EMPLOYMENT TRIBUNALS

Claimant: Ms L Nandlal

Respondent: Sanrizz (St Albans) Ltd

Heard at: Watford Employment Tribunal (in public; in person)

On: 20 September 2022

Before: Employment Judge Quill; Mr D Bean; Mr M Kaltz

Appearances
For the claimant: Mr Clair, solicitor
For the respondent: Ms Wood, consultant

RESERVED JUDGMENT

(1) All of the complaints fail. The Claimant's dismissal was not disability discrimination.

(2) The remedy hearing that had been provisionally arranged is therefore cancelled.

REASONS

Introduction

1. This claim is brought by a former employee against her former employer. The claim was presented on 8 July 2020, and is in time.

2. The Claimant alleged disability discrimination, which was denied by the Respondent. The Respondent had previously conceded (at a hearing on 17 February 2022) that the Claimant had a disability (within the definition in section 6 of the Equality Act) at all relevant times.

The Claims and Issues

3. The list of issues discussed at the preliminary hearing were:

> 27.1 Was the claimant's dismissal to any extent a result of something arising in consequence of the claimant's mental health condition? That question will

need to be answered by deciding whether or not the claimant's case as stated in the next subparagraph below is well-founded.

27.2 It is the claimant's case that she was dismissed because Ms Cox regarded her commitment to becoming a graduate stylist with the respondent as being less than sufficient (1) because of the claimant's absences from work because of her anxiety and depression, and/or (2) because the claimant appeared not to be as committed as she in fact was, as a result of her anxiety and depression. It is the claimant's case that either or both of those things arose in consequence of her disability which is best described as being anxiety and depression (i.e. the two mental health conditions which frequently co-exist, and which did here co-exist in the claimant).

27.3 If the tribunal accepts that case of the claimant, the question which will need to be answered will be whether or not it was a proportionate means of achieving a legitimate aim to dismiss the claimant. The respondent has not (understandably, as it is not legally represented) so far formulated its proposed legitimate aim, so I will record here that I regard it as being most likely that it could have been a legitimate aim of ensuring the effectiveness of the respondent's business through the efficiency of its staff and the quality of their hairdressing skills. The question will then be whether it was in the circumstances a proportionate means of achieving a legitimate aim to dismiss the claimant .

27.4 If the tribunal concludes that it was not such a proportionate means, then the claim will succeed and the next question will be what losses the claimant has suffered by reason of the breach of section 15 of the EqA 2010. In addition to the claim for financial losses suffered by reason of her dismissal, the claimant will be seeking compensation for injury to her feelings.

4. At the hearing, the Respondent's representative stated that the alleged "legitimate aim" was "to ensure the business can carry on".

5. The above list is extracted from the summary and orders made at the preliminary hearing which had been listed on 17 February 2022 at which, amongst other things, disability was conceded by the Respondent. The judge set out detailed and helpful notes about what had been discussed. The alleged reasons for dismissal were set out as per paragraph 27.2 above and the parties were given 14 days to write in if they disagreed with the list.

6. As per the notes, the judge had discussed at the hearing why he did not necessarily regard the complaint as being of an alleged failure to make reasonable adjustments.

7. The orders were sent to parties on 2 March 2022. On 31 March 2022, the Claimant's mother sent an email to the Tribunal which (to paraphrase it) asked that a complaint of failure to make reasonable adjustments (in relation to an alleged PCP, though the PCP itself was not specified). The email contained no other comments about the list of issues, or proposed amendments.

8. A letter was sent on the judge's instructions on 4 May 2022 which refused the amendment request, and gave reasons. [The letter also clarified that the agreed start date for the Claimant's employment was 25 June 2018.]

9. The Claimant had not been legally represented at the preliminary hearing (she was accompanied by her mother), but she was legally represented at this hearing. Subject to the clarification about the Respondent's intended "legitimate aim", the parties were agreed that the above list was accurate and complete, and contained the only complaints which we had to consider.

The Hearing and Evidence

10. The matter had been set down for two days, Monday and Tuesday 19 and 20 September 2022. However, as all courts and tribunals were closed on the Monday, it commenced on the Tuesday. The parties and the panel were in agreement that one day was sufficient for the evidence and submissions. We reserved our judgment.

11. The hearing took place fully in person.

12. We had a paginated and indexed bundle which was approximately 164 pages.

13. We had 4 written statements. Each of the witnesses swore to their statements and answered questions.

    13.1 For the Claimant, the only witness was the Claimant.

    13.2 For the Respondent, there were 3 witnesses: Rosemary Cole, Sharon Cox and Tony Rizzo.

The Facts

14. Tony Rizzo founded Sanrizz Salons in 1980 in Brook Street, London, as a luxury hair salon. The business he started later grew to a group of companies ("the Group") with salons in various locations including Knightsbridge, Brunswick Centre, Russell Square, and Guildford. The Russell Square Salon also incorporated a training facility, known as "the Academy". There was what was termed a "head office" next to the St Albans Salon.

15. Before the Pandemic, the Group operated 8 salons in London and around the South East. Some of the people who worked at these salons did so as employees of one of the companies in the Group. In addition, some hairdressers operated on a self-employed basis by making an arrangement with the relevant company by which the hairdresser would pay a fee to the company in order to operate from its premises.

