



EMPLOYMENT TRIBUNALS

Claimant:

Miss Alison Raeside

v

Respondent:

Data Systems (Computers)
Limited

Heard at:

Reading

On: 6, 7, 8, 9, 10, 13 January
2020 and in chambers on
14 January 2020

Before:

Employment Judge Hawksworth
Mrs A E Brown
Mr J Appleton

Appearances

For the Claimant:

In person

For the Respondent:

Miss S Bowen (counsel)

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that the claimant's complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and disability-related harassment fail and are dismissed.

REASONS

The claim

1. The respondent is a company which provides IT solutions and services to businesses. The claimant was employed by the respondent as a security sales specialist from 6 March 2017 to 2 August 2017 when she was dismissed.
2. The claimant's claim form was presented on 27 October 2017 after a period of Acas conciliation from 21 September 2017 to 28 September 2017. The claimant's complaints are of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and disability related harassment.
3. The respondent presented its ET3 on 1 December 2017. It defends the claim.

Hearing and evidence

4. The hearing took place over 7 days. We took the first day for reading; we read the witness statements and the documents referred to in the statements.
5. We began hearing evidence on the morning of 7 January 2020. We heard evidence from the claimant on 7, 8 and 9 January 2020. On 9, 10 and 13 January 2020 we heard evidence from witnesses for the respondent (in this order):
 - Mr Andrew Waters, a director and shareholder of the respondent;
 - Mr Jahazeb Butt, a Business Development Manager with the respondent
 - Mr Joel Temple-Joyce, a Business Development Manager with the respondent
 - Mr Gary Waters, a director and shareholder of the respondent;
6. In these reasons for clarity we have referred to Mr Andrew Waters as Andrew Waters and Mr Gary Waters as Gary Waters.
7. We also read the statement of Mrs Ellis, the respondent's marketing executive. Sadly, since making the statement, Mrs Ellis has died. We read her statement and have attached such weight to it as we thought appropriate.
8. We also read the statement of Ms Melody Ambrose, another of the respondent's witnesses. Ms Ambrose was not able to attend, and the respondent did not propose to rely on her evidence. However, the claimant asked that we read the statement, and the respondent had no objection to us doing so.
9. There was a bundle of 656 pages which was prepared by the respondent and agreed by the claimant. The respondent had redacted some of the documents in the bundle for client confidentiality, and some pages were illegible because of the size of the text. We dealt with these issues as they came up; the respondent's representative provided complete or clearer copies of any pages as required. A fully unredacted copy of the bundle was provided as the bundle for the witness table and was used by the tribunal in deliberations.

The issues

10. The issues for determination were agreed by the parties at a preliminary hearing on 15 June 2018 and set out in the case management summary.
11. On 3 July 2018 the respondent's representatives wrote to the tribunal and the claimant to confirm that the respondent concedes that the claimant was disabled by virtue of her being in remission from treatment from cancer. The respondent accepts that it had knowledge of her disability

from 19 May 2017. The respondent set out a number of limitations on this concession in its email, including that it did not accept that the claimant has any other disabling condition or that it had knowledge of any symptoms or substantial disadvantage that the claimant had as a consequence of her disability.

12. On 26 July 2018 the claimant made an application to amend her claim to include complaints of harassment. On 22 August 2018 Employment Judge Gumbiti-Zimuto gave permission for the claimant to amend her claim to include some complaints of harassment. The harassment complaints were summarised in a case management order dated 28 September 2018, more details of each complaint were in the claimant's application of 26 July 2018. These complaints have been included in the issues section below.
13. On the first and second days of the hearing, the tribunal discussed with the parties the issues to be determined in the complaint of discrimination arising from disability. The claimant confirmed that the 'something arising' from disability was her sickness absence. The incidents of unfavourable treatment for the purpose of this complaint are the same as the incidents of less favourable treatment for the direct discrimination complaint. In short, the claimant says that she was subjected to unfavourable or less favourable treatment because of her disability or because of her sickness absence arising from disability. This was set out in paragraphs 7.1 and 7.2 of the case management summary and confirmed by the claimant on the second day of the hearing, on 7 January 2020.
14. The issues for determination by the tribunal are below. The section numbers referred to are from the Equality Act 2010.

Time limits

- 14.1. The claim form was presented on 27 October 2017 following a period of ACAS Early Conciliation commencing on 21 September 2017 and ending on 28 September 2017. Accordingly and bearing in mind the effects of ACAS Early Conciliation, any act or omission which took place before 22 June 2017 is potentially out of time. Accordingly, does the Employment Tribunal have jurisdiction to hear complaints arising before this date?
- 14.2. Is it just and equitable for the employment tribunal to extend the ordinary time limit for the claimant to issue her claim?

Disability

- 14.3. The respondent has conceded that the claimant was disabled and accepts that it had knowledge of her disability from 19 May 2017. The respondent's concession is subject to the limitations set out in the email from Herrington Carmichael LLP to the Employment Tribunal of 3 July 2018.

- 14.4. The claimant contends that the respondent had knowledge of her disability from an earlier date.
- 14.5. To the extent necessary, what date did the respondent have knowledge of the claimant's disability?

Section 13: direct discrimination because of disability

- 14.6. The claimant alleges that she was subjected to the following less favourable treatment by the respondent:
- a. Dismissing her;
 - b. Failing to provide support for the claimant by not paying the claimant when she took time off to attend medical appointments, by adopting a sceptical attitude that required the claimant to prove that she had attended medical appointments etc. before any permission was granted to allow the claimant to attend appointments (this complaint also included an allegation that the respondent failed to give the claimant time off to attend medical appointments, this was withdrawn at the hearing);
 - c. Without the claimant's permission, Andrew Waters writing to the claimant's oncologist prior to 6 June 2017 and requesting that he provide to the respondent details of the claimant's medical record.
- 14.7. Did each of these alleged acts occur as alleged or at all?
- 14.8. Did each of these alleged acts amount to less favourable treatment?
- 14.9. Was any of the alleged acts of less favourable treatment because of the claimant's disability?
- 14.10. Has the respondent treated the claimant less favourably than it treated or would treat a comparator? (The claimant appears to be relying on Mrs Ellis as a comparator. Is Mrs Ellis an appropriate comparator?)
- 14.11. Has the claimant proved primary facts from which the employment tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's disability?
- 14.12. If so, what is the respondent's explanation and does it prove a non-discriminatory reason for any proven treatment?

Section 15: discrimination arising from disability

- 14.13. The claimant says her sickness absence was "something arising" from her disability.

- 14.14. Did the respondent treat the claimant unfavourably because of the "something arising" in consequence of the claimant's disability? The claimant relies on the treatment set out in paragraph 14.6 above.
- 14.15. Was the respondent's treatment of the claimant a proportionate means of achieving a legitimate aim?

Section 20 and section 21: reasonable adjustments

- 14.16. The following provision, criteria and/or practice (PCP) is relied on by the claimant: requiring the claimant to work from the office instead of working from home.
- 14.17. Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The claimant will say that the claimant's business as usual activities included the claimant spending time out of the office with clients, the claimant's medical condition also meant that the claimant spent time out of the office receiving medical treatment, the claimant therefore did not have sufficient time in the office to carry out the work that she was required to do to perform the 'Admin work' for her role.
- 14.18. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably require and they are identified as follows: enabling the claimant to work from home.
- 14.19. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Section 26: Harassment related to disability

- 14.20. Did the respondent engage in unwanted conduct as alleged by the claimant as follows:
- a."The respondent ignored the fact that [the claimant] was ill and still having ongoing 5 year, chemotherapy and provided no support to [the claimant] whilst [the claimant] had ongoing tests which all cancer patients have to undergo";
- b."[The claimant] had already informed the respondent that [she] was still undergoing chemotherapy due to having breast cancer but their disbelief and contacting [the claimant's] oncologist without [the claimant's] permission [her] feeling extremely harassed to prove [her] disability";

- c."This was an invasion of privacy, leaving [the claimant] harassed and stressed that because of [the claimant's] disability, [her] illness was disbelieved, and [the claimant] had to prove herself";
- d."The respondent has always been disbelieving of [the claimant's] disability and have never made any reasonable adjustments as [the claimant] had to prove [her] illness. [The respondent has] not been accommodating or patient. [The claimant] felt singled out due to [her] illness as no other colleague of [the claimant's] had] been dealt with in this manner";
- e."The claimant was extremely ill and suffering from effects of chemotherapy but when [the claimant] advised the respondent of this, [the respondent] showed no support or concern which it would have done if [the claimant] was another employee. [The claimant] was unable to appeal in person and felt singled out by [the respondent's] conduct."

- 14.21. Was the alleged conduct on related to the claimant's disability?
- 14.22. Did the alleged conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 14.23. Or, did the alleged conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and if so, was it reasonable for the conduct to have that effect, taking into account the perception of the Claimant and the other circumstances of the case?

Remedy

- 14.24. If the claimant succeeds in whole or part, the tribunal will be concerned with issues of remedy.
- 14.25. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

Findings of fact

- 15. We make the following findings of fact. The page numbers are references to the bundle pages.
- 16. The claimant is an IT sales consultant, with 20 years' experience, at least 11 of which were in cyber security. In 2013 the claimant was diagnosed with breast cancer. She had chemotherapy, radiotherapy and surgery. She

is continuing with maintenance treatment, including long-term medication, under the guidance of an oncologist.

17. The respondent is a small IT consultancy based in Berkshire. It was founded by Andrew Waters and Gary Waters who are brothers. The respondent sells IT products and services to businesses. The respondent works with suppliers, known as vendors. The vendors provide IT products, which the respondent sells on to its clients.
18. At the time the claimant was employed the respondent had about 14 employees. As a small IT company, the respondent found recruitment quite difficult as there are lots of much larger companies in the region which also provide IT services.

Recruitment of the claimant

19. In early 2017 the claimant's CV was sent to the respondent by a recruitment agency (page 70). The claimant attended two interviews with Andrew Waters and Gary Waters, and also had a telephone interview. The respondent said, and we accept, that the claimant did not tell them in her interviews that she had had cancer.
20. During the recruitment process, the claimant told the respondent that she had a pipeline of potential customers and that she was confident that she could generate sales quickly on starting work for the respondent. The pipeline was described as 'warm', meaning that the potential customers could be converted to sales quite quickly.
21. The recruitment agent told the respondent that they could not request a reference from one of the claimant's previous employers as she had a legal dispute with them. The respondent decided not to take up references for the claimant, and to make an offer on the basis of her interviews only.
22. The claimant accepted the offer from the respondent to work as an IT sales consultant (page 83). The role was subject to a three month probationary period. The claimant's salary, £50,000, was much higher than the respondent's other sales consultants. The respondent decided to offer the claimant a higher salary because of her experience and the 'warm pipeline' of leads she was bringing with her.
23. Prior to starting her job with the respondent, the claimant asked for a cyber security specific section to be added to the respondent's website, for marketing assistance and for remote and home working. The claimant said in her witness statement that she made these requests to enable her to do her job effectively, not because of her disability.
24. The recruitment consultant's fee which was payable by the respondent for the successful recruitment of the claimant was £7,500.

The claimant's targets

25. In her offer letter, the claimant was told that she would have a quarterly sales target of £100,000 (page 83). Her target for the first quarter was £40,000, reduced to reflect the fact that she had just started with the respondent. The claimant's targets were higher than the other sales consultants' targets, because the claimant's salary was higher. We find that the sales targets were a requirement of the claimant's role.
26. The claimant agreed to the targets. She said a quarterly sales target of £100,000 was achievable, and was not a difficult target to hit. The claimant did not at any stage during her employment by the respondent question or take issue with the level at which her targets were set. She did not request a reduction in these targets.
27. The claimant started working for the respondent on 6 March 2017. On 14 March 2017 the claimant had the morning off to have a mole removed. She did not attend work on 20 March 2017 and did not notify the respondent that she was sick. When Andrew Waters contacted the claimant in the afternoon, she said she was in hospital as she had an infection following the surgery.

Other aspects of the claimant's role with the respondent

28. The claimant's primary responsibility as a sales consultant was to generate sales for the respondent. However, the claimant and the respondent agreed that the claimant's role would include the additional responsibilities of building up a cyber security team, and acting as the 'security overlay' for other sales consultants. This meant that the claimant would provide expert advice on security related IT matters to customers of the respondent's other sales consultants, who did not have the same security expertise.
29. One aspect of the work the claimant was to do was providing clients with advice on the General Data Protection Regulation (GDPR) which was coming into force in May 2017. The respondent's other sales consultants introduced the claimant to their customers as the security expert, to help her to generate sales.
30. The claimant spent some time building up the cyber security side of the respondent's business, in particular, she wrote new sections for the website dealing with security products. This took her around 2 weeks. The claimant also took steps to revamp the respondent's product range by liaising with possible new vendors to identify suitable security products and services for the respondents to offer to its customers.
31. On 4 April 2017, almost a month into the claimant's employment, the respondent had a catch-up meeting with the claimant. The claimant had not made any sales.

32. On 6 April 2017 Andrew Waters told the claimant that he was concerned the claimant was spending too much time on the website, and that she should concentrate on the pipeline, by which he meant sales (page 165).
33. The respondent commissioned work on the website from a designer, but after liaising with the claimant, the designer decided the work was not deliverable within the agreed budget, and refunded the money. The claimant said that the lack of information about security on the respondent's website prevented her from making sales. There were no examples of this happening. The respondent said, and we accept, that the claimant did not have to wait for changes to the website or the introduction of new vendors before being able to sell products to clients, and that meeting her sales targets was her primary role as a sales consultant.

