these notes that one has only had the infrequent encounters with a GP which are referred to in the notes.

116. The claimant gave very limited evidence regarding the medication which she has been on. Her evidence regarding the deemed impact of her conditions were she to cease taking her medication was brief. I accepted that in general terms if she did not take her medication and or follow the regime which she did which had been recommended to her by medical professionals then the effect of her impairments would be worse.

117. A substantial amount of the claimant's evidence was spent going through various documents which she had downloaded from the internet. Whilst I felt too much time was spent on this I did find the documents useful as to providing a background as to the likely effects of fibromyalgia and hypothyroidism. In particular I accepted that persons with fibromyalgia may present with a number of apparently minor and unconnected ailments. I accepted that whilst there is a school of thought that this is an auto-immune disease there are still other explanations for this. I accepted that the process of diagnosing fibromyalgia can be a substantial drawn out process given that it is essentially based on

finding that someone has suffered a series of apparently unconnected ailments which have no other explicable cause.

118. Since I have made specific findings of fact in relation to various points made by the claimant in relation to the respondents' alleged state of knowledge it is appropriate that I set these out here.

119. The claimant lodged a document at page 457 which purported to be a statement of Dr M who had been the claimant's previous line manager. The document is neither dated nor signed. It is not an e-mail and does not refer to any e-mail correspondence. It states that the claimant informed Dr M in 2014 that she was suffering from a thyroid problem (hypothyroidism) this necessitated time off for medical appointments. It then goes on to say that in 2016 the claimant had undergone tests that indicated an auto-immune condition suspected as fibromyalgia. It also referred to the claimant requesting in 2015 consideration of an ergonomic workspace

> "that would assist with posture and health and would be suitable for her small frame".

It refers to the Access to Work application and Dr M receiving a copy of this form which the claimant had indicated she had suffered from a condition that had lasted/was expected to last more than 12 months. It also states that the claimant had advised that she needed to manage her work environment in terms of light, temperature and noise but this was not a problem because she worked from home and she was able to alter her environment to suit.

120. When the claimant first sought to refer to this document and I established that the claimant wished it to be taken as evidence I made it clear that evidence in Tribunals from a witness is expected to be given orally. Evidence which is not given orally is likely to be given little weight as the witness is not subject to cross examination. I also made it clear to the claimant and her representative that if there was some good and substantial reason for the witness not being able to attend then the Tribunal could consider a written statement. In those circumstances we would expect this statement to be in the form of an affidavit

or at least signed. I explained that even then such evidence would be given less weight than oral evidence. During cross examination the respondents' representative made much the same points to the claimant and asked her for an explanation as to why Dr M was unavailable and why there was no real provenance to the statement. In my view there was absolutely no doubt that the claimant and her representative were both aware that the only way Dr M's evidence about this document would be considered would be if Dr M came and gave her evidence orally. There was a break of several weeks in the case following the completion of the claimant's cross examination. I fully expected that when the case resumed the claimant would be calling Dr M. Immediately on the case resuming I asked the claimant if Dr M would be giving evidence and she indicated that she would not. I asked the claimant if she had asked Dr M to give evidence and the claimant indicated that she had not.

121. When I looked carefully at the document at page 457 it was my view that there were a number of points which basically cried out for cross examination. For example there is a statement that Dr M saw the Access to Work application form and that in that the claimant has stated that she suffered from a condition that had lasted/was expected to last more than 12 months. This caused me some concern. As noted below the claimant and her husband certainly put considerable emphasis on the Access to Work application and their view was that it demonstrated that the claimant was disabled. However, the actual Access to Work application was lodged and nowhere in it is there a statement that the claimant claims that her condition had lasted/was expected to last more than 12 months.

122. Given the serious doubts over the provenance of the document and given the fact that Dr M did not give evidence and apparently was not asked by the claimant to give evidence and given the fact that certain aspects of the document were difficult to reconcile with other documentary evidence I decided that I could give no weight to this document.

123. Both the claimant and her representative placed great emphasis on the Access to Work application which the claimant had made in 2015. The application

form was lodged (pages 309-313). Above there is a question on page 312 which states

> "Do you have a disability, mental ill health or a long term health condition that affects your ability to work."