16. One of the companies which Mr Rizzo operated was Sanrizz Holdings Ltd (company number 05390223). We will refer to this as "Holdings".

17. Another company was Sanrizz (St Albans) Limited. This is the company which is the Respondent in this employment tribunal litigation, and we will refer to it as "the Respondent".

18. The Respondent and Holdings both used the same registered office.

19. Ms Sharon Cox has worked for the Group for many years. Since 2001, she has been in charge of the Academy. Since 2018, she has been a director of the Respondent. She has been the only director since she was appointed. The company secretary is Mr Rizzo's wife.

20. Upon being asked questions about the ownership of the Respondent, Ms Cox seemed very unsure. It was put to her by the Claimant's representative that she, Ms Cox, owned more than 75% of the company, which she accepted. However, she did not seem to be aware of exactly who else was an owner, for example, Mr Rizzo, or his wife, or both, or neither. Her recollection and understanding was that this company had been given to her in recognition of the many years good service she had given to the Group.

21. Upon Ms Cox being asked about the spreadsheet which was a late addition to the bundle (page 167), and in particular about the row for "Franchise Fees", she seemed uncertain. Mr Rizzo shouted from the back of the room that this showed the sums paid to Holdings. The Tribunal reminded everyone that there must be no such communications with witnesses. Ms Cox said that she had been just about to give that same answer anyway, before it had been shouted out. However, given her uncertainty on other answers, we cannot be sure about that.

22. Ms Cox's evidence to the panel, which we accept was genuinely how she saw things at the time, was that the companies in the Group were each operating as part of a "brand" (was her terminology). This was run, as far as she was concerned, from "Head Office". The companies in the Group (or, at least, the Respondent) paid fees to "Head Office" and "Head Office" organised administrative matters on behalf of each of the companies (or, at least, on behalf of the Respondent). What Ms Cox refers to as "Head Office" was, in a company law sense, actually Sanrizz Holdings Ltd, but in a de facto sense was part of the Group which was directly controlled by Mr Rizzo.

23. Mr Rizzo's phrase for the arrangement was "branchising". Like Ms Cox, he saw everything operated by the Group as part of a single business that was run from "Head Office".

24. Our finding is that it is clear that Mr Rizzo, while he was not a director of the Respondent, was an important decision-maker. Furthermore, it is our finding that,

within the Group, certainly as far as the Respondent company was concerned, at least, Mr Rizzo was the principal decision-maker and the facts that Ms Cox was the sole director of the Respondent and the majority shareholder did not alter the fact that major decisions on behalf of the Respondent were taken by Mr Rizzo. Both Mr Rizzo and Ms Cox were of the view that when there was a significant issue to be decided, which affected the Respondent's finances, it would be Mr Rizzo who would tell Ms Cox what he had decided would be done. We have no reason to doubt that all concerned, including Mr Rizzo, Ms Cox and their accountants have complied with all company law and accounting requirements. However, based on the (limited) documents we saw, and our impression of the witnesses, it seems that both Mr Rizzo and Ms Cox regarded the Group as the important thing, and regarded Mr Rizzo as being in charge of the Group. On a day to day basis, when making decisions, they did not focus on the specifics of which company in the Group was (or should have been) formally be making the particular decision.

25. The Respondent operated the Group's St Albans hairdressing salon. Ms Cox was the senior person responsible for the salon. However, since she was also running the Academy, she usually only visited the salon in person on one or two days per week (at the relevant times prior to the start of the Covid pandemic and associated lockdowns.)

26. Ms Rosemary Cole joined the Respondent in around July 2018. She started as receptionist. She performed some management duties on a day to day basis while Ms Cox was off site, including dealing with staffing issues. She described herself as "co-manager" in a statement produced in response to the Claimant's complaints. She described herself as "manager" in a message exchange with the Claimant in April 2019 (page 72 of bundle).

27. The Claimant commenced employment with the Respondent on 25 June 2018. A contract was issued by the Respondent which appears in the bundle at pages 48 to 53 and was signed by both parties on or around 19 September 2018. The 3 months June to September were a trial period, which the Claimant successfully passed.

28. The contract stated "You are employed as an assistant and you will be required to cany out any other reasonable duties falling within your capabilities, as the needs of Sanrizz dictate".

29. The Claimant was issued with an employee handbook. The full document was not in the bundle, but our finding is that this was the same handbook used by other companies in the Group.

30. It contained section 4.2 which dealt with the rules for reporting absence and being paid for absence. There was a reference to contacting "your Manager". The Respondent's position is that, for the Respondent, the reference to "Manager" (with

capital letter) referred to Ms Cox and Ms Cox only (and that the Claimant, from time to time breached this alleged requirement). However, our finding is that, regardless of whether Ms Cole had been formally given the title of manager, and regardless of how the Respondent thinks the expression "your Manager" in the handbook should be interpreted, the Claimant's understanding was that contacting Ms Cole to report absences was reasonable and in accordance with her obligations to the Respondent. To the extent, if at all, that the Respondent genuinely had a requirement for sickness absence to be notified directly to Ms Cox (and only to Ms Cox), then the Respondent failed to give that instruction clearly to the Claimant. On the contrary, on 19 August 2019, Ms Cox sent a message to the Claimant which said that the procedure for notifying sickness was to phone Ms Cole ("Rosie") by 9am. (Page 80 of bundle).