Complaints about the claimant

34. Towards the end of March 2017, the claimant had a dispute with the respondent's marketing executive Mrs Ellis. The claimant said that her expectations far surpassed Mrs Ellis's capabilities; she raised her concerns about competency and ability with Mrs Ellis directly. Mrs Ellis was so upset about this that she resigned. Andrew Waters persuaded her to withdraw her resignation. He told the claimant to raise any concerns about marketing with him and Gary Waters in future, not direct with Mrs Ellis.
35. On 5 April 2017 a sales manager from a vendor company contacted Andrew Waters to say that he was shocked at the claimant's response to him in an email exchange. The claimant asked the vendor company about how it was intending to comply with GDPR requirements, and was then critical of the approach set out in the response she received. She suggested that the vendor company may want to purchase GDPR services from the respondent. The vendor's sales manager described the claimant's correspondence as aggressive and said he was disappointed the communication was used as a sales opportunity (pages 159 and 170 to 174). The claimant agreed that her response was not professional.
36. On 27 April 2017 the claimant and Mrs Ellis had an exchange of emails in which Mrs Ellis said that she did not feel able to work with the claimant and that she did not appreciate her tone in emails and telephone calls (page 233).

Sickness absence and sickness procedure

37. On 13 April 2017 the claimant did not attend work or notify anyone that she was sick. Andrew Waters texted the claimant at 10.16 to ask where she was. The claimant did not text back (page 540).
38. We pause here to include some details about the respondent's sickness absence procedure and medical appointments.

39. The respondent had a staff handbook which included a sickness absence procedure (page 594). The procedure said:

“10.3 Reporting when you are sick

10.3.1 If you cannot attend work because you are sick or injured you should telephone your immediate supervisor as early as possible and no later than 30 minutes after the time when you are normally expected to start work on each day of absence.”

10.3.2 Absence that has not been notified according to the sickness absence reporting procedure will be treated as unauthorised absence.

10.3.3 If you do not report for work and have not telephoned we will try to contact you, by telephone and in writing if necessary. This should not be treated as a substitute for reporting sickness absence.

10.4 Evidence of incapacity

10.4.1 You must complete a self-certification form for sickness absence of up to seven calendar days. A self-certification form can be obtained from the Company and must be submitted to your immediate supervisor.”

40. The claimant did not remember seeing a staff handbook but was aware that she was required to notify the respondent of sickness absence as soon as possible and by no later than 9.30. Her contract of employment said this (page 96).

41. The claimant agreed that it was reasonable for the respondent to contact her if she was absent and had not telephoned to explain why. She agreed that this was not a substitute for reporting absence.

Medical appointments

42. The claimant had a number of medical appointments during the time she worked for the respondent. She did not ask permission to attend medical appointments: when she had a medical appointment, she told Andrew Waters about it or put it in her calendar, for example on 14 March 2017 at 08.00, 31 May at 16.00 and 13 June at 18.30. The claimant accepted that there was no occasion when the respondent did not permit her to attend a medical appointment.

43. The claimant said that she was not paid by the respondent for time off attending medical appointments. She did not provide particulars or evidence of dates on which this happened. Her payslips were in the bundle at page 607 onwards. These showed deductions from the claimant’s pay in May 2017 (page 609) for sick leave (when the claimant received statutory

sick pay) and in June 2017 (page 610) for unauthorised absence. She was not paid for unauthorised absence. We were not taken to any deduction of pay for time attending medical appointments. The respondent said and we accept that the claimant was paid for times when she had informed the respondent that she would be absent from work, including when she had medical appointments.

Review meeting

44. Returning to the chronology, on 8 May 2017 Andrew and Gary Waters had a review with the claimant. They were concerned that she had still not made any sales, other than one sale which had been set up by another employee who left the respondent's business, and which was passed to the claimant for her to close the sale (page 280). The value of the sale was £2,700. Informally, the respondent did not view this as a sale by the claimant as the customer had been passed to her at a late stage in the process having been secured by another sales consultant.
45. At the review meeting, Andrew and Gary Waters looked at the claimant's pipeline document which showed her customer leads and progress towards sales. They were concerned that it did not include anything that seemed likely to lead to a sale. Some of the potential customers were large multi-national organisations which the respondent thought were unrealistic targets for a company the size of the respondent.

Further sickness absences in May 2017

46. The claimant had further unauthorised sickness absences. On 9 May 2017 she did not attend work and said she had slept through her alarms. On 10 May 2017 the claimant texted Andrew Waters at 08.21 to say 'I didn't sleep through my alarms yesterday, they didn't go off, it's happened again today. I'll be there as soon as possible. Sorry' (page 540). The claimant said this was when she began to experience sleep problems. She thought these arose from taking Letrozole, a long-term cancer remission medication.
47. The claimant failed to attend work or notify the respondent that she was unwell on 19 May 2017. Andrew Waters texted her at 10.52 and the claimant replied at 14.00. In her text the claimant said she had 'another kidney infection' and that this was 'one of the many side effects of Letrozole, the long term remission cancer drug I'm taking'. This was the first time the claimant had mentioned this drug to the respondent. The respondent accepts that from this date it was aware that the claimant had previously had cancer.
48. The claimant was absent from work on 22, 23 and for most of 24 May 2017. She left a voicemail for Gary Waters on one of those days, but did not contact either Gary or Andrew Waters on the other days. On her return to work on 24 May 2017 she completed an absence form which covered absences on 19, 22, 23 and 24 May 2017, the reason given for the

absence was 'severe kidney infection ended up in urgent care centre'. It was accompanied by a copy of a prescription (pages 295-6).

The claimant's references

49. By mid-May, the claimant had still not made any sales and the respondent's concerns were growing. Andrew Waters decided to approach the claimant's previous employers for references. He hoped this would provide him with information to help him assess whether the claimant was capable of improving her performance. He called the main numbers for the last three employers listed on the claimant's CV and obtained contact details for the person responsible for providing references at each of these companies.
50. On 22 and 23 May 2017 Andrew Waters sent standard reference request forms to the claimant's three last employers.
51. The claimant told Gary and Andrew Waters on 30 May 2017 that she had a mammogram on 31 May 2017 and a consultant appointment on 2 June 2017 to discuss the results. The respondent understood these were routine appointments.
52. The claimant was absent from work without notifying the respondent on 1 June 2017.
53. Also on 1 June 2017 the respondent received a reference from one of the claimant's previous employers. It said that the claimant had been employed from the end of June 2015 to the end of January 2016, a period of 7 months. This was not consistent with what the claimant had said in her CV which was that she was employed there from July 2014 to February 2016, a period of over 18 months. Also, the claimant's CV gave detailed figures for her sales performances with this employer for two target years. She said she had achieved 73% of a six month target of £300,000 in 2014-2015 and 91% of an annual target of £600,000 in 2015-2016. As the claimant had been employed by this employer for less than a year, it was unclear where these figures had come from.
54. This first reference also said that the employer would not re-employ the claimant and answered 'no comment' to the question as to whether the claimant was honest and trustworthy. Andrew Waters telephoned the company which had provided the reference to double check the employment dates and they were confirmed as correct.
55. Andrew Waters received a second reference for the claimant on 1 June 2017. This was from the employer with whom the respondent had been told the claimant had a legal dispute. The reference said the claimant had been dismissed for performance reasons.
56. On Friday 2 June 2017 at 16.24 the claimant emailed the respondent about medical appointments. She said she had an appointment on

Monday 5 June at 16.00, adding, 'I think I've already told you about [this]'. Andrew Waters replied at 16.38 saying 'Alison, Neither Gary or myself are aware of your appointment on Monday.' The claimant replied saying 'Sorry, I thought I'd told you' (page 312).

Extension of probation

57. On 5 June 2017 the claimant's three month probationary period came to an end. Andrew and Gary Waters had been intending to speak to her about her probationary period and the concerns they had about her failure to make any sales and her unexplained absences, however the claimant did not attend work on 5 June 2017 and did not contact the respondent to explain her absence. A call with a customer on 5 June 2017 had to be cancelled because of the claimant not attending work. Andrew Waters texted the claimant saying, 'Yet again no-one has any idea of your whereabouts!!' (page 542).
58. In the claimant's absence, Andrew and Gary Waters met and decided to extend the claimant's probation period for a further period of 3 months. The respondent could not recover any of the recruitment fee paid for the claimant's recruitment, and they hoped that by giving the claimant more time to make sales they could recover some of the costs they had spent. They were still considering the references they had received.
59. The respondent wrote to the claimant to confirm the extension of her probationary period, it said this was because of her unauthorised absences and her sales performance being below expectations. The letter was sent under cover of an email from Andrew Waters which said, 'Alison Myself and Gary wanted to discuss this and a few other matters this morning, but for obvious reasons were unable to' (page 314).

Further sickness absences in June 2017

60. The claimant's sickness absences became more frequent in June and July 2017. On 8 June 2017 the claimant was absent from work without notifying the respondent. She did not text Andrew Waters again until 9 June 2017. (pages 541 to 542). In her text of 9 June the claimant said she had been oversleeping to the point of not waking up at all to anything. She said calcium strands had been found in her kidney.
61. On 12 June 2017, the claimant was due in work at lunchtime after a medical appointment, but did not attend work or notify the respondent to explain why. At 21.29 she replied to a text sent by Andrew Waters at 15.16. She said that her consultant had been delayed at the hospital and she had been put in a private room at the hospital and slept all day.
62. On 13 June 2017 the claimant completed an absence form which covered absences on 5, 8, 9 and 12 June 2017, the reason given for the absences was 'very ill, over tired due to dirty blood caused by kidney damage and scaring caused by Lexitrol [sic]. Time off also contributed to by ultra sound

x-ray and blood tests on 9th and MRI on 12th'. The form was accompanied by an appointment card for 10 July 2017 and a copy of a blood science request form (pages 323-324).

Medical report requests and review meeting

63. On 13 June 2017 Andrew Waters wrote to the claimant. He said that the respondent was concerned about the amount of unauthorised absence she had taken over the past month or so, and he asked her to complete a consent form authorising the respondent to obtain a medical report from her doctor. The respondent did not understand the reasons the claimant's had been giving for her ill health absences, and hoped that a letter from her doctor would help them to understand.
64. On 16 June 2017 the claimant did not attend work or notify anyone at the respondent that she was sick. When Andrew Waters texted the claimant to ask where she was, she replied to say that he should 'read back through his texts from last week'. This was a reference to a long text sent by the claimant on 9 June 2017 which included a reference to a medical investigatory procedure 'next Friday'. Andrew Waters said that the claimant should inform him or Gary Waters about absences and put in an absence form, rather than relying on a text from a week ago (page 544).
65. Andrew Waters also sent the claimant an email on 16 June 2017 chasing up the consent form. He said that if the claimant did not wish to authorise the respondent obtaining a medical report from her doctor, she could obtain a letter from her consultant detailing her absences and the reasons for them (pages 344 to 345).
66. One day in the week of 12 June 2017 when the claimant was in the office, she went to speak to Andrew Waters. He was on the phone. The claimant texted him on 17 June 2017 to say she had been 'ushered away' when she tried to have a conversation with him, and she had been seeking feedback for months. She said she had 'requested 4 very reasonable requirements to enable me at DSC, yet not one has been delivered upon. We'll discuss in depth on Monday.'
67. Andrew Waters replied to say he had not ushered the claimant away, he had been on the phone. He said they would put a date in the diary to have a conversation, but 'we never know if you are going to turn up to work or not and your communication is non existent. You have asked for one thing to be done, and that was the website which [the IT consultant] has now refused to do with you and has refunded us the first payment.'
68. The four reasonable requirements requested by the claimant were those she had asked for before joining the respondent. They were changes to the website, marketing assistance and remote and home working. The claimant said these were to enable her to do her job effectively, not because of her disability.

69. On 19 June 2017 Andrew Waters received the third reference from the claimant's previous employers. It said that she was employed from 8 February 2016 to 27 June 2016, a period of under 5 months. This was inconsistent with the claimant's CV which had said that she worked for this company for 9 months from February to September 2016.
70. On 19 June 2017 Andrew and Gary Waters met with the claimant. They raised the claimant's unauthorised absences and lack of sales (page 343). They discussed the claimant's pipeline and said they had concerns about how realistic it was. They told the claimant that they needed to see a substantial improvement in sales performance and that she needed to make a sale by the end of the month. Andrew Waters said that if the claimant did not make a sale by the end of June, the conversation they would be having would be about the respondent needing to consider ending her employment. The claimant did not say at this meeting that her sales target was not achievable. She explained that the problems she had with attending work were due to medication she was taking, but she said she would be stopping the medication. The respondent understood this would mean the problems would also stop.
71. In her evidence to us, the claimant said that her pipeline document for IT product sales showed realistic prospects which could be converted to sales (pages 251 and 384). The respondent said that the pipeline document did not show realistic prospects. We accept the respondent's evidence on this point as it was consistent with the pipeline document itself. It included a column showing how far towards completion of a sale a lead had progressed, expressed as a percentage of 100%. Most of the leads listed on the pipeline were recorded at 10% towards completion, a small number were at 20-30%, one was at 50% and none were higher than this.
72. The claimant emailed Andrew Waters on 20 June 2017 to say she had completed the consent form allowing access to her medical records and had left it on his desk (page 344). She said that because of a recent change of GP and because all her treatment had been done privately, the GP records may not contain all the information the respondent needed adding:
- "So to ensure you get all the information you need I have:
...
Called Dr Joss Adam's (my oncologists) secretary and asked her to send me the medical report from Joss outlining why he has taken me off Lexitrol [sic]"*
73. The consent form completed and signed by the claimant was dated 20 June 2017 and said, 'I give my permission for the company to seek a medical report from my doctor', then gave the name and address of her GP (page 346).