5 The claimant has answered this yes. It was the claimant's position that the Access to Work officer had accepted that she was eligible on health grounds for a grant and that this meant that she was disabled in terms of the Act. There are two problems with this. First of all, the Access to Work program is available to individuals who are not disabled in terms of the Equality Act. This is actually 10 fairly clear from the application form itself which refers on the one hand to people who have a disability and on the other hand to people who have a long term health condition which affects their ability to work. I allowed the respondents' representative to lodge documentation relating to the Access to Work scheme on the second date of the hearing in the vain hope that once the 15 claimant and her representative saw this they would cease trying to go down this totally pointless line of enquiry and give evidence in relation to the matters which I wanted to hear about namely the effect of her impairment on her ability to carry out day to day activities and what information she had provided to the respondents over the years about her alleged disability. Unfortunately this was 20 not successful and throughout the hearing the claimant persisted in expressing her view that the alleged acceptance of her Access to Work application was a key point in favour of her being disabled and the respondents knowing about her disability. The second difficulty is that although the claimant's position was that Dr Crowther of Access to Work had accepted that she was disabled the 25 e-mail correspondence on which she relied does not in fact say anything like that. There is no e-mail saying her application for Access to Work was accepted. The principal e-mail on which she relies lodged at page 308 states

> "…. In order to progress your application I will need to ask further information about your job role, your disability and how your disability and 30 how your disability impacts on your job. I will then be able to determine the levels of support that we may be able to provide."

124. Additional aspects of the claimant's evidence regarding this matter were also unsatisfactory. First of all the claimant was adamant that the reason for application for associated with the symptoms of her hyperthyroidism/fibromyalgia. Although the application pre-dates her diagnosis of fibromyalgia by about two years given the nature of fibromyalgia I did not consider this to be a particular problem. What I did consider to be a problem is that all of the contemporary documents refer to the reason for the specialist equipment being required to be the claimant's petite frame and short stature. There is also reference at the time to the claimant suffering a frozen shoulder and believing that this was due to repetitive strain injury. Finally, there is a fact that the application did not proceed to a conclusion. The documentary evidence suggests that there were various administrative holdups and that Dr M simply agreed at the end of the day that if this was something the claimant was saying she wanted then it would be provided. It is accepted that the respondents did provide the sit stand desk for the claimant. It was also their evidence that they provided such desks for at least two other employees, neither of whom they believed to be disabled. The claimant's evidence regarding the reason the Access to Work application was abandoned was somewhat vague and changed during the course of the hearing. Initially she indicated that the problem was that it was going on so long. She then indicated that it was because she had been employed by the respondents for seven years and she was ineligible. She then indicated that she would only have been eligible for a small grant. She then indicated that there was an arrangement between the respondents and Argyll & Bute Council whereby the respondents (who were not registered for VAT) would purchase office equipment through Argyll & Bute Council and this pay the VAT. She indicated that if the equipment was purchased via Access to Work then the respondents would not be able to operate this scheme and would therefore have to pay the additional VAT. For all of the above reasons I considered that none of the evidence relating to the Access to Work application was helpful to the claimant either in establishing the fact of her disability or in relation to whether the respondents had actual or constructive knowledge of her disability.

125. The claimant lodged a substantial number of e-mails. Some of these were between herself and Dr M whilst Dr M was her line manager and were clearly relevant. She lodged a number of e-mails between herself and Dr P which pre-dated Dr P becoming her Line Manager. The context of the earlier e-mails to Dr P was that both the claimant and Dr P attended the same church and attended the same church group. Dr P's evidence was to the effect that she had been a member of that particular church group for 27 years. The claimant had been a member for a short time. Her position was that people came and went. The gist of the e-mails referred to was essentially to the effect that the claimant was not going to a meeting or saying that she would be unable to undertake a task because she was not feeling well. I accepted Dr P's evidence that her purpose when looking at the e-mails was to check whether or not the claimant was needing a lift/would be available to do a task and would then move on. She indicated she would perhaps take half a second in reading the e-mails. I entirely accepted her evidence that these e-mails in no way indicated that the claimant was advising her in her work capacity that she was disabled in terms of the Equality Act.

126. Ms X was also a member of the church group when the claimant sought to lodge a number of e-mails to her. Although these were a bit more chatty it was clear that these were emails sent in the social context of people who were members of the same organisation. Nothing in the e-mails refers to a particular diagnosis. Dr X became a member of the Board around May 2017. Many of the e-mails pre-date this. I accepted Dr P's evidence that the board took no active part in managing staff. This would be normal for a charitable board. I did not consider the e-mails to Mrs X to be of any evidential value in establishing the respondents' state of actual or constructive knowledge.