31. The Claimant was diagnosed with anxiety and depression in or around November 2018. At that time, she was prescribed Citalopram. It started at 10mg daily and increased to 20mg in February 2020. Later in February 2020, that was changed to 50mg of Sertraline per day. She started counselling in around January 2020.

32. The effects included that she has always found it hard travelling by various forms of transport and taking part in social activities. Although, as the Claimant accepts, and as alluded to in the Respondent's evidence, she was able to participate in some social activities (bundle pages 122 to 125).

33. Ms Cole was made aware in November 2018 that the Claimant was visiting her GP about mental health concerns. After the appointment, the Claimant told Ms Cole that had been prescribed citalopram. Ms Cole understood that this was an anti-depressant. (See message exchange of 1 November 2018 at pages 64 to 65 of bundle).

34. Ms Cole was also aware that the Claimant was having therapy, as confirmed by the message exchange on 25 January 2019 (page 66), in which the Claimant described feeling ill, but also feeling obliged to come into work.

35. On 17 April 2019, the Claimant made Ms Cole aware that she, the Claimant, had had difficulty sleeping and that it was because "*I'm so stressed out and exhausted I'm so sad can stop crying*". (Page 69). Ms Cole's response sought to be sympathetic and helpful, and she asked whether the Claimant wanted her to speak to Ms Cox to see whether there was anything that could be done to take some pressure off the Claimant. (Page 69). As the further messages between 18 April and 20 April demonstrate, Ms Cole continued the discussion about how the Claimant was feeling, was aware that the Claimant might (or should) discuss the issues with her therapist, and believed that other workers at the salon, including Ms Cox, were aware of how the Claimant was feeling and were – according to Ms Cole – willing to be sympathetic and accommodating. (Pages 70-71).

36. In August 2019, Ms Cole and the Claimant had a text exchange about how anxious the Claimant was feeling about potentially doing some work for clients. The Claimant told Ms Cole that she was too anxious to be able to sleep and was not sure she could come in. Ms Cole made some helpful and supportive comments. She encouraged the Claimant to communicate Ms Cox. This was 6.58am on 19 August 2019. The Claimant replied at 9.23am to say she had done so and said that "*she was really nice about it*", referring to Ms Cox. (Page 79). This is a reference to the exchange between the Claimant and Ms Cox on page 80 of the bundle which was:

> **Claimant**: I've had the worst anxiety since last night I've tried listening to calming music and everything and nothing is working it just seems to be getting worse and is making me feel sick and body shaking. I'm not gonna make it in. So sorry to let you down, i feel so awful about everything. Let me know when you get to the salon and I can call you.
>
> **Ms Cox**: Okay stop stressing get yourself better so your in the rest of the week, call Rosie @ 9 and report in sick to stalbans as that's the procedure. Stop worrying your gonna make a great stylist I'll help u and if your not ready that's also fine . Get better x

37. The Claimant's opinion was that the Respondent was asking too much of her as assistant, and that the Respondent should (either use additional assistants, at least some of the time, or) do more to seek to enforce the rules about which parts of the preparatory work for clients, and cleaning up afterwards, should be done by the hairdresser/stylist, rather than left for the assistant to do. She made these points, for example in a message to Ms Cole and email to Ms Cox in November 2019 (page 87 and 88 of bundle respectively). This followed the Claimant feeling so upset about the situation that she walked out of the workplace temporarily on 19 November 2019, which she mentioned to Ms Cox by text (Page 85) and followed up with a phone conversation. Ms Cox replied to say that she thought the Claimant's observations were fair, and that stylists should be expected to contribute rather than leave everything to the Claimant, the assistant, and that she, Ms Cox, would look into it, and discuss further with the Claimant.

38. The Claimant had some absences that were not connected to her disability and others that were. On 12 December 2019, she sent a message to Ms Cox which read:

> Hi Sharon I'm so sorry rm not coming in today. I feel so awful had the worse night woke up with sweats but feel constantly cold. I have so much anxiety, feel sick and just awful I've booked a doctors appointment for today. Let me know when your free and I can give you a call X

39. The same day, she sent a message to Ms Cole which said:

> I just feel like shit all the lime. I'm In tears. My anxiety is through the roof. I never leave the house and the thought of going out makes me feel sick. I keep waking up sweating but I'm shivering with cold. I honestly Just feel awful all the time, and constantly tired like

> more than normal. I don't know what's wrong with me. And i know If I come In I'll just end up coming home again. I don't know what's wrong.
>
> I've booked a doctors appointment for today

40. In her response, Ms Cole suggested "*maybe you need a higher dose of meds and I think you should start your therapy again*".