74. The following day, 21 June 2017, Dr Adams' secretary sent Andrew Waters a copy of the claimant's most recent clinic letter (page 350 and 351) by post.
75. The claimant said in her complaint that this letter was provided in response to a request by Andrew Waters made to her oncologist without her consent. At the hearing she accepted that she had got the dates wrong, and that the letter was sent at her request. We find that the copy letter was sent in response to the claimant's telephone request which she referred to in her email of 20 June 2017 and that she asked for it to be sent direct to the respondent. Andrew Waters did not contact the claimant's oncologist to obtain this letter.
76. The claimant's specialist's letter was dated 6 June 2017. It said,
- 'Unfortunately, it sounds like she had a lot of problems with her Letrozole. She started this in March but seems to have had a number of urinary and tract infections since then. She has now come off her medication...Mrs Raeside will stay off the Letrozole for now.'*
77. There was no mention in the consultant's letter of sleep issues, and the letter did not say that the claimant was unable to attend work.
78. On 23 June 2017 the claimant sent the respondent an email headed 'Extreme tiredness' which contained some general information from the internet regarding cancer-related fatigue (page 352-353). She said she had been taken off Letrozole because of the severe side effects.
79. Also on 23 June 2017, Andrew Waters wrote to the claimant's GP to obtain information about the claimant's condition and in particular to understand whether it could cause the claimant to have extreme tiredness (page 355). The letter enclosed the consent form completed by the claimant and set out the background as follows:
- "Alison has been an employee of DSC since March 2017 and has had considerable time off due to illness. She states that she had had issues with her kidneys due to previous cancer treatment and has been attending her GP, Urgent care centre and a consultant. However, we have numerous days that are, at present, classified as unauthorised absence due to no communication as to her whereabouts etc.*
- Alison states that these days of unauthorised absence are due to her illness, as mentioned above, causing her to sleep excessively to the point that phone calls and alarms do not wake her for work and that it causes her to sleep all night and day."*
80. The letter asked the GP to clarify:

"Firstly that you are aware of her condition as stated above, and also that this condition can cause these instances of unauthorised absence along with any specific recommendations you wish to make about her."

81. On 4 July 2017 Andrew Waters wrote to the claimant's oncologist, Dr Adams (page 386). He obtained the contact details from the copy letter he had been sent by Dr Adams' secretary. The letter said

'Thank you for sending me your correspondence dated 6 June 2017.

I was wondering whether you could give a little more detail as to the side effects of the treatment that Ms Raeside is receiving to enable us as employers to understand her situation.

Ms Raeside has been absent from work on numerous occasions as she says she is unable to be woken by her alarm, telephone etc due to the side effect of her treatment and various infections and what she says is 'dirty blood'. She describes episodes of 'unconsciousness for 19 hours' and sleeping for excess of 15 hours without being able to be woken.

Obviously this is concerning from her health point of view, but also is now impacting on her ability to do her job

I have already written to Ms Raeside's GP with her consent and understand if you need to obtain her consent to respond to me further.'

82. We find that after this letter was sent, the claimant's oncologist called the claimant to ask her permission to respond to it, and the claimant gave her permission. She said she did so because she had nothing to hide. In her statement the claimant thought this conversation occurred before 21 June 2017 but in her evidence she accepted that she got the dates wrong and we find that this call was in the context of the respondent's 4 July letter to Dr Adams.

83. In the event Dr Adams did not respond to the respondent's request.

Further sickness absences in July 2017

84. The claimant did not attend work on 3, 4, and 5 July 2017. Andrew Waters sent the claimant texts. She replied on 3 July saying that she had sleep paralysis and on 4 July saying that she had been asleep or unconscious.
85. On 5 July 2017 the claimant was working and had a meeting away from the office which was due to finish at 10.30. When she had not returned to the office by 12.15, Andrew Waters texted her. She said she had been meeting with and having lunch with a vendor. Andrew Waters texted to

say that sales were more important and long vendor lunches (that is, lunches with suppliers) were not a productive use of her time (page 547).

86. On 6 July 2017 the claimant completed a sickness absence form which covered absences on 3 and 4 July 2017, the reason she gave for the absences was 'sleep issues with unconscious like symptoms' (page 387).
87. On 7 July 2017 the respondent received a letter from the claimant's GP. It said that the claimant had recently transferred to the practice, they had not yet seen her and did not have her full history of correspondence from specialists. It said that the claimant was continuing with maintenance therapy under the guidance of a specialist oncologist. It continued:

"Alison has also suffered with recurrent urinary tract infections since she has been on treatment which have required courses of antibiotics and have been documented to cause excessive sleepiness when she has got an active infection...She is awaiting specialist assessment and further investigations because of these recurrent infections.

At the present time I am unable to comment on any specific recommendations about Miss Raeside..."

88. The claimant's GP letter of 7 July was the only medical evidence the claimant produced to the respondent or to the tribunal which referred to sleep issues. The GP letter did not refer to sleep paralysis or unconsciousness. It did not say that the sleep issues were caused by the claimant taking Letrozole. In any event, the claimant had stopped taking Letrozole prior to 6 June 2017, according to the letter from her consultant. There was no evidence before the tribunal that the claimant's sleep problems were caused by taking Letrozole or by the ongoing effects of having taken Letrozole previously.
89. In her evidence to us, the claimant said that the cause of her sleep problems had not been identified and that to identify the cause she would need to have attended a sleep clinic, which she did not want to do. She said she had been put on the narcolepsy scale. The claimant said that her sleep problems started the moment she started taking Letrozole. She was unclear about when this was but Dr Adam's letter said it was March 2017. She had stopped taking Letrozole by 6 June 2017. She said she had been told by a consultant that Letrozole damaged her brain or her brain proteins and this was why her sleep problems persisted after she stopped taking Letrozole. There was no evidence of this in the claimant's doctor's letters or in the GP records which were in the bundle. There was no medical evidence before us of narcolepsy or brain damage caused by Letrozole.
90. On 10 July 2017 the claimant did not attend work. Her calendar showed she had a medical appointment, but not until 15.15 (page 324 and 661). Andrew Waters texted the claimant saying, 'Yet again no-one has any idea of your whereabouts and you had a conference call at 9.30!' (page 548).

The claimant missed the conference call. The claimant texted in the afternoon to say that she had slept through the day.

91. On 11 July 2017 the claimant did not attend work. Andrew Waters texted the claimant saying, 'Again???' (page 548). When the claimant replied she said she would work from home that afternoon. She told the respondent that she would be doing this, she did not ask for permission.
92. We find that in saying 'Again???' and 'Yet again' in his texts, Andrew Waters was referring to the claimant not attending work again and not notifying the respondent of her absence. His use of these words does not suggest that he was sceptical about whether the claimant needed time off for medical appointments, or whether she was ill.
93. On 12 July 2017 the claimant did not attend work. Andrew Waters texted the claimant at 10.31 saying, 'Can you please update me what is going on?'. A second text at 11.29 said that he had cancelled the claimant's appointment with a customer for that day as he had no idea whether the claimant was intending to be there. The claimant replied and said, *'I'm sorry I'm ill, but you are not making things easier for me. We need to have a discussion about reasonable adjustments.'*
94. Andrew Waters replied to this text by email on 12 July 2017. He said that he and Gary Waters found the claimant's comment 'totally unfair' (page 400). The claimant misunderstood this email. She thought that the respondent was saying that she had been totally unfair by asking them to make reasonable adjustments. We find that the respondent was suggesting that it was unfair to say that they had not made things easier for her. They felt, as the email said, that they had been more than accommodating and patient with her. The email asked the claimant to elaborate on why she felt they were not making things easy, and what she would deem as reasonable adjustments. The claimant did not reply to these questions.
95. On 13 July 2017 the claimant did not attend work. It was the fourth day that week she had not attended work or notified her absence in line with the absence procedure. She texted Andrew Waters at 15.11 to say that she had just woken up. She said she had arranged for her lodger to sleep there to wake her up for the next day, and that the following week she would sleep at her mother's to ensure she got up (page 550). The claimant also replied by email to the respondent's email of the previous day. She apologised and said that she appreciated the respondent's patience 'until my body re-stabilises itself'. She listed the medical help she was getting and said again that she would be sleeping at her mother's the following week, so her mother could wake up her and see if she could reinstall a normal routine (page 404).
96. On 17 and 19 July the claimant did not attend work or notify anyone that she would not be attending. Andrew Waters texted her on 17 and 19 July, and then again on 19 July saying, 'We have heard nothing from you all

week'. The claimant replied at 15.39 on 19 July 2017 saying that she had just woken up. She said she had not got as far as her mother's. On 18 July 2017 the claimant had a meeting with a potential client from 09.30 to 11.00, but she did not attend work after the meeting.

Working from home

97. The claimant worked from home on occasion, for example on 11 July 2017. She also worked at home in the evenings when she wanted to.
98. When working from home, the claimant had access to her emails via Outlook Web Access. She could contact customers and potential customers via LinkedIn. However, she did not have access to all the respondent's systems when working from home, such as client databases. The respondent did not at that time provide full remote access to any of its employees. The claimant thought that systems should have been in place to facilitate her working fully from home. She was shocked to discover that the respondent did not have systems to facilitate full home working as her previous employers had done.
99. On 19 July 2017 the claimant had not attended work and was working from home. She texted Andrew Waters to say she needed access to her emails to do meeting follow ups and see her diary. She said, 'Just because I'm not well doesn't mean I've let go of the reins' and 'I've been asking for homework if since week one' [sic]. Andrew Waters replied to say that he had checked her email access and it was all up and running, and that he Gary Waters and other staff used Outlook Web Access with no issue.
100. The claimant sent a long reply which she said that she had every reason to have the same advantages as her competition and the respondent needed to bring their working practices into this millennium. She asked, 'Where is the sense or logic in your attitude towards this?'. Andrew Waters said that her message was disrespectful and he would not reply. The claimant replied, 'I'm not well Andrew and making reasonable adjustments to enable me to continue working throughout my illness is a requirement by law. Please reconsider.'
101. On 20 July 2017 the respondent's internal IT support officer sent an email to all employees asking if they would like to test a software product which would allow them to log onto the respondent's entire system remotely. The claimant did not reply.

The claimant's sales performance

102. By 20 July the claimant had still not made any sales and the respondent had not seen any evidence that she was close to making any sales. She had not made any sales by the end of June as required at the review meeting on 19 June.

103. During her time working for the respondent, the claimant closed two sales. The first was the sale which had been set up another employee who left the respondent's business, and the client was passed to the claimant to close the sale (page 280). The second was a sale to the same client (page 292). The sales were valued at £2,700 and £3,600.
104. Therefore, during the first quarter of her employment with the respondent (March to May 2017) the claimant made sales of £6,300 against a target of £40,000. She made no other sales during that quarter. From 23 May 2017 and during the part of the second quarter in which the claimant worked for the respondent, she made no sales at all. None of her 'warm' pipeline converted to sales, either while the claimant was working for the respondent or after she left.
105. In her evidence to us, the claimant said that as her target was larger than the other sales consultants, she had to take a different approach which was, rather than selling individual products with a low profit margin, she had to sell fewer larger deals, and these took longer to set up and close. However, at the time her targets were set, she did not suggest that this could impact on her ability to generate sales of £40,000 in the first quarter of her employment.

Disciplinary proceedings

106. Andrew and Gary Waters discussed the claimant's position and decided that the respondent could not continue to tolerate the claimant's complete lack of sales, particularly as she was being paid a high salary. They remained concerned about the references they had received. They decided to start the respondent's disciplinary procedure.
107. The respondent wrote to the claimant by email and post to her home address on 19 July 2017 to invite her to a disciplinary meeting to consider the references which had been received (copies were enclosed), and the claimant's failure to bring any revenue into the business (other than one purchase order given to her when another employee left). The letter warned that a possible outcome was termination of the claimant's employment (page 410).
108. The disciplinary meeting was due to take place on 26 July 2017 at 14.30. The respondent said that the meeting had deliberately been arranged in the afternoon to take account of the claimant's ongoing problems with waking up, and asked her to let the respondent know if she had any other specific needs for the hearing. The respondent put a diary entry for the meeting into the claimant's work calendar.
109. The claimant was on holiday from 20 July to 25 July inclusive.
110. The claimant did not attend work on 26 July and she did not attend the disciplinary hearing. She did not provide any explanation for her absence. The respondent rescheduled the disciplinary hearing for 28 July 2017 at

- 15.00 (page 418). The claimant replied by email on 26 July saying that she had been ill and was having tests to try 'to discover what is causing the extreme exhaustion' (page 419).
111. The claimant did not attend work on 27 July 2017 and did not contact the respondent to explain her absence. Andrew Waters sent a text message to the claimant asking her to confirm that she would be attending the hearing on 28 July. She did not reply on 27 July 2017.
112. On 27 July 2017 Mrs Ellis sent Andrew Waters screenshots from the claimant's Facebook page. Mrs Ellis was a Facebook friend of the claimant's. The claimant's Facebook page showed the claimant engaging in social activities including going to a garden party and having a helicopter ride on a day after she had not attended work (15 July 2017) and included a post about going to a garden party on 20 July 2017, a day after she had not attended work (pages 509 and 511).
113. The claimant did not attend the disciplinary hearing on 28 July. She sent a text at 14.47, 13 minutes before the hearing was due to start, saying that she was unable to attend because she was unwell. She said, 'I have nobody to blame but myself' because she had shared a bottle of wine with a client the previous day which she was 'seriously paying for today'. She said she was still suffering from the side effects of the change in the cancer medication. The text also included points responding to the issues to be considered at the disciplinary hearing (page 555).
114. The disciplinary hearing was rescheduled for 1 August 2017. The claimant did not attend work on 31 July 2017 and did not notify the respondent of why she was not attending work.
115. The claimant had 10 days of unauthorised absence in July.
116. The claimant did not attend work on 1 August and she did not attend the disciplinary hearing. She did not notify the respondent as to why she did not attend. She did not answer her phone when the respondent tried to call her. As the hearing had been rescheduled twice, Andrew Waters decided to go ahead with it, however he sent an email to the claimant to let her know this and giving her until 17.00 to send any information she would like to be taken into account (page 429). The claimant did not provide any further information.
117. Andrew Waters decided that the claimant should be dismissed because of her poor sales performance and unsatisfactory references. This was set out in a letter to the claimant on 2 August 2017 (pages 433 to 435). We accept the respondent's description of the claimant's sales performance as non-performance rather than under-performance. The claimant did not achieve any sales other than two small sales for a client which was passed to her by another employee just before completion of the first sale.