127. The claimant also lodged a substantial number of e-mails to various other acquaintances. I did not consider these to be of any evidential use whatsoever. I note the suggestion in submission that in a small community everyone knows everyone else with the implicit suggestion that individuals would have gossiped with either Dr P or members of the board regarding the claimant's health. I did not accept this as in any way a helpful suggestion.

128. As indicated above the claimant lodged a document at page 140 which bore to be from her GP. The letter was objected to by the respondents on the basis that it was undated, not addressed to anyone and had not come up in evidence until the cross examination of Dr P. The claimant at that stage stated that a letter similar to one in the bundle had been offered to the respondents. The claimant did not give any evidence at any stage that she had offered a letter similar to this to the respondents at any time. This was accepted by the claimant's representative in submission. I accepted Dr P's position which was that the respondents had never seen this letter or any letter like it at any point. I also noted her answer which was to the effect that if the claimant had provided such a letter then this would have gone a very long way to answering the questions which they had continually asked the claimant about her health and which the claimant had continually refused to answer.

129. At the end of the day I considered that given the numerous instances where the evidence of the Claimant did not coincide with the written documentation and given the general vagueness of much of this I felt that I could not place any real reliance on what the claimant was saying about specifics unless this was backed up by evidence from some other source. It appeared to me that the claimant was perfectly prepared to embellish her evidence in order to suit what she saw as advancing her case.

Discussion and Decision

Was the claimant disabled?

130. The first question which I had to determine was whether at the time the claimant alleges the discrimination took place the claimant was a disabled person in terms of the Equality Act. Both parties submitted full submissions. The claimant also submitted further comments on the respondents' submissions. The respondents also provided brief comment on the claimant's submissions. Unfortunately for reasons best known to themselves the respondents then submitted a further document to the Tribunal approximately 10 days after submissions had closed. The claimant responded to this. The

respondents then submitted a further document in which they basically indicated that they were not responding to the claimant's further allegations.

131. Whilst I have read the additional documents which came in I have not taken them particularly into account. The additional documents do not simply repeat what was said in earlier submissions and they react to what are perceived to be personal accusations and slurs contained in the other party's submissions to the Tribunal. I do not find this to be appropriate and would refer both parties to the terms of the overriding objective and their duty to assist the Tribunal in dealing with cases fairly.

132. I shall not repeat the submissions here but refer to them where appropriate in the discussion below.

133. Section 6 of the Equality Act provides that

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

134. By schedule 1 of the Equality Act supplementary provision is made is relation to the determination of the question whether a person is disabled for these purposes.

135. With regard to the definition of long-term it is provided in part 1, section 2 that

> "The effect of an impairment is long-term if –
> (a) It has lasted for at least 12 months,
> (b) It is likely to last for at least 12 months, or
> (c) It is likely to last for the rest of the life of the person affected."

136. With regard to the definition of substantial adverse effects the Tribunal is required by part 1, section 4 to take into account regulations prescribed by the Secretary of State. The current regulations are set out at statutory instrument 2010/2128. There is also guidance provided in terms of part 2 of Schedule 1, the current version of which dates from 2011.

137. Since the matter was raised during the hearing it is appropriate to say that within Schedule 1 and the guidance provided in terms of Schedule 1, part 1, section 6.5 certain impairments are automatically deemed to be disabilities. These include for example cancer and multiple sclerosis. An individual who suffers from these conditions does not have to demonstrate that these impairments have a substantial long-term effect on their ability to carry out day to day activities.

138. None of the conditions which the claimant states she suffers from qualify as automatic deemed disabilities this way.

139. Accordingly, in order to make a finding that the claimant is disabled I have to find that the claimant suffers from an impairment or impairments and that the impairments have a long-term substantial effect on her ability to carry out day to day activities.