41. In messages to Ms Cole the following day, 13 December 2019, the Claimant said "*I keep crying I feel like I can't even get out of bed*" and "*I'm just feel so sad and like shit*". After Ms Cole asked for details of the reasons, suggesting some alternatives, and asking "*Or do you think it's more of a mental thing*", the Claimant replied to say "*I think there is something physically wrong but I'm also battling with my head* [at the moment] *too*". The reference to "my head" was a reference to anxiety and depression, and Ms Cole knew that.

42. The same day, 13 December 2019, the Claimant wrote to Ms Cox to say:

> Sorry Sharon I won't be coming in today feeling the same as yesterday feel like I can't even get out of bed. If you need me to call. I can x

43. Ms Cox sent an email to the Claimant on 13 December (page 101) which said, amongst other things, "*I spoke briefly to a friend about your anxiety she supports girls with similar things, she has recommended this group and They are in stalbans. Call them hope it may help*", and which forwarded contact details for that group. The subject line was "YouthTalk counselling", which shows Ms Cox was aware of the reasons for the Claimant's absences at the time.

44. The Claimant performed her duties well. In January 2020 she received an award recognising her as the Top Assistant in the Group.

45. As well as carrying out the duties of an assistant, she was also training to become a stylist. Some of this training required her to attend the Academy. Because of her disability, she did not find travelling to the Academy, in London, via public transport to be easy. To the extent that Ms Cox has alleged in her witness statement that the reluctance to go to the Academy demonstrated a lack of interest in career development, we find this to be incorrect. The Claimant was keen to progress her career and, we find, had made clear to Ms Cox that she was nervous of travelling for mental health reasons.

46. On 13 January 2020, the Claimant was unable to come to work. This was not an absence caused by her disability, but was due to a sore throat and other physical symptoms.

47. On 5 February 2020, she sent messages to Ms Cox (page 109) which included:

> Hl Sharon I've got the worst anxiety. I'm just sitting with my mum to try to work through it. I wanna come in but it's just impossible at the minute, I will keep you updated. I'm so sorry x
>
> Sorry I've been trying to come in and leave the house. But it's just not gonna happen today I feel awful. Will be back in tomorrow x
>
> I'm still feeling awful I'm gonna book a doctors appointment tomorrow and see how I feel

48. The following day she messaged that she had been to the doctors who had said to increase her medication. It is our finding that Ms Cox knew that the Claimant was taking antidepressants, and knew that that was the medication which was to be increased. On 7 February, the Claimant said that she was hoping the increased medication would soon start working sufficiently that she would be able to come in. Again, we are satisfied (on the balance of probabilities) that Ms Cox realised that the Claimant was saying that she was not well enough to come in because of depression, but hoped to be able to return soon provided her medication enabled her to do so.

49. The Claimant communicated with Ms Cole during February, and made clear that she was struggling to be able to come to work and that this was for mental health reasons.

50. On or around 21 February 2020, sent a fit note to Ms Cole via Whatsapp. On or around 28 February, she messaged Ms Cox and made clear that the absence was for mental health reasons and supplied a new fit note to Ms Cox. (Page 118)

51. A further fit note dated 13 March 2020, stating that the Claimant was not fit for work because of anxiety and depression between 13 March and 31 March 2020 was also obtained and supplied to the Respondent. In terms of that being the reason for the Claimant's absence, as Ms Cole says in paragraph 11 of her witness statement:

> On 13 March 2020 We receive a sick note from Lacé dated 13"' March for more continued absence on grounds of anxiety and depression - which of course we were aware of. As far as we knew Lacé was not even able to leave the house at this point because her anxiety was so bad.

52. It came to the Respondent's attention that the Claimant had been socialising with friends (she posted images on social media, and also inadvertently used Ms Cole's Uber account) and had been on holiday with her boyfriend. To the extent, if at all, that the Respondent seeks to argue that the Claimant's absence from work was not genuinely for the reasons which the Claimant gave at the time, our finding is that the Claimant was genuinely absent from work for mental health reasons.

53. There was a delay in the Claimant's pay in March 2020. Our finding is that the explanation which Ms Cox gave at the time, and in evidence, was true. In other

words, the fit notes did not reach "head office" prior to the payroll cut off point. As we have said above, we reject the later assertion made that the Claimant had not properly complied with sickness absence requirements when she sent notifications to Ms Cole rather than to Ms Cox. Furthermore and in any event, the second fit note had been sent to directly to Ms Cox by the Claimant. However, the Claimant was paid in due course for the absence. The payment was late, rather than non-existent. Furthermore, regardless of who might have been at fault (the Claimant and/or Ms Cole and/or Ms Cox) for the fit notes not being supplied to "head office" in time for the March payroll cut off date, our finding is that the non-payment was not because the Respondent had decided that the Claimant was not ill (and therefore should not be paid), but was simply because the fit notes had not been processed in time.

54. It had been the Claimant's genuine opinion that by supplying the notes via Whatsapp (either to Ms Cole or Ms Cox) was sufficient. In any event, once she was given an email address to send them to, she did so, and was later paid SSP for the absences in February and March.