118. The respondent's grounds of resistance said that another reason for the claimant's dismissal was her unauthorised absences and the failure to explain them. Unauthorised absences were also referred to in the letter informing the claimant that her probationary period was to be extended. However, this was not a reason given in the dismissal letter sent to the claimant at the time of dismissal. Andrew Waters said, and we accept, that if the claimant had been bringing in revenue for the respondent, the situation would have been dramatically different. The respondent was keen for the claimant to succeed so they could recover some of the money they had spent on recruiting her; the claimant's failure to bring in any revenue at all was a very major concern for the respondent. We accept the respondent's evidence that the reasons for dismissal were as set out in the dismissal letter.

Appeal

119. The claimant appealed against her dismissal on 4 August 2017 (page 436) and she also submitted a grievance. The appeal was to be considered by Gary Waters but he was on holiday. Andrew Waters emailed the claimant on 10 August 2017 to explain this, and he wrote to her on 16 August 2017 regarding arrangements for the appeal hearing.
120. The appeal hearing was scheduled for 24 August 2017 to be conducted by Gary Waters with an external HR provider attending to take notes. The claimant was informed of her right to be accompanied (page 447).
121. On 17 August 2017 the claimant emailed the respondent to say that it was her grandmother's birthday the next day in Plymouth, and that she would then be in Cornwall 'for a week or possibly two'. She asked to reschedule the hearing to 6 September 2017.
122. Andrew Waters wrote to the claimant on 18 August 2017 to say that the appeal hearing would not be rescheduled. He sent this by email (page 450-451). He emailed the claimant again on 21 August 2017 to confirm that the hearing would take place on Thursday 24 August 2017 (page 456). He said that the appeal would proceed although the claimant was not intending to attend.
123. On 23 August 2017 the claimant called Andrew Waters to ask for the details of the external HR provider. She said that she would be attending the appeal hearing that day. Andrew Waters said that the appeal was not scheduled for that day, it was scheduled for 24 August. Later the same day, the claimant emailed the respondent to ask for the hearing to be dealt with by Skype as she was in Cornwall. The respondent declined to do so as it was concerned about security of the call and whether anyone would be listening in.
124. Andrew Waters emailed the claimant on 23 August 2017 replying to an email from her of the same date in which she said she made a subject access request (pages 465-466). He attached some documents, but said

that her email did not constitute a valid subject access request and the respondent would not be replying to it. He also said that all correspondence should be through him and in writing and that the respondent would not deviate from this approach. The claimant replied to say that she could not open the attachments (page 470). Andrew Waters replied to say that he had checked the attachments. He re-sent the attachments as an email (page 469).

125. The claimant provided a written document to be considered at the appeal (pages 475 to 495). Gary Waters considered the appeal on 24 August 2017. He considered the documents sent by the claimant. He upheld the decision to dismiss the claimant and she was informed of this in a letter dated 31 August 2017.

The law

126. Disability is a protected characteristic under section 9 of the Equality Act 2010. Cancer is a disability pursuant to paragraph 6 of schedule 1 of the Equality Act.

Direct disability discrimination

127. Section 13 of the Equality Act provides:

“(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.”

128. Section 23(1) provides that:

“On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case.”

Discrimination arising from disability

129. Section 15(1) of the Equality Act 2010 provides that 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.*

130. There are four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and anor v Dunn EAT 0234/16:

- i. there must be unfavourable treatment;
- ii. there must be something that arises in consequence of the claimant's disability;

- iii. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
 - iv. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
131. The EHRC Employment Code says that unfavourable treatment should be construed synonymously with 'disadvantage'. In Williams v Trustees of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230, SC the Supreme Court held that little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in section 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions of the Equality Act. It accepted that the EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage section 15.
132. In relation to the third element, the causal link between the 'something arising' and the unfavourable treatment, the EAT in Secretary of State for Justice and anor v Dunn held that motive is irrelevant and, in Praisner v NHS England and anor 2016 IRLR 170, EAT, that:

“there may be more than one reason or cause for impugned treatment....The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.’

Reasonable Adjustments

133. The Equality Act also imposes on employers a duty to make reasonable adjustments. The duty comprises three requirements. Here, the first requirement is relevant, this is set out in sub-section 20(3). In relation to an employer, A:

“(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

134. Paragraph 20(1)(b) of Schedule 8 of the Equality Act provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage.

Harassment

135. Under section 26 of the Equality Act, a person (A) harasses another (B) if

“a) A engages in unwanted conduct related to a relevant protected characteristic, and

b) the conduct has the purpose or effect of –

i) violating B’s dignity, or

ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

136. In deciding whether conduct has the effect referred to, the tribunal must take into account:

“a) the perception of B;

b) the other circumstances of the case;

c) whether it is reasonable for the conduct to have that effect.”

Burden of proof

137. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision.”

138. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of disability. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

139. In Igen v Wong [2005] ICR 931 the court set out ‘revised Barton guidance’ on the shifting burden of proof. We bear in mind that the court’s guidance is not a substitute for the statutory language and that the statute must be the starting point.

140. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. “Something more” is needed, although this need not be a great deal: “In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred...” (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

141. In order to establish a prima facie case of discrimination under section 15 and for the burden of proof to shift to the respondent, a claimant must prove that she has a disability within the meaning of section 6, that the respondent had actual or constructive knowledge of her disability and that the respondent treated her unfavourably. It is also for the claimant to show that 'something' arose as a consequence of her disability and that there are facts from which it could be inferred that this 'something' was a reason for the unfavourable treatment. The claimant needs to satisfy the tribunal in respect of each of these elements for the burden of proof to shift to the respondent.
142. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof.
143. Where the burden of proof shifts, the respondent can defeat a complaint under section 15 by proving either that the reason or reasons for the unfavourable treatment were not the 'something arising' in consequence of the disability, or that the treatment was justified as a proportionate means of achieving a legitimate aim.

Conclusions

144. We have applied the legal principles to our findings of fact and reach the following conclusions on the issues for determination.

Disability

145. The respondent has conceded that the claimant was disabled and accepts that it had knowledge of her disability from 19 May 2017. The claimant contends that the respondent had knowledge of her disability from an earlier date. We have found that the claimant did not inform the respondent of her disability at her interview.

Direct discrimination because of disability

146. We have first considered whether the treatment complained of by the claimant in her complaint of direct disability discrimination happened as alleged by the claimant and whether it amounted to less favourable treatment by the respondent. These are issues 14.6a, b and c in the issues section above.
147. Issue 14.6a: The claimant said the respondent subjected her to less favourable treatment by dismissing her. We have found that the claimant was dismissed by the respondent. A dismissal amounts to less favourable treatment in the sense that it was disadvantageous to the claimant.

148. Issue 14.6b: The claimant also said the respondent failed to provide support for the claimant:
- 148.1. by not paying the claimant when she took time off to attend medical appointments; and
 - 148.2. by adopting a sceptical attitude that required the claimant to prove that she had attended medical appointments etc. before any permission was granted to allow the claimant to attend appointments);
 - 148.3. a further complaint that the respondent failed to give the claimant time off to attend medical appointments was withdrawn at the hearing.
149. We have not found that there were any deductions from the claimant's pay for time off to attend medical appointments.
150. We have not found that the respondent adopted a sceptical attitude to the claimant's requests for time off to attend appointments. We have found that Andrew Waters said 'Yet again' in two of his texts and 'Again???' in another. We have found that this was because the claimant had failed on a number of occasions to attend work without notifying the respondent of her absence, not because he was sceptical about her medical appointments or because he was sceptical about whether she was ill. In his texts Andrew Waters was expressing surprise that the claimant had not attended work again and had not notified the respondent that she was unwell.
151. We have also found that the claimant was not required to prove that she had medical appointments before being allowed the time off. We have found that she did not request permission to attend them. When she had appointments, she told the respondent she would be attending them or put them in her work calendar. We have found that the claimant did provide an appointment card on one occasion with her absence form, but this was not requested by the respondent.
152. We have found that the letters sent by the respondent to the claimant's GP and specialist recorded what the claimant had told the respondent about her ill health, saying 'she states', 'she describes' and 'she says'. However, this was factual. The respondent was recording what the claimant had told them, and asking the claimant's doctors to confirm the medical position. The letters were not, as the claimant suggested, implying that she was fabricating things. We conclude that the respondent was not displaying a sceptical attitude about what the claimant was saying.
153. We conclude therefore that the treatment at issue 14.6b did not happen as alleged by the claimant.
154. Issue 14.6c: The claimant alleged that Andrew Waters wrote to the claimant's oncologist prior to 6 June 2017 without her permission and requested that he provide details of the claimant's medical record did not occur as alleged. The claimant accepted that she got this allegation wrong.

We have found that she asked her oncologist's secretary to send a copy of the latest clinic letter to the respondent. Andrew Waters did not write to the claimant's oncologist prior to 6 June 2017. This alleged act of less favourable treatment did not happen.

155. We have found that the dismissal of the claimant was an act of less favourable treatment which happened as alleged by the claimant. We have not found that the other alleged acts of less favourable treatment happened as alleged by the claimant.
156. We therefore have to consider whether the claimant's dismissal was because of her disability. Applying the legal principles regarding the burden of proof, we have to consider whether the claimant has proved primary facts from which we could properly and fairly conclude that the difference in treatment was because of the claimant's disability.
157. We conclude that the claimant has not proved evidence from which we could properly and fairly conclude that the decision to dismiss was because of her disability. The claimant at one stage relied on difference in treatment between herself and Mrs Ellis, who also had breast cancer. However, Mrs Ellis would not be a comparator for the claimant as both had cancer. A comparator would be a person in circumstances not materially different to the claimant who did not have cancer.
158. The reasons given by the respondent for the dismissal of the claimant were her non-performance against her sales targets and unsatisfactory references. These are circumstances which are material to the claimant's case. A comparator would be someone who had the same or similar levels of non-performance and/or who someone whose references the respondent considered to be unsatisfactory. We did not have any evidence that the respondent did or would have treated someone with those circumstances but without cancer any differently to the claimant.
159. Even if we had found that the burden of proof had shifted to the respondent, we would have accepted that the respondent's reasons for the claimant's dismissal, that is the claimant's non-performance against sales targets and unsatisfactory references, were non-discriminatory reasons for her dismissal.
160. For these reasons, the complaint of direct disability discrimination fails.

Discrimination arising from disability

161. The claimant says her sickness absence was "something arising" from her disability. We have to consider whether the claimant's sickness absence was 'something arising' from her disability, that is, whether it arose in consequence of breast cancer or breast cancer treatment. The claimant says that her sleep problems were caused by Letrozole, a medication she was taking because of cancer.

162. There was very little medical evidence before us about the reasons for the claimant's absence from work and the medical cause of her sickness absence. She did not obtain a fit note from her GP for any of the absences. The reasons she gave on her self-certification forms were 'severe kidney infection' (May), "very ill, over tired due to dirty blood caused by kidney damage and scaring caused by Lexitrol. Time off also contributed to by ultra sound x-ray and blood tests and MRI (June) and 'sleep issues with unconscious like symptoms (July).
163. We have found that the claimant started taking Letrozole from March 2017 and that by 6 June 2017 she had stopped taking it. These dates do not coincide with the dates of the claimant's absences from work which were increasing over the period May to July; the claimant had 4 days absence in May, 6 days in June and 10 days in July. Most of the claimant's absences in June and all of her absences in July occurred after she had stopped taking Letrozole.
164. The letter from the claimant's specialist refers to the claimant having problems with Letrozole but said this caused 'urinary and tract infections'. It does not refer to sleep problems at all.
165. The letter from the claimant's GP is the only medical evidence which refers to sleep problems. It was written by a GP at a new surgery which had not at that stage seen the claimant. It says that the claimant's urinary tract infections, not Letrozole, have been documented to cause excessive sleepiness when she has got an active infection. The GP did not describe sleep paralysis, unconscious-like symptoms or narcolepsy. The letter might have been expected to mention these severe symptoms if the GP had been aware of them. There was no mention of these severe symptoms in the GP records.
166. The claimant provided some information from the internet but this was not specific to her case and did not refer to sleep paralysis, unconscious-like symptoms or narcolepsy. The claimant in her evidence said that the cause of her sleep paralysis or unconscious-like symptoms had not been identified, that it would have required investigation at a sleep clinic to identify the cause, and that she did not wish to do this. The claimant said she had been told that Letrozole had damaged her brain or brain proteins and this was why the sleep problems persisted after she had stopped taking Letrozole. However, there was no medical evidence before us to support this.
167. Having assessed the evidence before us, we conclude that it is not possible for us to reach a conclusion on the balance of probabilities that the claimant's sickness absence because of sleep problems was something arising from cancer or cancer treatment. There was no evidence that the claimant's sleep problems were caused by Letrozole or by the ongoing effects of having taken Letrozole.

168. If we had concluded that the claimant's sickness absence was something arising in consequence of cancer, we would have gone on to consider whether the unfavourable treatment complained of by the claimant was because of her sickness absence. The only unfavourable treatment which we have found occurred as alleged by the claimant is her dismissal. Again, we would have accepted the respondent's evidence that the claimant's dismissal was because of her non-performance against sales targets and unsatisfactory references.
169. If we had found that the claimant's unauthorised sickness absence played any part in her dismissal, we would have found that her dismissal was a proportionate means of achieving a legitimate aim, namely the respondent's need to know where its employees are during working hours for reasons including managing the business, meeting customer demands, employee safety and ensuring that there are legitimate reasons for absence.
170. The complaint of discrimination arising from disability therefore fails.