140. As can be seen from my findings in fact I accepted that from 2014 the claimant was diagnosed as suffering from hypothyroidism. This is an impairment. The claimant did not give much in the way of evidence as to the effect of her hypothyroidism in 2014. The letter from her GP in 2016 refers to the claimant having presented with symptoms suggestive of hypothyroidism and this having been confirmed biochemically. The claimant was then put on Thyroxine. I understood from her GP's letter that normally this would replace the thyroid levels to what they would be if the thyroid was working properly and should in fact result in the patient becoming free of symptoms. This accorded with the claimant's evidence. It also accorded with the evidence of Dr P that she knows a number of people with thyroid problems who lead perfectly normal active lives. It would appear however that in the claimant's case her symptoms did not settle and by March 2016 she was consulting her GP in respect of her ongoing symptoms of nausea, abdominal bloating, lethargy, significant weight gain, peripheral oedema, sweating, reduced libido and mood swings. The claimant was then referred to a specialist and various tests undertaken which do not appear to have reached a conclusion until the claimant was diagnosed as suffering from fibromyalgia in the middle of 2017. Along the way the

claimant's medical advisers appeared to have looked into whether the claimant suffered from a number of other conditions and indeed tests for lupus and osteoarthritis continued after the diagnosis of fibromyalgia.

141. Although the claimant and her representative spent a fair amount of time on the issue of diagnosis I am mindful that in the case of ***Walker v Sita Information Networking Computing Limited [2013] UKEAT/0097/12*** it was suggested that the Tribunal must concentrate on the question of whether the claimant has a physical or mental impairment and that whilst the cause of the impairment or absence of apparent cause will not be without significance its significance will be evidential rather than legal. This case was discussed in the recent case of ***Nissa v Waverly Education Foundation Ltd and another (UKEAT/0135/18)*** which I found particularly helpful since it deals with a claimant who stated they suffered from fibromyalgia. It was noted that the issue of cause may well be useful evidentially but what the Tribunal was looking at is the effect (or deemed effect) of the impairment. In this case all that can really be said is that the claimant was off work with a wide range of apparently unconnected minor ailments from 2016 onwards. I also accepted the claimant's evidence that from around 2015 onwards she started taking a long bath in the morning in order to ameliorate her symptoms of stiffness throughout the day.

142. I would agree with the respondents' representative that the period during which the claimant claims to have suffered discrimination on grounds of disability is essentially from October 2017 until her employment terminated on 28 April 2018. I accept that during this period the claimant was suffering from hypothyroidism and fibromyalgia.

143. I accept that both of these are lifelong conditions and that, given that a diagnosis of fibromyalgia had been made that if there were substantial effects in the period between October and April then they would on the balance of probabilities be likely to last for more than 12 months.

144. The singular difficulty in this case is the paucity of evidence in relation to the substantive effects.

145. The claimant referred to giving up certain social activities. She stopped skiing. On occasions she would be too tired to go to community groups she was involved in and she disengaged herself to an extent from these. None of these in my view amount to substantial effects. Many people who would not dream of describing themselves as disabled cut down on their social or community activities because they feel too tired to continue with them. I accepted the claimant's assertion that she had stopped going skiing from around 2015 onwards apart from to take her daughter there. What I did get from her evidence was that progressively from 2016 onwards the claimant had begun to treat herself as if she was ill. She was familiar with the concept of payback and would deliberately pace herself so as to avoid becoming too fatigued since she knew that this would lead her into difficulties. She developed a morning routine which from mid 2017 onwards included specific exercises to prevent stiffness. I also accepted her evidence that when shopping for clothes, she would be mindful of the need to avoid buying clothes with fasteners which she would have difficulty with because of her stiffness.

146. The claimant's evidence was that she had suffered from an abnormally high number of minor ailments over this period. She described these as caused by her immune system attacking her body. I was prepared to accept that, without specifically endorsing the medical opinions which the claimant gave, the frequency with which she suffered from minor ailments and aches and pains was something which was attributable to her fibromyalgia. On balance I accepted the claimant's evidence that she perceives herself to be in pain much of the time. This was the claimant's evidence which was backed up by the evidence of Dr Paul that this is a very typical symptoms of fibromyalgia. I also accepted that at least by November 2017 the claimant suffered from photophobia and sought to avoid exposure to direct sunlight. The letter which the claimant provided from her optician dated January 2019 was not particularly helpful in that it simply refers to the claimant being prescribed photochromatic lenses which is something which is not at all unusual. That having been said I accepted the claimant's evidence that her lenses were of a specific type usually used in ski goggles and her evidence regarding

photophobia was backed up by the evidence of Dr P in relation to what took place at the lone worker training in November 2017.

147. I also accepted the claimant's evidence that she took thyroid replacement therapy and in addition took painkillers. One of these included amitriptyline and she also took sertraline and tramadol. The list of drugs is set out on page 147.

148. This is important because part 1, section 4 of schedule 1 to the Equality Act states

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid (1) does not apply
>
> (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
>
> (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed."