55. Ms Cox arranged a video meeting with the Claimant. It was unclear to Ms Cox whether, in principle, the Claimant was fit to return to work (her last note expiring on 31 March 2020) or not. She was still unclear after the call. In any event, on 2 April 2020, the Respondent notified the Claimant (in a letter in Mr Rizzo's name) that the salon was closed until further notice because of the Covid pandemic. The letter asked the Claimant to agree to receive 80% of salary (rather then the full amount) subject to the fact that the Respondent was intending to make use of the government's job retention scheme. The Claimant replied to the email the same day to say that she agreed. (Page 134).

56. Notably, the 2 April letter included the following paragraph:

> The Retention Scheme means that you will **not be made redundant** despite the fact that you will not be able lo carry out your job for at least a period of time. Instead you will be designated a "furloughed worker" in the words of the government. You will **remain as an employee for as long as the scheme exists** in the hope that you will be able l o return to your job al some time in the future when circumstances allow.

57. The emphasis is ours and is not in the original. Although the letter commences "Dear Lace" (ie it is addressed to the Claimant by name), our finding is that this was the standard letter sent to all of those employees of the Group who were being furloughed. All of the salons were closed; the employees at those salons were furloughed and the locations were not available for use by the self-employed stylists.

58. On 6 May 2020, there was an exchange between the Claimant and Maggie in "head office". The Claimant argued that she had not been paid properly yet, taking account of her February and March sickness absence, and the April furlough arrangements. Maggie's reply disputed that, alleging that the April pay had included the correct amount for arrears of SSP and also the April furlough.

59. In the meantime, Mr Rizzo had been considering the Group's financial situation. Of particular importance to him was that income had dropped to zero, but he still had outgoings. Although he was using the government scheme to help cover salaries, the business(es) still had to pay rent and other expenses. He examined the state of affairs for the Group as a whole (the financial affairs of which were managed via Holdings) rather than contemplating the particular decision-making procedures which would be or should be followed for each company.

60. Having conferred with his advisers, he came to the view that there were employees who should be dismissed. Mr Rizzo decided that he would terminate the employment of the two employees for whom there are dismissal letters in the bundle. These were the Claimant, who worked for the Respondent, and Dario, who worked for another company in the group. The respective termination letters are at pages 139 and 140 respectively. They are each signed by Mr Rizzo and are each on the notepaper of Holdings. They are each identical letters, save for the start date of employment. In the Claimant's case, this was June 2018 and in Dario's case, this was March 2020.

61. Both letters were dated 7 May 2020. The Claimant's said:

> Because of the current situation with regards to the Covid pandemic, I hereby give you seven days notice terminating your employment contract with Sanrizz doted 25 June 2018. I very much regret having to take this action but I know you will be aware of the extreme difficulties· we are experiencing.
>
> For the avoidance of doubt your contract is hereby terminated on Thursday next week 14 May 2020.
>
> We will be in touch with you again before the end of this month setting out our calculation of any money owed to you under that contract. If any money is in fact owed to you we will transfer the funds to your bank account on or before the last working day of May.

62. At different times, the Respondent has given different explanations for why the Claimant was dismissed. Any assertion that all employees with under two years' service were dismissed cannot be true (as Mr Rizzo accepted in oral evidence) because there were several employees (including Ms Cole, who started about a month after the Claimant, and another assistant who had been there for a few months) who had less than 2 years service and who were not dismissed. Similarly, it cannot be true that all people who had much less than 2 years' service were not dismissed (on the grounds that they were nowhere near acquiring statutory rights

to redundancy pay or to not be unfairly dismissed) because that is not consistent with the fact of Dario's dismissal.

63. Our finding is that the dismissal decisions were taken by Mr Rizzo. We think it is likely that he did so after speaking to Ms Cox (and presumably her counterparts at the other salons). However, it was he, rather than anyone else, who took the decisions. A desire to save costs and to avoid employees acquiring at least two years' service was part of his thought process. However, it was not the only factor; for example, a decision was made to retain Ms Cole due to the fact that the salon (and Ms Cox) were going to need Ms Cole's services as front of house manager when the salon did re-open. She was in a unique position and did need to be retained.

64. For the reasons mentioned in the last two paragraphs, it is our finding that the following sentence (from paragraph 6 of Mr Rizzo's witness statement) is not true: "*On the advice of the group's accountants, It made financial sense to dismiss all staff with less than two years' service, which included the Claimant*."

65. We have only seen documentary evidence that the Claimant and Dario were dismissed at this time. In relation to the sentence in paragraph 7, "*In the end 6 employees were made redundant in similar circumstances and some staff resigned*", we are not persuaded that 6 employees in total were dismissed on 7 May 2020.

66. In his oral evidence, Mr Rizzo stated that around this time the salon which were permanently closed down (because of high rent and no income were:

    66.1 St Pauls, which had 8 staff: 6 self-employed and 2 employees. but 2 self employed

    66.2 Muswell Hill. 4 employees and 1 self employed.

67. He was also in the process of closing Grosvenor, where all the staff were self-employed.

68. For the Respondent itself, as well as keeping Ms Cole, the Respondent had a trainee (Ms Evans) who had much less than two years' service (she had started a few months prior to the lockdown). She was on a slightly higher hourly rate than the Claimant (being paid minimum wage, but being older than the Claimant). However, her weekly pay was less than the Claimant, because she was part-time.