Reasonable adjustments

171. The claimant said that the respondent had a provision, criteria and/or practice (PCP) of requiring the claimant to work from the office instead of working from home.
172. We have found that the claimant did work from home from time to time, for example on 11 and 19 July 2017, and that she was able to do so by telling the respondent that she would. She did not have to ask the respondent's permission. We conclude therefore that the respondent did not have a PCP of requiring the claimant to work from the office instead of working from home.
173. The absence of a PCP means that this complaint must fail. For completeness, we have gone on to consider the other elements of the complaint. As the claimant could work from home when she chose to do so, she was not at a substantial disadvantage compared to people who were not disabled by not having sufficient time in the office to carry out her work.
174. The claimant has accepted that the requirements she requested of the respondent before her employment started were made for business reasons, to enable her to do her job efficiently, not because of her disability. They were made because the claimant felt that the respondent should have had systems to allow full access for remote working. The claimant felt that this was in line with modern workplace approaches including those of the respondent's competitors.
175. The claimant did not tell the respondent that she was disadvantaged because of her disability by not being able to work from home. When she referred to reasonable adjustments in texts on 12 and 19 July 2017 the

respondent asked her to say what reasonable adjustments she was seeking and she did not respond. When the respondent's IT officer invited staff to test a system which would have permitted full remote access, the claimant did not reply.

176. There was no evidence before us that the respondent could reasonably have been expected to have known that the claimant was likely to have been placed at a disadvantage by her disability in respect of the need for home working.
177. The complaint of failure to make reasonable adjustments fails.

Harassment related to disability

178. We have considered the claimant's complaints of disability-related harassment which are set out in paragraphs 14.20a to 14.20e in the issues section above. More detail about these complaints was given in the claimant's further particulars of 26 July 2018.
179. Issue 14.20a: The claimant's further information dated 26 July 2018 says that this complaint of harassment refers to the emails sent to her by Andrew Waters on 2 June 2017 (page 312) and 5 June 2017 (page 313). (She also referred to an email sent on 30 May 2017, but there was no email of that date from the respondent.) The claimant said that these two emails had the purpose of humiliating her and creating a hostile environment.
180. The email of 2 June from the respondent to the claimant was an email sent in response to an email from the claimant saying she thought the respondent was aware about an upcoming appointment. It said, 'Alison, Neither Gary or myself are aware of your appointment on Monday.' The claimant replied saying, 'Sorry, I thought I'd told you.'
181. The respondent's email was related to an oncology appointment and was therefore related to the claimant's disability.
182. The respondent's email was in neutral/factual terms. It was sent in response to the claimant saying she thought she had told the respondent about an appointment, and it clarified the position to the claimant which was that she had not. The email cannot be said to have been unwanted conduct. It did not have the purpose of humiliating the claimant or creating a hostile environment for her, it had the purpose of clarifying something to the claimant.
183. (The claimant did not rely on the effect of the email. In any event, there was no evidence that she found the email humiliating or that it created a hostile environment. Her reply to the email was in very matter of fact terms. Even if the email had those effects, it was not reasonable for it to do so, considering the context in which it was sent and in particular when read together with the email from the claimant to which it was responding.)

184. We conclude that this email was not an act of harassment by the respondent.
185. The email of 5 June 2017 said, 'Alison, Myself and Gary wanted to discuss this and a few other matters this morning, but for obvious reasons were unable to'. It referred to the fact that the claimant had not attended work that morning.
186. This email was related to the claimant's sickness absence on 5 June 2017. The claimant said in her absence form that the reason for her absence on this day was because she was 'very ill and over tired due to dirty blood caused by kidney damage and scaring caused by Lexitrol'. We have decided that this absence was not something arising from disability, for the reasons set out above. For the same reasons, we conclude that this email relating to sickness absence was not related to the claimant's disability.
187. Even if we had found that this email was related to the claimant's disability, we would not have found that it amounted to unwanted conduct or that it had the purpose of humiliating the claimant or creating a hostile environment for her. Again, there was no evidence that her perception was that the email was humiliating or that it created a hostile environment for her. If it had those effects, it was not reasonable for it to do so, considering what it said and the fact that its contents were in neutral/factual terms.
188. We conclude that this email was not an act of disability-related harassment by the respondent.
189. Issue 14.20b: The claimant's further information said that this complaint of harassment refers to the letter sent by Andrew Waters to the claimant's oncologist on 4 July 2017 (page 386). The claimant said that the letter had the effect of creating an intimidating and degrading environment for her.
190. The letter was related to the claimant's disability as it was sent to the claimant's oncologist.
191. The claimant had expressly consented to the respondent obtaining a report from her GP. That consent form did not extend to her oncologist. However, the claimant had asked her oncologist's office to send some correspondence to the respondent, and this had been sent directly to Andrew Waters, not via the claimant. Andrew Waters obtained the oncologist's contact details from the correspondence he had with the oncologist's office which was sent at the request of the claimant. His letter was clearly a follow up to that correspondence. He made clear in his letter that he understood that express consent from the claimant may be required. On receipt of the letter, the claimant's oncologist called her to ask for her permission, and she gave it.
192. In the circumstances, the respondent's letter to the claimant's oncologist cannot be said to have been unwanted conduct. Further, it did not have

the effect of creating an intimidating and degrading environment for her, the claimant's perception about this request was that she had nothing to hide. If the respondent's letter did have those effects, it was not reasonable for it to do so, considering the circumstances.

193. We conclude that this letter was not an act of harassment by the respondent.
194. Issue 14.20c: The claimant's further information said that this complaint of harassment referred to the letter sent by Andrew Waters to the claimant's GP on 23 June 2017 (page 355). The claimant said that the email had the effect of making her feel intimidated, constantly harassed and like she was walking on egg shells.
195. The respondent's letter to the claimant's GP was mainly focused on the claimant's sickness absence and sleep problems which we have decided were not related to the claimant's disability. However, it referred to the claimant's previous cancer treatment and was therefore related to her disability.
196. The claimant had expressly consented to the respondent obtaining a report from her GP and had completed a consent form when requested by the respondent. We have found that the respondent's letter to the claimant's GP recorded what the claimant had told the respondent about her ill health in a factual manner. It was not, as the claimant suggested, implying that she was fabricating things.
197. In the circumstances, the respondent's letter to the claimant's GP cannot be said to have been unwanted conduct. If the claimant's perception was that the respondent's letter to her GP made her feel intimidated, constantly harassed and like she was walking on egg shells, it was not reasonable for it to do so, considering the circumstances.
198. We conclude that this letter was not an act of harassment by the respondent.
199. Issue 14.20d: The claimant's further information said that this complaint of harassment referred to the email sent by Andrew Waters to the claimant on 12 July 2017 (page 400). The claimant said that the email had the effect of creating an offensive environment that was extremely degrading for her.
200. In this email the respondent referred to reasonable adjustments. We conclude that the respondent's email was related to the claimant's disability.
201. The email of 12 July 2017 to the claimant was responding to a text from the claimant which said, 'I'm sorry I'm ill, but you are not making things easier for me' and concluded by saying, 'We need to have a discussion about reasonable adjustments'. Andrew Waters' reply started by saying

'Myself and Gary find your comment below totally unfair'. The claimant said that the respondent was saying that she had been totally unfair by asking them to make reasonable adjustments. We have found that the claimant misunderstood this, and the respondent was suggesting that it was unfair to say that they had not made things easier for her. They felt, as the email concluded, that they had been more than accommodating and patient with her. They asked her to elaborate on why she felt they were not making things easy, and what she would deem as reasonable adjustments.

202. We also conclude that the email was unwanted conduct in that it set out a different view to that put forward by the claimant. However, we do not find that it had the effect of creating an offensive and extremely degrading environment for the claimant. The claimant had misunderstood the email, and if it did have this effect, it was not reasonable for it to do so.
203. We conclude that this email was not an act of harassment by the respondent.
204. Issue 14.20e: The claimant's further information said that this complaint of harassment referred to the emails sent by Andrew Waters to the claimant on 18, 22, 23 and 24 August 2017 when she was asking for the appeal hearing to be postponed. There were no emails from the respondent to the claimant on 18, 22 or 24 August 2017. We understand this complaint to be about the emails from the respondent on 21 and 23 August 2017 (pages 456, 465, 466, 469 and 470). The claimant said that these emails had the effect of degrading her as no consideration was given to the fact that breast cancer medication can bring on extreme side effects and bouts of sickness which the claimant had no control over.
205. These email exchanges were about the arrangements for the claimant's appeal hearing and her request to postpone the hearing. This request was made and the emails were sent because the claimant was on holiday in Cornwall at the time of the hearing, not because she was unwell or for any reason related to the claimant's disability. We conclude that the respondent's emails which are the subject of this complaint were not related to the claimant's disability.
206. We conclude that these emails were not acts of harassment by the respondent.
207. The claimant's complaints of harassment fail.
208. The employment judge apologises to the parties for the delay in promulgating this reserved judgment. Conclusion of the judgment was delayed by changes in working arrangements required by the covid-19 measures.

Employment Judge Hawksworth

Date: 1 June 2020

Judgment and Reasons

Sent to the parties on: ..05/06/2020....

.....
For the Tribunal Office

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EMPLOYMENT TRIBUNALS

Claimant:

Miss Alison Raeside

v

Respondent:

Data Systems (Computers)
Limited

Heard at:

Reading

On: 6, 7, 8, 9, 10, 13 January
2020 and in chambers on
14 January 2020

Before:

Employment Judge Hawksworth
Mrs A E Brown
Mr J Appleton

Appearances

For the Claimant:

In person

For the Respondent:

Miss S Bowen (counsel)

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that the claimant's complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and disability-related harassment fail and are dismissed.

REASONS

The claim

1. The respondent is a company which provides IT solutions and services to businesses. The claimant was employed by the respondent as a security sales specialist from 6 March 2017 to 2 August 2017 when she was dismissed.
2. The claimant's claim form was presented on 27 October 2017 after a period of Acas conciliation from 21 September 2017 to 28 September 2017. The claimant's complaints are of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and disability related harassment.
3. The respondent presented its ET3 on 1 December 2017. It defends the claim.

Hearing and evidence

4. The hearing took place over 7 days. We took the first day for reading; we read the witness statements and the documents referred to in the statements.
5. We began hearing evidence on the morning of 7 January 2020. We heard evidence from the claimant on 7, 8 and 9 January 2020. On 9, 10 and 13 January 2020 we heard evidence from witnesses for the respondent (in this order):
 - Mr Andrew Waters, a director and shareholder of the respondent;
 - Mr Jahazeb Butt, a Business Development Manager with the respondent
 - Mr Joel Temple-Joyce, a Business Development Manager with the respondent
 - Mr Gary Waters, a director and shareholder of the respondent;
6. In these reasons for clarity we have referred to Mr Andrew Waters as Andrew Waters and Mr Gary Waters as Gary Waters.
7. We also read the statement of Mrs Ellis, the respondent's marketing executive. Sadly, since making the statement, Mrs Ellis has died. We read her statement and have attached such weight to it as we thought appropriate.
8. We also read the statement of Ms Melody Ambrose, another of the respondent's witnesses. Ms Ambrose was not able to attend, and the respondent did not propose to rely on her evidence. However, the claimant asked that we read the statement, and the respondent had no objection to us doing so.
9. There was a bundle of 656 pages which was prepared by the respondent and agreed by the claimant. The respondent had redacted some of the documents in the bundle for client confidentiality, and some pages were illegible because of the size of the text. We dealt with these issues as they came up; the respondent's representative provided complete or clearer copies of any pages as required. A fully unredacted copy of the bundle was provided as the bundle for the witness table and was used by the tribunal in deliberations.

The issues

10. The issues for determination were agreed by the parties at a preliminary hearing on 15 June 2018 and set out in the case management summary.
11. On 3 July 2018 the respondent's representatives wrote to the tribunal and the claimant to confirm that the respondent concedes that the claimant was disabled by virtue of her being in remission from treatment from cancer. The respondent accepts that it had knowledge of her disability

from 19 May 2017. The respondent set out a number of limitations on this concession in its email, including that it did not accept that the claimant has any other disabling condition or that it had knowledge of any symptoms or substantial disadvantage that the claimant had as a consequence of her disability.

12. On 26 July 2018 the claimant made an application to amend her claim to include complaints of harassment. On 22 August 2018 Employment Judge Gumbiti-Zimuto gave permission for the claimant to amend her claim to include some complaints of harassment. The harassment complaints were summarised in a case management order dated 28 September 2018, more details of each complaint were in the claimant's application of 26 July 2018. These complaints have been included in the issues section below.
13. On the first and second days of the hearing, the tribunal discussed with the parties the issues to be determined in the complaint of discrimination arising from disability. The claimant confirmed that the 'something arising' from disability was her sickness absence. The incidents of unfavourable treatment for the purpose of this complaint are the same as the incidents of less favourable treatment for the direct discrimination complaint. In short, the claimant says that she was subjected to unfavourable or less favourable treatment because of her disability or because of her sickness absence arising from disability. This was set out in paragraphs 7.1 and 7.2 of the case management summary and confirmed by the claimant on the second day of the hearing, on 7 January 2020.
14. The issues for determination by the tribunal are below. The section numbers referred to are from the Equality Act 2010.

Time limits

- 14.1. The claim form was presented on 27 October 2017 following a period of ACAS Early Conciliation commencing on 21 September 2017 and ending on 28 September 2017. Accordingly and bearing in mind the effects of ACAS Early Conciliation, any act or omission which took place before 22 June 2017 is potentially out of time. Accordingly, does the Employment Tribunal have jurisdiction to hear complaints arising before this date?
- 14.2. Is it just and equitable for the employment tribunal to extend the ordinary time limit for the claimant to issue her claim?

Disability

- 14.3. The respondent has conceded that the claimant was disabled and accepts that it had knowledge of her disability from 19 May 2017. The respondent's concession is subject to the limitations set out in the email from Herrington Carmichael LLP to the Employment Tribunal of 3 July 2018.

- 14.4. The claimant contends that the respondent had knowledge of her disability from an earlier date.
- 14.5. To the extent necessary, what date did the respondent have knowledge of the claimant's disability?