149. Leaving aside the photophobia it does appear to me that on the basis of the claimant's evidence and a common sense approach that if the claimant is suffering from pain throughout the day despite taking strong painkillers then the pain is likely to be worse and have a better effect if she is not taking the painkillers.

150. That having been said I was referred by the respondents to the case of ***Morgan Stanley International v Posovek EAT0209/13***. What I take from this case is that I am required to bear in mind the burden of proof which is on the claimant and make specific findings in fact. In that case the Employment Appeal Tribunal stated that the evidence before the original Employment Tribunal

"amounted to a pot pourri of different conditions and symptoms which might or might not have been part of or attributable to the two pleaded conditions. It was in those circumstances incumbent in my view, upon the Employment Judge in his reason to identify what it was that the claimant was disabled by during the relevant period and what symptoms were or were not attributable to the pleaded or other conditions." (para 28)

151. I have borne this stricture in mind since in many respects the evidence in this case can be described in similar terms. I also however have to take into account the above mentioned recent case of ***Nissa*** and note that it is important that one looks at deduced effects in assessing the impact of a claimant's conditions absent mitigation through medication. I note that in the ***Nissa*** case, unlike the present case, there was a comprehensive medical report setting out the effect of the claimant's fibromyalgia on her ability to carry out day to day activities. Such a report would have been extremely useful in this case but was not available. The report from Dr Paul for the reasons stated above did not assist. I was also asked by the respondents to take into account the claimant's coping strategies. I was referred to the case of ***Commissioner of Police for the Metropolis v Virdi UKEAT0339/06/RN***. I agree with the respondents that coping strategies are dealt with differently from medication. The adverse effect must be assessed as being the severity of the impairment minus the person's ability to modify their behaviour to cope with it. I was also asked by the respondents to take into account the fact that despite the claimant's condition and her alleged difficulties she has been able to carry out all of the tasks involved in pursuing her claim whilst working two jobs, one of which involves a two hour commute each day.

152. At the end of the day I have found this to be an extremely finely balanced decision. It has been particularly difficult due to the way the claimant has presented evidence. I am required to on the one hand take into account that the claimant is not legally represented and behaviour which would attract serious criticism if carried out by someone legally qualified must not blind my eyes to the fact that the claimant has lodged her claim without the benefit of legal assistance and indeed has been seriously misled by some of the online

materials which she consulted. I have to ensure that on the one hand I do not give the claimant too much of the benefit of the doubt and assume that evidence which the claimant has not brought to the Tribunal would have been available and would have been brought had she been legally represented. On the other hand I must not make the assumption that the claimant's behaviour has been motivated by a desire to mislead the Tribunal where such behaviour can equally be explained by her being unrepresented and inexperienced in these matters.

153. At the end of the day I consider that the claimant from around 2014 onwards began to experience various symptoms. She was first diagnosed as suffering from hypothyroidism and indeed this was confirmed by blood test. Despite receiving treatment for this which would normally reduce or remove her symptoms these symptoms continued. The symptoms are wide ranging and vague. The claimant has attributed everything that has gone wrong with her health to an overriding medical condition and in mid-2017 she was diagnosed with fibromyalgia. It appears that tests are still continuing and her doctors are still trying to work out precisely what the diagnosis is. What the claimant is left with however is a health condition which is there when she wakes up in the morning and remains all day and which she has to take into account in carrying out every aspect of her life. Whilst many of the contended effects are minor I am required to take into account the deemed effect of the condition as per ***Nissa***. In those circumstances, with some hesitation, I am prepared to find that the effects of her condition are substantial rather than trivial or minor. I am prepared to accept on balance that they are attributable to her impairments of fibromyalgia and hypothyroidism rather than simply a series of unconnected symptoms and episodes of ill health. I am prepared to find that given both of these are lifelong conditions that the effects are long term in the sense that within the period of alleged discrimination it "could well happen" that the claimant's impairments would last for 12 months. I therefore find that the claimant was disabled at the relevant time.

Knowledge of disability

154. In this case I note from the claimant's completed Agenda and Judge McPherson's note that the claimant makes claims of failure to comply with a duty to make reasonable adjustments, indirect discrimination and discrimination arising from disability. It is unclear if the claimant is currently making a claim of direct discrimination but, given that there is an amendment process in contemplation, I shall also deal briefly with my view on this. The legal position regarding knowledge in respect of each of these types of claim is different.