69. Mr Rizzo made the decisions at a time when he did not know when the salons were going to re-open, and when he did not know how busy they might be after they did open. He knew that, when they did open, their ability to generate income depended on there being sufficient stylists. He prioritised retaining these fee earning staff.

70. In fact, in summer, when it re-opened after lockdown, the Respondent's salon did become busy. It was compared to a pre-Christmas rush by the witnesses. As a result, it had to take on some extra staff to do the assistant work. However, that was not something Mr Rizzo had anticipated at the time he decided to dismiss the Claimant.

71. Mr Rizzo's concerns about the Group's finances did, in due course, turn out to be well-founded. Before the pandemic, the Group operated salons in Southampton, St Pauls, Grosvenor House and Muswell Hill, which had all closed by the time of the tribunal hearing. The premises for the Knightsbridge branch and for the Training Academy were no longer, by the date of the tribunal hearing, occupied exclusively by the Group, but were now shared. The Group's overall workforce (counting both employees and contractors) reduced to about half. Mr Rizzo did not know, as of 7 May 2020, that that would be the exact eventual outcome. However, as of 7 May 2020, he was not sure if the business(es) would be able to survive at all, and was considering that there was a possibility of all the companies in the Group going out of business.

72. The Group lost more than £3 million that year. While Mr Rizzo would not have known, as of 7 May 2020, what the figure would be, he knew, by 7 May 2020, that there certain to be very significant losses and that he had to take action to minimise those losses if the Group was to survive.

73. On 12 May, the Claimant sent an email to Mr Rizzo (and to Maggie). She said she had sought legal advice. She asked for the notice to be retracted. In other words, this was effectively an appeal against dismissal. The email said she was happy to leave once the furlough period was over. She also challenged the notice period on the basis that, according to her email, she had received the notice on 11 May and the termination date should be amended to reflect that. By implication (though not expressly stated) she was not disputing that the notice period should be 1 week. She also argues that she was entitled to be paid outstanding salary, SSP and payment in lieu of holiday earlier than stated in the termination letter (at end of notice period, not end of May).

74. There was no suggestion that the Claimant disputed the authority of Mr Rizzo (or Holdings) to terminate her employment. On the contrary, in that email, and again on 15 May 2020, she asked Mr Rizzo to supply written reasons for the dismissal. Furthermore, as well as seeking payment in lieu of holiday (something only available on termination of employment), she sought to make arrangements to collect her belongings from the Respondent's premises (which were closed at the time).

75. The Claimant commenced ACAS early conciliation on 21 May 2020. She presented her claim to the Tribunal on 8 July 2020. Box 5 gave her dates of employment as 25 June 2018 to 16 May 2020. Box 8.1 included ticks against "I

was unfairly dismissed (including constructive dismissal)" and "I was discriminated against on the grounds of: disability". No claim details were provided either in the form or in any attachment (there being no attachment). (Though Box 9 was completed).

76. By letter dated 11 November 2020, sent on the instructions of a judge, the tribunal asked the Claimant for details of the disability claim. By letter dated 18 November 2020 (page 18 of hearing bundle), the Claimant complied with that order.

77. The judge had also decided to reject the unfair dismissal claim, and that part of the decision was communicated to the Claimant by letter dated 8 December 2020. The standard information about seeking reconsideration of the rejection was included with the letter, and the Claimant made no application.

78. On the same date, a "Notice of Claim" letter was sent to the Respondent, which also stated that the unfair dismissal part of the claim was rejected, and that the Respondent was required to respond to the disability discrimination claim only.

79. The response which the Respondent sent, received by ET around 23 December 2020, was therefore prepared more than 6 months after the termination. Perhaps not surprisingly (given the claim form had no details), it commented on the 18 November 2020 letter primarily. However, it ended by saying:

> We had therefore been informed by Lace that she had recovered from her illness and that she had been fit for work since 1 April 2020.
>
> Lace was dismissed on 7 May 2020 by being given one week's written notice in accordance with her employment contract. It was by then clear that, unfortunately, staff would have to be dismissed because of the financial plight of the business.

The Law

80. The complaints are brought under the Equality Act 2010 ("EQA").

81. Discrimination arising from disability is defined in section 15 of the Equality Act.

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

82. The elements that must be made out in order for the claimant to succeed in a S.15 claim are:

82.1 there must be unfavourable treatment;

82.2 there must be something that arises in consequence of the claimant's disability;

82.3 the unfavourable treatment must be because of (in other words, caused by) the something that arises in consequence of the disability, and

82.4 the alleged discriminator cannot show at least one of the following:

82.4.1 that the unfavourable treatment was a proportionate means of achieving a legitimate aim AND/OR

82.4.2 that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability.

83. The word "unfavourably" in section 15(1) EQA is not separately defined by the legislation but must interpreted consistently with case law and taken account of the Equality and Human Rights Commissions Code of Practice on Employment. Dismissal can amount to unfavourable treatment as indeed could treatment which is much less disadvantageous to an employee than a dismissal. However, it does not follow that there has been unfavourable treatment merely because a Claimant can prove that they genuinely believe that they should have had better treatment.