Section 13: direct discrimination because of disability

- 14.6. The claimant alleges that she was subjected to the following less favourable treatment by the respondent:
- a. Dismissing her;
 - b. Failing to provide support for the claimant by not paying the claimant when she took time off to attend medical appointments, by adopting a sceptical attitude that required the claimant to prove that she had attended medical appointments etc. before any permission was granted to allow the claimant to attend appointments (this complaint also included an allegation that the respondent failed to give the claimant time off to attend medical appointments, this was withdrawn at the hearing);
 - c. Without the claimant's permission, Andrew Waters writing to the claimant's oncologist prior to 6 June 2017 and requesting that he provide to the respondent details of the claimant's medical record.
- 14.7. Did each of these alleged acts occur as alleged or at all?
- 14.8. Did each of these alleged acts amount to less favourable treatment?
- 14.9. Was any of the alleged acts of less favourable treatment because of the claimant's disability?
- 14.10. Has the respondent treated the claimant less favourably than it treated or would treat a comparator? (The claimant appears to be relying on Mrs Ellis as a comparator. Is Mrs Ellis an appropriate comparator?)
- 14.11. Has the claimant proved primary facts from which the employment tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's disability?
- 14.12. If so, what is the respondent's explanation and does it prove a non-discriminatory reason for any proven treatment?

Section 15: discrimination arising from disability

- 14.13. The claimant says her sickness absence was "something arising" from her disability.

- 14.14. Did the respondent treat the claimant unfavourably because of the "something arising" in consequence of the claimant's disability? The claimant relies on the treatment set out in paragraph 14.6 above.
- 14.15. Was the respondent's treatment of the claimant a proportionate means of achieving a legitimate aim?

Section 20 and section 21: reasonable adjustments

- 14.16. The following provision, criteria and/or practice (PCP) is relied on by the claimant: requiring the claimant to work from the office instead of working from home.
- 14.17. Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The claimant will say that the claimant's business as usual activities included the claimant spending time out of the office with clients, the claimant's medical condition also meant that the claimant spent time out of the office receiving medical treatment, the claimant therefore did not have sufficient time in the office to carry out the work that she was required to do to perform the 'Admin work' for her role.
- 14.18. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably require and they are identified as follows: enabling the claimant to work from home.
- 14.19. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Section 26: Harassment related to disability

- 14.20. Did the respondent engage in unwanted conduct as alleged by the claimant as follows:
- a."The respondent ignored the fact that [the claimant] was ill and still having ongoing 5 year, chemotherapy and provided no support to [the claimant] whilst [the claimant] had ongoing tests which all cancer patients have to undergo";
- b."[The claimant] had already informed the respondent that [she] was still undergoing chemotherapy due to having breast cancer but their disbelief and contacting [the claimant's] oncologist without [the claimant's] permission [her] feeling extremely harassed to prove [her] disability";

- c."This was an invasion of privacy, leaving [the claimant] harassed and stressed that because of [the claimant's] disability, [her] illness was disbelieved, and [the claimant] had to prove herself";
- d."The respondent has always been disbelieving of [the claimant's] disability and have never made any reasonable adjustments as [the claimant] had to prove [her] illness. [The respondent has] not been accommodating or patient. [The claimant] felt singled out due to [her] illness as no other colleague of [the claimant's] had] been dealt with in this manner";
- e."The claimant was extremely ill and suffering from effects of chemotherapy but when [the claimant] advised the respondent of this, [the respondent] showed no support or concern which it would have done if [the claimant] was another employee. [The claimant] was unable to appeal in person and felt singled out by [the respondent's] conduct."

- 14.21. Was the alleged conduct on related to the claimant's disability?
- 14.22. Did the alleged conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 14.23. Or, did the alleged conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and if so, was it reasonable for the conduct to have that effect, taking into account the perception of the Claimant and the other circumstances of the case?

Remedy

- 14.24. If the claimant succeeds in whole or part, the tribunal will be concerned with issues of remedy.
- 14.25. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

Findings of fact

- 15. We make the following findings of fact. The page numbers are references to the bundle pages.
- 16. The claimant is an IT sales consultant, with 20 years' experience, at least 11 of which were in cyber security. In 2013 the claimant was diagnosed with breast cancer. She had chemotherapy, radiotherapy and surgery. She

is continuing with maintenance treatment, including long-term medication, under the guidance of an oncologist.

17. The respondent is a small IT consultancy based in Berkshire. It was founded by Andrew Waters and Gary Waters who are brothers. The respondent sells IT products and services to businesses. The respondent works with suppliers, known as vendors. The vendors provide IT products, which the respondent sells on to its clients.
18. At the time the claimant was employed the respondent had about 14 employees. As a small IT company, the respondent found recruitment quite difficult as there are lots of much larger companies in the region which also provide IT services.

Recruitment of the claimant

19. In early 2017 the claimant's CV was sent to the respondent by a recruitment agency (page 70). The claimant attended two interviews with Andrew Waters and Gary Waters, and also had a telephone interview. The respondent said, and we accept, that the claimant did not tell them in her interviews that she had had cancer.
20. During the recruitment process, the claimant told the respondent that she had a pipeline of potential customers and that she was confident that she could generate sales quickly on starting work for the respondent. The pipeline was described as 'warm', meaning that the potential customers could be converted to sales quite quickly.
21. The recruitment agent told the respondent that they could not request a reference from one of the claimant's previous employers as she had a legal dispute with them. The respondent decided not to take up references for the claimant, and to make an offer on the basis of her interviews only.
22. The claimant accepted the offer from the respondent to work as an IT sales consultant (page 83). The role was subject to a three month probationary period. The claimant's salary, £50,000, was much higher than the respondent's other sales consultants. The respondent decided to offer the claimant a higher salary because of her experience and the 'warm pipeline' of leads she was bringing with her.
23. Prior to starting her job with the respondent, the claimant asked for a cyber security specific section to be added to the respondent's website, for marketing assistance and for remote and home working. The claimant said in her witness statement that she made these requests to enable her to do her job effectively, not because of her disability.
24. The recruitment consultant's fee which was payable by the respondent for the successful recruitment of the claimant was £7,500.

The claimant's targets

25. In her offer letter, the claimant was told that she would have a quarterly sales target of £100,000 (page 83). Her target for the first quarter was £40,000, reduced to reflect the fact that she had just started with the respondent. The claimant's targets were higher than the other sales consultants' targets, because the claimant's salary was higher. We find that the sales targets were a requirement of the claimant's role.
26. The claimant agreed to the targets. She said a quarterly sales target of £100,000 was achievable, and was not a difficult target to hit. The claimant did not at any stage during her employment by the respondent question or take issue with the level at which her targets were set. She did not request a reduction in these targets.
27. The claimant started working for the respondent on 6 March 2017. On 14 March 2017 the claimant had the morning off to have a mole removed. She did not attend work on 20 March 2017 and did not notify the respondent that she was sick. When Andrew Waters contacted the claimant in the afternoon, she said she was in hospital as she had an infection following the surgery.

Other aspects of the claimant's role with the respondent

28. The claimant's primary responsibility as a sales consultant was to generate sales for the respondent. However, the claimant and the respondent agreed that the claimant's role would include the additional responsibilities of building up a cyber security team, and acting as the 'security overlay' for other sales consultants. This meant that the claimant would provide expert advice on security related IT matters to customers of the respondent's other sales consultants, who did not have the same security expertise.
29. One aspect of the work the claimant was to do was providing clients with advice on the General Data Protection Regulation (GDPR) which was coming into force in May 2017. The respondent's other sales consultants introduced the claimant to their customers as the security expert, to help her to generate sales.
30. The claimant spent some time building up the cyber security side of the respondent's business, in particular, she wrote new sections for the website dealing with security products. This took her around 2 weeks. The claimant also took steps to revamp the respondent's product range by liaising with possible new vendors to identify suitable security products and services for the respondents to offer to its customers.
31. On 4 April 2017, almost a month into the claimant's employment, the respondent had a catch-up meeting with the claimant. The claimant had not made any sales.

32. On 6 April 2017 Andrew Waters told the claimant that he was concerned the claimant was spending too much time on the website, and that she should concentrate on the pipeline, by which he meant sales (page 165).
33. The respondent commissioned work on the website from a designer, but after liaising with the claimant, the designer decided the work was not deliverable within the agreed budget, and refunded the money. The claimant said that the lack of information about security on the respondent's website prevented her from making sales. There were no examples of this happening. The respondent said, and we accept, that the claimant did not have to wait for changes to the website or the introduction of new vendors before being able to sell products to clients, and that meeting her sales targets was her primary role as a sales consultant.

Complaints about the claimant

34. Towards the end of March 2017, the claimant had a dispute with the respondent's marketing executive Mrs Ellis. The claimant said that her expectations far surpassed Mrs Ellis's capabilities; she raised her concerns about competency and ability with Mrs Ellis directly. Mrs Ellis was so upset about this that she resigned. Andrew Waters persuaded her to withdraw her resignation. He told the claimant to raise any concerns about marketing with him and Gary Waters in future, not direct with Mrs Ellis.
35. On 5 April 2017 a sales manager from a vendor company contacted Andrew Waters to say that he was shocked at the claimant's response to him in an email exchange. The claimant asked the vendor company about how it was intending to comply with GDPR requirements, and was then critical of the approach set out in the response she received. She suggested that the vendor company may want to purchase GDPR services from the respondent. The vendor's sales manager described the claimant's correspondence as aggressive and said he was disappointed the communication was used as a sales opportunity (pages 159 and 170 to 174). The claimant agreed that her response was not professional.
36. On 27 April 2017 the claimant and Mrs Ellis had an exchange of emails in which Mrs Ellis said that she did not feel able to work with the claimant and that she did not appreciate her tone in emails and telephone calls (page 233).

Sickness absence and sickness procedure

37. On 13 April 2017 the claimant did not attend work or notify anyone that she was sick. Andrew Waters texted the claimant at 10.16 to ask where she was. The claimant did not text back (page 540).
38. We pause here to include some details about the respondent's sickness absence procedure and medical appointments.

39. The respondent had a staff handbook which included a sickness absence procedure (page 594). The procedure said:

“10.3 Reporting when you are sick

10.3.1 If you cannot attend work because you are sick or injured you should telephone your immediate supervisor as early as possible and no later than 30 minutes after the time when you are normally expected to start work on each day of absence.”

10.3.2 Absence that has not been notified according to the sickness absence reporting procedure will be treated as unauthorised absence.

10.3.3 If you do not report for work and have not telephoned we will try to contact you, by telephone and in writing if necessary. This should not be treated as a substitute for reporting sickness absence.

10.4 Evidence of incapacity

10.4.1 You must complete a self-certification form for sickness absence of up to seven calendar days. A self-certification form can be obtained from the Company and must be submitted to your immediate supervisor.”

40. The claimant did not remember seeing a staff handbook but was aware that she was required to notify the respondent of sickness absence as soon as possible and by no later than 9.30. Her contract of employment said this (page 96).

41. The claimant agreed that it was reasonable for the respondent to contact her if she was absent and had not telephoned to explain why. She agreed that this was not a substitute for reporting absence.

Medical appointments

42. The claimant had a number of medical appointments during the time she worked for the respondent. She did not ask permission to attend medical appointments: when she had a medical appointment, she told Andrew Waters about it or put it in her calendar, for example on 14 March 2017 at 08.00, 31 May at 16.00 and 13 June at 18.30. The claimant accepted that there was no occasion when the respondent did not permit her to attend a medical appointment.

43. The claimant said that she was not paid by the respondent for time off attending medical appointments. She did not provide particulars or evidence of dates on which this happened. Her payslips were in the bundle at page 607 onwards. These showed deductions from the claimant’s pay in May 2017 (page 609) for sick leave (when the claimant received statutory

sick pay) and in June 2017 (page 610) for unauthorised absence. She was not paid for unauthorised absence. We were not taken to any deduction of pay for time attending medical appointments. The respondent said and we accept that the claimant was paid for times when she had informed the respondent that she would be absent from work, including when she had medical appointments.

Review meeting

44. Returning to the chronology, on 8 May 2017 Andrew and Gary Waters had a review with the claimant. They were concerned that she had still not made any sales, other than one sale which had been set up by another employee who left the respondent's business, and which was passed to the claimant for her to close the sale (page 280). The value of the sale was £2,700. Informally, the respondent did not view this as a sale by the claimant as the customer had been passed to her at a late stage in the process having been secured by another sales consultant.
45. At the review meeting, Andrew and Gary Waters looked at the claimant's pipeline document which showed her customer leads and progress towards sales. They were concerned that it did not include anything that seemed likely to lead to a sale. Some of the potential customers were large multi-national organisations which the respondent thought were unrealistic targets for a company the size of the respondent.

Further sickness absences in May 2017

46. The claimant had further unauthorised sickness absences. On 9 May 2017 she did not attend work and said she had slept through her alarms. On 10 May 2017 the claimant texted Andrew Waters at 08.21 to say 'I didn't sleep through my alarms yesterday, they didn't go off, it's happened again today. I'll be there as soon as possible. Sorry' (page 540). The claimant said this was when she began to experience sleep problems. She thought these arose from taking Letrozole, a long-term cancer remission medication.
47. The claimant failed to attend work or notify the respondent that she was unwell on 19 May 2017. Andrew Waters texted her at 10.52 and the claimant replied at 14.00. In her text the claimant said she had 'another kidney infection' and that this was 'one of the many side effects of Letrozole, the long term remission cancer drug I'm taking'. This was the first time the claimant had mentioned this drug to the respondent. The respondent accepts that from this date it was aware that the claimant had previously had cancer.
48. The claimant was absent from work on 22, 23 and for most of 24 May 2017. She left a voicemail for Gary Waters on one of those days, but did not contact either Gary or Andrew Waters on the other days. On her return to work on 24 May 2017 she completed an absence form which covered absences on 19, 22, 23 and 24 May 2017, the reason given for the

absence was 'severe kidney infection ended up in urgent care centre'. It was accompanied by a copy of a prescription (pages 295-6).