155. With regard to the claim of indirect discrimination there is no need for an employee to show that their employer was aware that they were disabled before such a claim can succeed. If an employer has a provision, criteria or practice which is discriminatory in the sense of having a disparate impact on those who share a protected characteristic then anyone who has such a protected characteristic and is disadvantaged by the PCP can potentially claim they have been indirectly discriminated against and unless the respondents are able to justify the PCP then the claim was succeed. It therefore follows that the claim of indirect discrimination can proceed to a hearing albeit that I agree with Judge McPherson that some further particularisation of the claim may be required.

156. With regard to the claim of direct discrimination there is no specific statutory provision setting out the issue of knowledge. Direct discrimination is described in section 13 of the Equality Act 2010. It states

> "(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."

It is therefore logical that a person can only directly discriminate against someone "because of" their disability if that person knows that they are disabled. The question which would require to be answered in respect of a claim of direct disability discrimination (were one to be made) is therefore the

simple one of whether the respondents did or did not know that the claimant was disabled at the relevant time. In considering the matter I am entitled to go beyond what the respondents is currently saying and look at all the evidence to decide whether or not, despite what the respondents now say, as a matter of fact they did know of the claimant's disability at the relevant time.

157. I believe the claimant is making a claim of discrimination arising from disability. I require to consider whether or not section 15(2) of the Equality Act applies. This states

> "(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."

I note that this places the onus on the respondents to show that they did not know and could not reasonably be expected to know that the claimant had a disability.

158. The claimant also claims that the respondents failed to comply with a duty to make reasonable adjustments. Schedule 8, part 3, section 20 states

> "(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –
> (a) In the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

159. The case of ***Wilcox v Birmingham CAB Services Limited [2011] All ER(d) 73*** which referred to an equivalent provision in the Disability Discrimination Act held that this means that an employer is under no duty unless he knows (actually or constructively) both (1) that the employee is disabled and (2) that he or she is disadvantaged by the disability in the way set out in the legislation. In the case of ***Secretary of State for the Department for Work and Pensions***

v Alam [2010] IRLR 283 it was pointed out that element 2 will not come into play if the employer does not have the knowledge in element 1.

160. In the present case I am at some difficulty in making any decision regarding element 2. In her application the claimant has set out certain specific failures to make what she considers to be reasonable adjustments primarily in relation to allowing her to continue home working. I am aware however that the claimant has submitted an amendment which if accepted would expand the claim in certain respects.

161. In those circumstances I do not believe there is any point in me considering the matter of whether or not the employer knew not only that the employee was disabled but also that the disability was liable to affect her in the way set out in the legislation. That means I will not be making any decision as to whether or not the respondents were aware that their alleged PCP placed the claimant at the disadvantage claimed. In any event as can be seen below I would not have reached that stage however I feel it is as well to point out from the outset that had I decided in the claimant's favour that this further issue relating to knowledge (which is not at all straightforward) would have to be decided at the final hearing.

162. To sum up, in terms of the issue I have to decide for the purposes of a direct discrimination claim whether as a matter of fact the respondents had knowledge of the claimant's disability. In relation to a claim of discrimination arising from disability I have to decide whether the respondents have shown that they did not know and could not reasonably have been expected to know that the claimant had the disability in terms of Section 15(2). In relation to the claim of a failure to make reasonable adjustments I will be determining whether in terms of part 3, section 20 the respondents did not know and could not reasonably expected to know that the claimant had a disability. I will not be deciding whether or not the respondent had knowledge the claimant was likely to be placed at the disadvantage referred to.

163. With regard to the issue of actual knowledge I was in absolutely no doubt that the respondents were unaware that the claimant was disabled. So far as Dr P

was concerned I had no hesitation in accepting her evidence. She did not know that the claimant was disabled. On occasions the claimant would refer to entirely inspecific health concerns. A specific example of this is the letter she wrote in May 2017 regarding her reluctance to stop home working. Medical concerns are linked in with a whole lot of other reasons why the claimant doesn't think this is a good idea. What Ms P got from this was no doubt that the claimant did not want to stop working from home. The evidence was that Dr P found the claimant to be a difficult employee to manage who she found hard to integrate into the workplace. Her state of knowledge was exactly as set out in the application to occupational health. On occasions the claimant would bring up health concerns, often as an additional reason for not doing things which she didn't want to do. When Dr P asked her for more information the claimant refused to provide this.