84. For section 15, the unfavourable treatment has to be shown by the claimant to be because of something arising in consequence of his or her disability as opposed to being because of the disability itself.

85. There is a need to identify two separate steps when considering causation. One is that the disability had the consequence of "something", that is an objective test. The second is that the claimant was treated unfavourably because of that "something". The latter requires consideration of the decision maker's thought processes and motivations, both conscious and subconscious.

86. The section does not require the disabled person to show that his or her treatment was less favourable than that experienced by a comparator. The fact that a particular policy has been applied to a disabled person in circumstances in which the same policy would have been applied to a non-disabled person does not, in itself, mean that there has been no unfavourable treatment. In other words, a decision that adversely affects the Claimant could potentially still amount to treating the Claimant unfavourably even if the decision was based on a policy that was applied to other employees as well.

87. When considering whether the claimant was treated unfavourably because of that "something", the "something" need not be the sole reason for the treatment, but it must be a significant, or more than trivial, reason. It does not matter if the employer was unaware that the "something" was connected to the person's disability.

88. A complaint of discrimination arising from disability will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself and must represent a real, objective consideration.

Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another may not be sufficient.

89. In relation to proportionality, it is not necessary for the Respondent to go as far as proving that the course of action which it chose to follow was the only possible way of achieving the legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply that the treatment was not proportionate. It is necessary to carry out a balancing exercise which takes into account the importance (to the Respondent) of achieving the legitimate aim, and the means adopted to pursue that aim, in comparison to the discriminatory effect of the treatment. It is unnecessary that the Respondent demonstrate that it had itself carried out the necessary balancing exercise; what matters is that the tribunal carries out that exercise, based on the evidence presented at the tribunal hearing.

90. If a Respondent employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for that Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

91. When considering what the Respondent knew (and/or what it "could not reasonably have been expected to know"), the relevant time is the time at which the (alleged) unfavourable treatment occurred. Naturally this might mean that different decisions on the Respondent's knowledge are reached in relation to different allegations of unfavourable treatment, including, for example, a decision to dismiss and a decision to reject an appeal.

92. In A Ltd v Z [2020] ICR 199, UKEAT/0273/18, the EAT said at paragraph 23 in determining whether the employer had the requisite knowledge for section 15(2) purposes, approved a list of principles (which had been agreed between the parties in that case). Amongst other things, it stated:

> (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

93. The burden of proof provisions are codified in s.136 EQA and s.136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

94. It is a two stage approach.

94.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

94.2 At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

94.3 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

95. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

96. The burden of proof does not shift simply because, for example, the claimant proves that she has a disability and/or that there was something arising from disability and/or that there was unfavourable treatment. Those things are not sufficient in themselves to shift the burden of proof, something more is needed.

97. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

Analysis and conclusions

98. The Claimant's dismissal took effect on 14 May 2020, because that was the termination date which was clearly and unambiguously stated in the 7 May 2020 letter, and because the Claimant read that letter before 14 May. No complaint was presented to the tribunal alleging breach of contract; the claim did not contain an allegation that she ought to have had notice to expire 18 May 2020 (which would have been 1 week after the 11 May receipt date which she asserted in her 12 May

2020 email), or even on 16 May 2020 (the termination date stated in Box 5 of the claim form).

99. At the time of her dismissal, the Claimant had less than two years' employment, and that would have been the case even if the effective date of termination had been 18 May 2020. As made clear by section 108(3) the Employment Rights Act 1996, not every complaint of unfair dismissal requires two years service. However, the Claimant did not ask for reconsideration of the rejection of her unfair dismissal claim. The only complaints which we must address are those set out in the list of issues.

100. The Claimant alleges "*Ms Cox regarded her commitment to becoming a graduate stylist with the respondent as being less than sufficient*". The Claimant has proved this to our satisfaction. Paragraph 6 of Ms Cox's witness statement implies this, as do the last two sentences of paragraph 7.

101. The Claimant further alleges that this opinion of Ms Cox's was something arising from the Claimant's disability. The Claimant has proved this to our satisfaction.

101.1 We are satisfied that the Claimant's reluctance to go to the Academy was because of the difficulties she had in making journeys by public transport.

101.2 We are satisfied that the reasons she had difficulties in making journeys by public transport was because of her disability.

101.3 We are satisfied that Ms Cox's opinion that the Claimant lacked commitment to becoming a graduate stylist was partially based on the fact that Ms Cox perceived her as being reluctant to attend the Academy.

102. Furthermore, the Claimant's inability to attend work in February and March was because of her disability, as was her inability to give a clear answer to Ms Cox about the likely return date. These were also some of the things mentioned by Ms Cox in her evidence as causing her to doubt whether the Claimant intended to pursue a career as a hairdresser (or, at least, to doubt whether the Claimant intended to pursue a career with the Respondent).

103. There is no doubt that dismissing an employee falls amounts to treating someone "unfavourably" as that expression is used in section 15 EQA. So we have to decide whether the reason for the unfavourable treatment was the "something arising" from the Claimant's disability. The "something arising" would not have to be the principal reason for the dismissal. Furthermore, we have to apply section 136. So we do not ask ourselves if the Claimant has proved, on the balance of probabilities, that the "something arising" was one of the causes of her dismissal; we ask ourselves whether we have found facts from which we could potentially conclude - in the absence of an adequate explanation – that that was the case.