The claimant's references

49. By mid-May, the claimant had still not made any sales and the respondent's concerns were growing. Andrew Waters decided to approach the claimant's previous employers for references. He hoped this would provide him with information to help him assess whether the claimant was capable of improving her performance. He called the main numbers for the last three employers listed on the claimant's CV and obtained contact details for the person responsible for providing references at each of these companies.
50. On 22 and 23 May 2017 Andrew Waters sent standard reference request forms to the claimant's three last employers.
51. The claimant told Gary and Andrew Waters on 30 May 2017 that she had a mammogram on 31 May 2017 and a consultant appointment on 2 June 2017 to discuss the results. The respondent understood these were routine appointments.
52. The claimant was absent from work without notifying the respondent on 1 June 2017.
53. Also on 1 June 2017 the respondent received a reference from one of the claimant's previous employers. It said that the claimant had been employed from the end of June 2015 to the end of January 2016, a period of 7 months. This was not consistent with what the claimant had said in her CV which was that she was employed there from July 2014 to February 2016, a period of over 18 months. Also, the claimant's CV gave detailed figures for her sales performances with this employer for two target years. She said she had achieved 73% of a six month target of £300,000 in 2014-2015 and 91% of an annual target of £600,000 in 2015-2016. As the claimant had been employed by this employer for less than a year, it was unclear where these figures had come from.
54. This first reference also said that the employer would not re-employ the claimant and answered 'no comment' to the question as to whether the claimant was honest and trustworthy. Andrew Waters telephoned the company which had provided the reference to double check the employment dates and they were confirmed as correct.
55. Andrew Waters received a second reference for the claimant on 1 June 2017. This was from the employer with whom the respondent had been told the claimant had a legal dispute. The reference said the claimant had been dismissed for performance reasons.
56. On Friday 2 June 2017 at 16.24 the claimant emailed the respondent about medical appointments. She said she had an appointment on

Monday 5 June at 16.00, adding, 'I think I've already told you about [this]'. Andrew Waters replied at 16.38 saying 'Alison, Neither Gary or myself are aware of your appointment on Monday.' The claimant replied saying 'Sorry, I thought I'd told you' (page 312).

Extension of probation

57. On 5 June 2017 the claimant's three month probationary period came to an end. Andrew and Gary Waters had been intending to speak to her about her probationary period and the concerns they had about her failure to make any sales and her unexplained absences, however the claimant did not attend work on 5 June 2017 and did not contact the respondent to explain her absence. A call with a customer on 5 June 2017 had to be cancelled because of the claimant not attending work. Andrew Waters texted the claimant saying, 'Yet again no-one has any idea of your whereabouts!!' (page 542).
58. In the claimant's absence, Andrew and Gary Waters met and decided to extend the claimant's probation period for a further period of 3 months. The respondent could not recover any of the recruitment fee paid for the claimant's recruitment, and they hoped that by giving the claimant more time to make sales they could recover some of the costs they had spent. They were still considering the references they had received.
59. The respondent wrote to the claimant to confirm the extension of her probationary period, it said this was because of her unauthorised absences and her sales performance being below expectations. The letter was sent under cover of an email from Andrew Waters which said, 'Alison Myself and Gary wanted to discuss this and a few other matters this morning, but for obvious reasons were unable to' (page 314).

Further sickness absences in June 2017

60. The claimant's sickness absences became more frequent in June and July 2017. On 8 June 2017 the claimant was absent from work without notifying the respondent. She did not text Andrew Waters again until 9 June 2017. (pages 541 to 542). In her text of 9 June the claimant said she had been oversleeping to the point of not waking up at all to anything. She said calcium strands had been found in her kidney.
61. On 12 June 2017, the claimant was due in work at lunchtime after a medical appointment, but did not attend work or notify the respondent to explain why. At 21.29 she replied to a text sent by Andrew Waters at 15.16. She said that her consultant had been delayed at the hospital and she had been put in a private room at the hospital and slept all day.
62. On 13 June 2017 the claimant completed an absence form which covered absences on 5, 8, 9 and 12 June 2017, the reason given for the absences was 'very ill, over tired due to dirty blood caused by kidney damage and scaring caused by Lexitrol [sic]. Time off also contributed to by ultra sound

x-ray and blood tests on 9th and MRI on 12th'. The form was accompanied by an appointment card for 10 July 2017 and a copy of a blood science request form (pages 323-324).

Medical report requests and review meeting

63. On 13 June 2017 Andrew Waters wrote to the claimant. He said that the respondent was concerned about the amount of unauthorised absence she had taken over the past month or so, and he asked her to complete a consent form authorising the respondent to obtain a medical report from her doctor. The respondent did not understand the reasons the claimant's had been giving for her ill health absences, and hoped that a letter from her doctor would help them to understand.
64. On 16 June 2017 the claimant did not attend work or notify anyone at the respondent that she was sick. When Andrew Waters texted the claimant to ask where she was, she replied to say that he should 'read back through his texts from last week'. This was a reference to a long text sent by the claimant on 9 June 2017 which included a reference to a medical investigatory procedure 'next Friday'. Andrew Waters said that the claimant should inform him or Gary Waters about absences and put in an absence form, rather than relying on a text from a week ago (page 544).
65. Andrew Waters also sent the claimant an email on 16 June 2017 chasing up the consent form. He said that if the claimant did not wish to authorise the respondent obtaining a medical report from her doctor, she could obtain a letter from her consultant detailing her absences and the reasons for them (pages 344 to 345).
66. One day in the week of 12 June 2017 when the claimant was in the office, she went to speak to Andrew Waters. He was on the phone. The claimant texted him on 17 June 2017 to say she had been 'ushered away' when she tried to have a conversation with him, and she had been seeking feedback for months. She said she had 'requested 4 very reasonable requirements to enable me at DSC, yet not one has been delivered upon. We'll discuss in depth on Monday.'
67. Andrew Waters replied to say he had not ushered the claimant away, he had been on the phone. He said they would put a date in the diary to have a conversation, but 'we never know if you are going to turn up to work or not and your communication is non existent. You have asked for one thing to be done, and that was the website which [the IT consultant] has now refused to do with you and has refunded us the first payment.'
68. The four reasonable requirements requested by the claimant were those she had asked for before joining the respondent. They were changes to the website, marketing assistance and remote and home working. The claimant said these were to enable her to do her job effectively, not because of her disability.

69. On 19 June 2017 Andrew Waters received the third reference from the claimant's previous employers. It said that she was employed from 8 February 2016 to 27 June 2016, a period of under 5 months. This was inconsistent with the claimant's CV which had said that she worked for this company for 9 months from February to September 2016.
70. On 19 June 2017 Andrew and Gary Waters met with the claimant. They raised the claimant's unauthorised absences and lack of sales (page 343). They discussed the claimant's pipeline and said they had concerns about how realistic it was. They told the claimant that they needed to see a substantial improvement in sales performance and that she needed to make a sale by the end of the month. Andrew Waters said that if the claimant did not make a sale by the end of June, the conversation they would be having would be about the respondent needing to consider ending her employment. The claimant did not say at this meeting that her sales target was not achievable. She explained that the problems she had with attending work were due to medication she was taking, but she said she would be stopping the medication. The respondent understood this would mean the problems would also stop.
71. In her evidence to us, the claimant said that her pipeline document for IT product sales showed realistic prospects which could be converted to sales (pages 251 and 384). The respondent said that the pipeline document did not show realistic prospects. We accept the respondent's evidence on this point as it was consistent with the pipeline document itself. It included a column showing how far towards completion of a sale a lead had progressed, expressed as a percentage of 100%. Most of the leads listed on the pipeline were recorded at 10% towards completion, a small number were at 20-30%, one was at 50% and none were higher than this.
72. The claimant emailed Andrew Waters on 20 June 2017 to say she had completed the consent form allowing access to her medical records and had left it on his desk (page 344). She said that because of a recent change of GP and because all her treatment had been done privately, the GP records may not contain all the information the respondent needed adding:
- "So to ensure you get all the information you need I have:
...
Called Dr Joss Adam's (my oncologists) secretary and asked her to send me the medical report from Joss outlining why he has taken me off Lexitrol [sic]"*
73. The consent form completed and signed by the claimant was dated 20 June 2017 and said, 'I give my permission for the company to seek a medical report from my doctor', then gave the name and address of her GP (page 346).

74. The following day, 21 June 2017, Dr Adams' secretary sent Andrew Waters a copy of the claimant's most recent clinic letter (page 350 and 351) by post.
75. The claimant said in her complaint that this letter was provided in response to a request by Andrew Waters made to her oncologist without her consent. At the hearing she accepted that she had got the dates wrong, and that the letter was sent at her request. We find that the copy letter was sent in response to the claimant's telephone request which she referred to in her email of 20 June 2017 and that she asked for it to be sent direct to the respondent. Andrew Waters did not contact the claimant's oncologist to obtain this letter.
76. The claimant's specialist's letter was dated 6 June 2017. It said,
- 'Unfortunately, it sounds like she had a lot of problems with her Letrozole. She started this in March but seems to have had a number of urinary and tract infections since then. She has now come off her medication...Mrs Raeside will stay off the Letrozole for now.'*
77. There was no mention in the consultant's letter of sleep issues, and the letter did not say that the claimant was unable to attend work.
78. On 23 June 2017 the claimant sent the respondent an email headed 'Extreme tiredness' which contained some general information from the internet regarding cancer-related fatigue (page 352-353). She said she had been taken off Letrozole because of the severe side effects.
79. Also on 23 June 2017, Andrew Waters wrote to the claimant's GP to obtain information about the claimant's condition and in particular to understand whether it could cause the claimant to have extreme tiredness (page 355). The letter enclosed the consent form completed by the claimant and set out the background as follows:
- "Alison has been an employee of DSC since March 2017 and has had considerable time off due to illness. She states that she had had issues with her kidneys due to previous cancer treatment and has been attending her GP, Urgent care centre and a consultant. However, we have numerous days that are, at present, classified as unauthorised absence due to no communication as to her whereabouts etc.*
- Alison states that these days of unauthorised absence are due to her illness, as mentioned above, causing her to sleep excessively to the point that phone calls and alarms do not wake her for work and that it causes her to sleep all night and day."*
80. The letter asked the GP to clarify:

"Firstly that you are aware of her condition as stated above, and also that this condition can cause these instances of unauthorised absence along with any specific recommendations you wish to make about her."

81. On 4 July 2017 Andrew Waters wrote to the claimant's oncologist, Dr Adams (page 386). He obtained the contact details from the copy letter he had been sent by Dr Adams' secretary. The letter said

'Thank you for sending me your correspondence dated 6 June 2017.

I was wondering whether you could give a little more detail as to the side effects of the treatment that Ms Raeside is receiving to enable us as employers to understand her situation.

Ms Raeside has been absent from work on numerous occasions as she says she is unable to be woken by her alarm, telephone etc due to the side effect of her treatment and various infections and what she says is 'dirty blood'. She describes episodes of 'unconsciousness for 19 hours' and sleeping for excess of 15 hours without being able to be woken.

Obviously this is concerning from her health point of view, but also is now impacting on her ability to do her job

I have already written to Ms Raeside's GP with her consent and understand if you need to obtain her consent to respond to me further.'

82. We find that after this letter was sent, the claimant's oncologist called the claimant to ask her permission to respond to it, and the claimant gave her permission. She said she did so because she had nothing to hide. In her statement the claimant thought this conversation occurred before 21 June 2017 but in her evidence she accepted that she got the dates wrong and we find that this call was in the context of the respondent's 4 July letter to Dr Adams.

83. In the event Dr Adams did not respond to the respondent's request.

Further sickness absences in July 2017

84. The claimant did not attend work on 3, 4, and 5 July 2017. Andrew Waters sent the claimant texts. She replied on 3 July saying that she had sleep paralysis and on 4 July saying that she had been asleep or unconscious.
85. On 5 July 2017 the claimant was working and had a meeting away from the office which was due to finish at 10.30. When she had not returned to the office by 12.15, Andrew Waters texted her. She said she had been meeting with and having lunch with a vendor. Andrew Waters texted to

say that sales were more important and long vendor lunches (that is, lunches with suppliers) were not a productive use of her time (page 547).

86. On 6 July 2017 the claimant completed a sickness absence form which covered absences on 3 and 4 July 2017, the reason she gave for the absences was 'sleep issues with unconscious like symptoms' (page 387).
87. On 7 July 2017 the respondent received a letter from the claimant's GP. It said that the claimant had recently transferred to the practice, they had not yet seen her and did not have her full history of correspondence from specialists. It said that the claimant was continuing with maintenance therapy under the guidance of a specialist oncologist. It continued:

"Alison has also suffered with recurrent urinary tract infections since she has been on treatment which have required courses of antibiotics and have been documented to cause excessive sleepiness when she has got an active infection...She is awaiting specialist assessment and further investigations because of these recurrent infections.

At the present time I am unable to comment on any specific recommendations about Miss Raeside..."

88. The claimant's GP letter of 7 July was the only medical evidence the claimant produced to the respondent or to the tribunal which referred to sleep issues. The GP letter did not refer to sleep paralysis or unconsciousness. It did not say that the sleep issues were caused by the claimant taking Letrozole. In any event, the claimant had stopped taking Letrozole prior to 6 June 2017, according to the letter from her consultant. There was no evidence before the tribunal that the claimant's sleep problems were caused by taking Letrozole or by the ongoing effects of having taken Letrozole previously.
89. In her evidence to us, the claimant said that the cause of her sleep problems had not been identified and that to identify the cause she would need to have attended a sleep clinic, which she did not want to do. She said she had been put on the narcolepsy scale. The claimant said that her sleep problems started the moment she started taking Letrozole. She was unclear about when this was but Dr Adam's letter said it was March 2017. She had stopped taking Letrozole by 6 June 2017. She said she had been told by a consultant that Letrozole damaged her brain or her brain proteins and this was why her sleep problems persisted after she stopped taking Letrozole. There was no evidence of this in the claimant's doctor's letters or in the GP records which were in the bundle. There was no medical evidence before us of narcolepsy or brain damage caused by Letrozole.
90. On 10 July 2017 the claimant did not attend work. Her calendar showed she had a medical appointment, but not until 15.15 (page 324 and 661). Andrew Waters texted the claimant saying, 'Yet again no-one has any idea of your whereabouts and you had a conference call at 9.30!' (page 548).