164. With regard to Dr M I required to consider the e-mail evidence with a view to determining whether I could make a finding as a result of that that Dr M did in fact know about the claimant's disability. This is distinct from the next stage where I will have to look at the evidence again to decide whether Dr M (and Dr P) ought to have known from the information in their possession.

165. Dealing with the issue of actual knowledge first there was nothing which I considered in any way demonstrated that Dr M was aware that the claimant was disabled. The emails refer to various health concerns which do not appear to be linked in any way. There is vague reference to thyroid but, as noted above, many people with thyroid issues are not disabled.

166. Having established that the respondents had no actual knowledge of the claimant's disability I then required to consider the issue of constructive knowledge. Ought they to have been aware she was disabled.

167. Based on the finding of fact I have made I believe the answer is a firm no. This was not a case where there was a substantial period of absence nor was there a succession of fit notes which ought to have alerted the respondents that something was going on. What we had was an employee who was a home worker who had a number of apparently unrelated illnesses. As noted above

the fit notes were lodged and showed a series of unconnected ailments, many of which were minor. In addition to this the claimant was a home worker and the respondents' managers both complained that she did not always let them know what was happening and in particular did not tell them about medical appointments. It was in response to this that the claimant provided the only letter from her GP which she provided during the whole of her employment which was the letter provided to Dr M in May 2016 to say that the claimant would be having a number of hospital and GP surgery appointments in the future.

168. So far as Dr M is concerned I considered that the various cryptic comments in e-mails about something else some of which referred to thyroid or auto-immune fall very far short of what would be required to show that an employer ought to have taken from this that an employee was disabled with all that that entails.

169. I did consider whether it could be said that a reasonable employer ought to have sought further information by referring the claimant to an occupational health provider with a view to seeking a report at the time the claimant provided a note of various medical appointments to Dr M in March 2016. I do not believe this to be the case. The Claimant at that stage had not been diagnosed with Fibromyalgia. The information provided was in the context of Dr M trying to manage the claimant taking unheralded and unreported days off for medical appointments. On the basis of the emails I do not believe there is anything like enough to put a reasonable employer on notice that they should refer the claimant to occupational health.

170. Matters moved on and Dr P then took over. I accepted Dr P's evidence that on occasions the claimant would make vague reference to health problems. These would be made in reference to something else. At no point was here anything whatsoever to put Dr P on warning that the claimant might have some overarching health condition.

171. The nature of fibromyalgia and hypothyroidism is that the sufferer may suffer from a number of apparently unrelated conditions. As noted above this was referred to in the case of **Posovek** as a "pot pourri of symptoms and effects".

It is going too far to say that an employer faced with an employee who is demonstrating such a pot pourri of symptoms particularly in a case like this where the symptoms are expressed in a vague, imprecise and incomplete way, ought reasonably to have been aware of the disability.

5 172. It is clear that the respondents had access to professional HR advice. I accepted Ms P's evidence that in the case of another employee who stated she had a medical reason for not wishing to work from Malin House the medical certificate was sought and the adjustment was made.

173. We then move on to the period from May onwards when Dr P is asking the
10 claimant just what her medical condition is and the claimant is refusing to answer. Despite the claimant's current protestations it was absolutely clear to me during the hearing that the claimant had been very reticent about discussing any detail of her medical problems and indeed was still sensitive on the subject. The respondents then meet with the claimant on 16 November
15 and the decision is made that the claimant be referred to Occupational Health.

174. I was initially concerned that the decision having been made in November the referral did not happen until the following March. Once I heard Dr P's explanation for this however I entirely accepted it. The claimant went off on a lengthy period of annual leave almost immediately after the meeting in
20 November. A day or so after her return to work the respondents' board decided that the claimant's current role could no longer be sustained and they wished to have a consultation meeting in connection with potential redundancy. I agreed with Dr P that in those circumstances the employers, who were a small charity, could not be criticised for putting the Occupational Health assessment
25 on hold. It was only when the respondents found that they had obtained additional funding which would allow them to offer the claimant a part time role that the issue arose again. Initially it would seem the respondents were of the view that it was only if the claimant indicated she was going to take this role on a trial basis that they would think it worthwhile to proceed with the Occupational
30 Health assessment. Again in the context of a small employer which is a charity I do not see anything wrong with this approach. The only adjustment the