104. People who breach EQA are not likely to admit it to the tribunal. They might also take care to disguise it in contemporaneous conversations or documents.

105. Something which is notable here is contained in paragraph 7 of the judge's summary of the preliminary hearing, at which the Respondent was represented by Ms Cox:

> Nevertheless, I note here that the statement by Ms Cox on 17 February 2022 that the reason for the claimant's dismissal was that she doubted the claimant's commitment to becoming a graduate stylist was a statement of a reason which was different from that which was given in the response to the claim … .

106. It is certainly true that that is a different explanation to the one contained in the response (the last two paragraphs of which we quoted in the findings of fact).

107. It is also true that that is a different reason to the one alleged by the Claimant in her 18 November 2020 letter, which stated:

> I can only conclude that my employment was terminated due to my mental health issues and related absenteeism and because I had questioned my pay, specifically my entitlement to statutory sick pay.

108. In paragraph 18 of the Claimant's statement, she asserted, about the dismissal reason:

> The only explanation I have is that they dismissed me because of my mental health and the times I had been signed-off by the doctor.

109. What Ms Cox is recorded as having said at the preliminary hearing differs from what is in her remarks to the tribunal at the preliminary hearing:

> 12. There was considerable uncertainty over when the national lockdown would be lifted. Despite the Government Coronavirus Job retention Scheme, it was clear to the Directors that substantial savings would still have to be made. Tony Rizzo himself took charge of redundancies and dismissals, with advice from the accountants.
>
> 13. In the St Albans Salon it was decided to keep one trainee (Felicity Evans) on furlough as she was part-way through her Sanrizz training.
>
> 14. Ultimately the group closed 3 salons entirely and made a total of six staff redundant in addition to other resignations and departures. The group now has less than half the team members that we had before the pandemic.

110. In the findings of fact, we commented on paragraphs 6 and 7 of Mr Rizzo's statement. In paragraph 8, he said:

> I am not involved with the day-to-day running of individual salons. I did not know the Claimant personally, I did not know she had been absent and did not know she suffered from anxiety. I was not made aware that her progress through the company was slow. My decision was based entirely on length of service.

111. It is clear to us that both Ms Cole and Ms Cox were aware that the Claimant's absences were caused by anxiety and depression, for which the Claimant was having medication and other treatment. They were also aware that this was a condition which she had had since at least November 2018. Because of their management positions within the Respondent, it is appropriate for the Respondent to be deemed to have knowledge of those facts. If we had decided that the Respondent dismissed the Claimant because of (or partially because of) Ms Cox's opinion that the Claimant's commitment to becoming a graduate stylist was less than sufficient, then Mr Rizzo's purported lack of knowledge would be irrelevant.

112. However, notwithstanding what Ms Cox said at the preliminary hearing, having heard from Ms Cox and Mr Rizzo (as well as the other witnesses) at the final hearing we were satisfied that the termination decisions were taken entirely by Mr Rizzo based on looking at the medium term financial consequences of the various options. In particular, we were satisfied by his oral evidence that he had a desire to avoid employees who had close to two years (but less than two years) employment, like the Claimant, reaching the two year mark before the lockdown was over unless (like Ms Cole) they were someone whose absence would hamper income generation when the salons did re-open.

113. We have not found facts which lead us to decide that the burden of proof should shift. The Claimant and her representative rightly draw attention to the fact that the Respondent has given inconsistent explanations for its decision. However, what Ms Cox said at the preliminary hearing is of little significance given that she was not the decision-maker; she was told about the decision, after Mr Rizzo had made it. Although Mr Rizzo's statement cannot be believed in one respect (he did not dismiss everyone who had less than two years' service), the facts are that there were closures, and terminations of employment contracts and self-employed contractor arrangements, in order to keep the business afloat. We are satisfied that he was not motivated, even in part, by the Claimant's absences, or Ms Cox's opinion that the Claimant was not committed to becoming a stylist.

114. Had we decided that the unfavourable treatment (the dismissal) was because of the something arising (Ms Cox's opinion about the Claimant's lack of commitment), then the Respondent's defence under section 15(1)(b) EQA would not have succeeded.

114.1 We would have decided that "to ensure the business can carry on" was a legitimate aim.

114.2 However, we would not have decided that dismissing the Claimant was proportionate on this hypothesis. The benefit to the Respondent of dismissing the Claimant (on this hypothesis) would not have outweighed the discriminatory effect on the Claimant.

115. However, our decision was that the unfavourable treatment (the dismissal) was NOT because of the something arising (Ms Cox's opinion about the Claimant's lack of commitment) and therefore the claim fails, without the need for the Respondent to establish the defence under section 15(1)(b).

Outcome and next steps

116. At the end of the liability hearing, we agreed a date with the parties for a remedy hearing, if needed. As we said, we would cancel that hearing if none of the complaints were successful.

117. As a result of our decision, the hearing on 22 February 2023 is cancelled.

Employment Judge Quill

Date: 16 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 December 2022.

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FOR EMPLOYMENT TRIBUNALS