claimant was looking for was home working which she already had on the basis of her existing contract. The claimant was sensitive about divulging her medical issues. It could readily be anticipated that she would not be happy at being sent to occupational health if she only had a few more weeks to work with the respondents. The respondents then agree to proceed with the Occupational Health referral without the claimant saying whether or not she was interested in the role. Matters then unfolded as set out above. I entirely reject the claimant's suggestion that there was anything untoward about the matter being dealt with by a telephone assessment. Judicial experience is that virtually every Occupational Health assessment is carried out on the telephone nowadays. This was confirmed by Ms P's evidence of what she had been told by EVH and what the occupational health providers say in their email. The claimant's comparison with a driving test or a physical check up is simply nonsensical. There was no need for the Occupational Health doctor to make a diagnosis. All that was required was for the Occupational Health doctor to speak to the claimant and find out what the claimant's medical position was. He would then be in a position to report back to the respondents as to whether or not there was a good medical reason for the claimant not to be working at Malin House. If any further examination was required then this could be arranged. It is clear to me that the claimant was clearly advised of this both by Dr P and the Occupational Health provider but simply chose to ignore their advice.

175. The upshot was that at the end of the day the claimant did not attend the Occupational Health assessment which may have resulted in the respondents having sufficient information to make a decision as to whether or not the claimant was disabled. In my view the respondents cannot be criticised both for the fact that the appointment was not made until March 2018 and for the fact that the claimant did not attend the telephone appointment when it was made.

176. In considering the issue of constructive knowledge the nature of the claimant's disability and my findings in fact and discussion above in relation to the issue of whether or not the claimant was disabled is also relevant. This is not a case

where the claimant had a straightforward ailment with straightforward effects which were fixed from day to day. It appears that the claimant has a complex of issues arising from her two diagnosis of hypothyroidism and fibromyalgia. Both illnesses can present as other things and indeed as a number of apparently unrelated symptoms. In order for the respondents to be expected to know that the claimant is suffering from disability rather than a series of random episodes of ill health the respondents needed to know the overarching diagnosis. The respondents were denied this information by the claimant.

177. Furthermore, as is noted above I found the issue of whether or not the claimant was disabled to be a finely balanced one. I found it so after hearing evidence over five days and considering documents which had been put together by the claimant over a substantial period of time. Whilst the claimant's position was that she suffered various symptoms it is also clear to me that from the outside she almost certainly presented as someone who was extremely hard working combining job and family. There is nothing to suggest for example the respondents were aware of the fact that the claimant had withdrawn from carrying out household tasks and that her husband now did the cooking and cleaning. During December 2018 the claimant in fact took on another job. Dr P's position was that whilst the claimant had not advised her of this Dr P became aware of this and indeed it is mentioned by her in the Occupational Health referral. Many of the e-mails which the claimant now relies on as saying that she was telling the respondents how tired she was are also capable of being interpreted, and were no doubt interpreted at the time, as saying how hard the claimant said she was working.

178. Finally and crucially, the issue which tipped me over into finding that the claimant was indeed disabled was the issue of deemed effect. I had access to the list of medications which the claimant provided in the pack. At no time did the respondents have access to this list.

179. Whilst I consider my decision on the issue of whether or not the claimant is disabled to be one which is finely balanced my decision on the issue of knowledge and/or constructive knowledge of disability is perfectly clear and in

my view completely inevitable given the evidence in the case. I find that the respondents were not aware and could not reasonably have been aware that the claimant was disabled at the relevant time or indeed at any point during her employment. The claims of direct discrimination, discrimination arising from disability and of a failure to make reasonable adjustments can therefore no longer proceed. They are therefore dismissed. As mentioned above the issue of knowledge is not relevant to any claim of indirect discrimination and my ruling on the issue of knowledge therefore does not affect this.

180. I was not requested by either party to make any orders relating to the anonymisation of the judgment. Given that the subject matter of this judgment includes sensitive medical information I had resolved, on my own initiative in terms of rule 50, to anonymise the names of the claimant, the respondent and the claimant's two line managers and the board member referred to. I have done so to the best of my ability. If I have missed anything the parties should let the Tribunal know so that the matter can be rectified before the judgment is published on the internet.

181. During the course of preparation of the judgment the claimant's representative wrote to the tribunal enquiring about this and I advised both parties of my intention.

Employment Judge: **I McFatridge**
Date of Judgment: **12 June 2019**
Entered in register: **14 June 2019**
and copied to parties