The claimant missed the conference call. The claimant texted in the afternoon to say that she had slept through the day.

91. On 11 July 2017 the claimant did not attend work. Andrew Waters texted the claimant saying, 'Again???' (page 548). When the claimant replied she said she would work from home that afternoon. She told the respondent that she would be doing this, she did not ask for permission.
92. We find that in saying 'Again???' and 'Yet again' in his texts, Andrew Waters was referring to the claimant not attending work again and not notifying the respondent of her absence. His use of these words does not suggest that he was sceptical about whether the claimant needed time off for medical appointments, or whether she was ill.
93. On 12 July 2017 the claimant did not attend work. Andrew Waters texted the claimant at 10.31 saying, 'Can you please update me what is going on?'. A second text at 11.29 said that he had cancelled the claimant's appointment with a customer for that day as he had no idea whether the claimant was intending to be there. The claimant replied and said, *'I'm sorry I'm ill, but you are not making things easier for me. We need to have a discussion about reasonable adjustments.'*
94. Andrew Waters replied to this text by email on 12 July 2017. He said that he and Gary Waters found the claimant's comment 'totally unfair' (page 400). The claimant misunderstood this email. She thought that the respondent was saying that she had been totally unfair by asking them to make reasonable adjustments. We find that the respondent was suggesting that it was unfair to say that they had not made things easier for her. They felt, as the email said, that they had been more than accommodating and patient with her. The email asked the claimant to elaborate on why she felt they were not making things easy, and what she would deem as reasonable adjustments. The claimant did not reply to these questions.
95. On 13 July 2017 the claimant did not attend work. It was the fourth day that week she had not attended work or notified her absence in line with the absence procedure. She texted Andrew Waters at 15.11 to say that she had just woken up. She said she had arranged for her lodger to sleep there to wake her up for the next day, and that the following week she would sleep at her mother's to ensure she got up (page 550). The claimant also replied by email to the respondent's email of the previous day. She apologised and said that she appreciated the respondent's patience 'until my body re-stabilises itself'. She listed the medical help she was getting and said again that she would be sleeping at her mother's the following week, so her mother could wake up her and see if she could reinstall a normal routine (page 404).
96. On 17 and 19 July the claimant did not attend work or notify anyone that she would not be attending. Andrew Waters texted her on 17 and 19 July, and then again on 19 July saying, 'We have heard nothing from you all

week'. The claimant replied at 15.39 on 19 July 2017 saying that she had just woken up. She said she had not got as far as her mother's. On 18 July 2017 the claimant had a meeting with a potential client from 09.30 to 11.00, but she did not attend work after the meeting.

Working from home

97. The claimant worked from home on occasion, for example on 11 July 2017. She also worked at home in the evenings when she wanted to.
98. When working from home, the claimant had access to her emails via Outlook Web Access. She could contact customers and potential customers via LinkedIn. However, she did not have access to all the respondent's systems when working from home, such as client databases. The respondent did not at that time provide full remote access to any of its employees. The claimant thought that systems should have been in place to facilitate her working fully from home. She was shocked to discover that the respondent did not have systems to facilitate full home working as her previous employers had done.
99. On 19 July 2017 the claimant had not attended work and was working from home. She texted Andrew Waters to say she needed access to her emails to do meeting follow ups and see her diary. She said, 'Just because I'm not well doesn't mean I've let go of the reins' and 'I've been asking for homework if since week one' [sic]. Andrew Waters replied to say that he had checked her email access and it was all up and running, and that he Gary Waters and other staff used Outlook Web Access with no issue.
100. The claimant sent a long reply which she said that she had every reason to have the same advantages as her competition and the respondent needed to bring their working practices into this millennium. She asked, 'Where is the sense or logic in your attitude towards this?'. Andrew Waters said that her message was disrespectful and he would not reply. The claimant replied, 'I'm not well Andrew and making reasonable adjustments to enable me to continue working throughout my illness is a requirement by law. Please reconsider.'
101. On 20 July 2017 the respondent's internal IT support officer sent an email to all employees asking if they would like to test a software product which would allow them to log onto the respondent's entire system remotely. The claimant did not reply.

The claimant's sales performance

102. By 20 July the claimant had still not made any sales and the respondent had not seen any evidence that she was close to making any sales. She had not made any sales by the end of June as required at the review meeting on 19 June.

103. During her time working for the respondent, the claimant closed two sales. The first was the sale which had been set up another employee who left the respondent's business, and the client was passed to the claimant to close the sale (page 280). The second was a sale to the same client (page 292). The sales were valued at £2,700 and £3,600.
104. Therefore, during the first quarter of her employment with the respondent (March to May 2017) the claimant made sales of £6,300 against a target of £40,000. She made no other sales during that quarter. From 23 May 2017 and during the part of the second quarter in which the claimant worked for the respondent, she made no sales at all. None of her 'warm' pipeline converted to sales, either while the claimant was working for the respondent or after she left.
105. In her evidence to us, the claimant said that as her target was larger than the other sales consultants, she had to take a different approach which was, rather than selling individual products with a low profit margin, she had to sell fewer larger deals, and these took longer to set up and close. However, at the time her targets were set, she did not suggest that this could impact on her ability to generate sales of £40,000 in the first quarter of her employment.

Disciplinary proceedings

106. Andrew and Gary Waters discussed the claimant's position and decided that the respondent could not continue to tolerate the claimant's complete lack of sales, particularly as she was being paid a high salary. They remained concerned about the references they had received. They decided to start the respondent's disciplinary procedure.
107. The respondent wrote to the claimant by email and post to her home address on 19 July 2017 to invite her to a disciplinary meeting to consider the references which had been received (copies were enclosed), and the claimant's failure to bring any revenue into the business (other than one purchase order given to her when another employee left). The letter warned that a possible outcome was termination of the claimant's employment (page 410).
108. The disciplinary meeting was due to take place on 26 July 2017 at 14.30. The respondent said that the meeting had deliberately been arranged in the afternoon to take account of the claimant's ongoing problems with waking up, and asked her to let the respondent know if she had any other specific needs for the hearing. The respondent put a diary entry for the meeting into the claimant's work calendar.
109. The claimant was on holiday from 20 July to 25 July inclusive.
110. The claimant did not attend work on 26 July and she did not attend the disciplinary hearing. She did not provide any explanation for her absence. The respondent rescheduled the disciplinary hearing for 28 July 2017 at

- 15.00 (page 418). The claimant replied by email on 26 July saying that she had been ill and was having tests to try 'to discover what is causing the extreme exhaustion' (page 419).
111. The claimant did not attend work on 27 July 2017 and did not contact the respondent to explain her absence. Andrew Waters sent a text message to the claimant asking her to confirm that she would be attending the hearing on 28 July. She did not reply on 27 July 2017.
 112. On 27 July 2017 Mrs Ellis sent Andrew Waters screenshots from the claimant's Facebook page. Mrs Ellis was a Facebook friend of the claimant's. The claimant's Facebook page showed the claimant engaging in social activities including going to a garden party and having a helicopter ride on a day after she had not attended work (15 July 2017) and included a post about going to a garden party on 20 July 2017, a day after she had not attended work (pages 509 and 511).
 113. The claimant did not attend the disciplinary hearing on 28 July. She sent a text at 14.47, 13 minutes before the hearing was due to start, saying that she was unable to attend because she was unwell. She said, 'I have nobody to blame but myself' because she had shared a bottle of wine with a client the previous day which she was 'seriously paying for today'. She said she was still suffering from the side effects of the change in the cancer medication. The text also included points responding to the issues to be considered at the disciplinary hearing (page 555).
 114. The disciplinary hearing was rescheduled for 1 August 2017. The claimant did not attend work on 31 July 2017 and did not notify the respondent of why she was not attending work.
 115. The claimant had 10 days of unauthorised absence in July.
 116. The claimant did not attend work on 1 August and she did not attend the disciplinary hearing. She did not notify the respondent as to why she did not attend. She did not answer her phone when the respondent tried to call her. As the hearing had been rescheduled twice, Andrew Waters decided to go ahead with it, however he sent an email to the claimant to let her know this and giving her until 17.00 to send any information she would like to be taken into account (page 429). The claimant did not provide any further information.
 117. Andrew Waters decided that the claimant should be dismissed because of her poor sales performance and unsatisfactory references. This was set out in a letter to the claimant on 2 August 2017 (pages 433 to 435). We accept the respondent's description of the claimant's sales performance as non-performance rather than under-performance. The claimant did not achieve any sales other than two small sales for a client which was passed to her by another employee just before completion of the first sale.

118. The respondent's grounds of resistance said that another reason for the claimant's dismissal was her unauthorised absences and the failure to explain them. Unauthorised absences were also referred to in the letter informing the claimant that her probationary period was to be extended. However, this was not a reason given in the dismissal letter sent to the claimant at the time of dismissal. Andrew Waters said, and we accept, that if the claimant had been bringing in revenue for the respondent, the situation would have been dramatically different. The respondent was keen for the claimant to succeed so they could recover some of the money they had spent on recruiting her; the claimant's failure to bring in any revenue at all was a very major concern for the respondent. We accept the respondent's evidence that the reasons for dismissal were as set out in the dismissal letter.

Appeal

119. The claimant appealed against her dismissal on 4 August 2017 (page 436) and she also submitted a grievance. The appeal was to be considered by Gary Waters but he was on holiday. Andrew Waters emailed the claimant on 10 August 2017 to explain this, and he wrote to her on 16 August 2017 regarding arrangements for the appeal hearing.
120. The appeal hearing was scheduled for 24 August 2017 to be conducted by Gary Waters with an external HR provider attending to take notes. The claimant was informed of her right to be accompanied (page 447).
121. On 17 August 2017 the claimant emailed the respondent to say that it was her grandmother's birthday the next day in Plymouth, and that she would then be in Cornwall 'for a week or possibly two'. She asked to reschedule the hearing to 6 September 2017.
122. Andrew Waters wrote to the claimant on 18 August 2017 to say that the appeal hearing would not be rescheduled. He sent this by email (page 450-451). He emailed the claimant again on 21 August 2017 to confirm that the hearing would take place on Thursday 24 August 2017 (page 456). He said that the appeal would proceed although the claimant was not intending to attend.
123. On 23 August 2017 the claimant called Andrew Waters to ask for the details of the external HR provider. She said that she would be attending the appeal hearing that day. Andrew Waters said that the appeal was not scheduled for that day, it was scheduled for 24 August. Later the same day, the claimant emailed the respondent to ask for the hearing to be dealt with by Skype as she was in Cornwall. The respondent declined to do so as it was concerned about security of the call and whether anyone would be listening in.
124. Andrew Waters emailed the claimant on 23 August 2017 replying to an email from her of the same date in which she said she made a subject access request (pages 465-466). He attached some documents, but said

that her email did not constitute a valid subject access request and the respondent would not be replying to it. He also said that all correspondence should be through him and in writing and that the respondent would not deviate from this approach. The claimant replied to say that she could not open the attachments (page 470). Andrew Waters replied to say that he had checked the attachments. He re-sent the attachments as an email (page 469).

125. The claimant provided a written document to be considered at the appeal (pages 475 to 495). Gary Waters considered the appeal on 24 August 2017. He considered the documents sent by the claimant. He upheld the decision to dismiss the claimant and she was informed of this in a letter dated 31 August 2017.

The law

126. Disability is a protected characteristic under section 9 of the Equality Act 2010. Cancer is a disability pursuant to paragraph 6 of schedule 1 of the Equality Act.

Direct disability discrimination

127. Section 13 of the Equality Act provides:

“(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.”

128. Section 23(1) provides that:

“On a comparison of cases for the purposes of section 13 [direct discrimination] ... there must be no material difference between the circumstances relating to each case.”

Discrimination arising from disability

129. Section 15(1) of the Equality Act 2010 provides that 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.*

130. There are four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and anor v Dunn EAT 0234/16:

- i. there must be unfavourable treatment;
- ii. there must be something that arises in consequence of the claimant's disability;

- iii. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
 - iv. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
131. The EHRC Employment Code says that unfavourable treatment should be construed synonymously with 'disadvantage'. In Williams v Trustees of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230, SC the Supreme Court held that little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in section 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions of the Equality Act. It accepted that the EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage section 15.
132. In relation to the third element, the causal link between the 'something arising' and the unfavourable treatment, the EAT in Secretary of State for Justice and anor v Dunn held that motive is irrelevant and, in Praisner v NHS England and anor 2016 IRLR 170, EAT, that:

“there may be more than one reason or cause for impugned treatment....The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.’

Reasonable Adjustments

133. The Equality Act also imposes on employers a duty to make reasonable adjustments. The duty comprises three requirements. Here, the first requirement is relevant, this is set out in sub-section 20(3). In relation to an employer, A:

“(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

134. Paragraph 20(1)(b) of Schedule 8 of the Equality Act provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage.

Harassment

135. Under section 26 of the Equality Act, a person (A) harasses another (B) if

“a) A engages in unwanted conduct related to a relevant protected characteristic, and

b) the conduct has the purpose or effect of –

i) violating B’s dignity, or

ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

136. In deciding whether conduct has the effect referred to, the tribunal must take into account:

“a) the perception of B;

b) the other circumstances of the case;

c) whether it is reasonable for the conduct to have that effect.”

Burden of proof

137. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision.”

138. This means that if there are facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent. The respondent must then prove that the treatment was in no sense whatsoever on the grounds of disability. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

139. In Igen v Wong [2005] ICR 931 the court set out ‘revised Barton guidance’ on the shifting burden of proof. We bear in mind that the court’s guidance is not a substitute for the statutory language and that the statute must be the starting point.

140. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. “Something more” is needed, although this need not be a great deal: “In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred...” (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

141. In order to establish a prima facie case of discrimination under section 15 and for the burden of proof to shift to the respondent, a claimant must prove that she has a disability within the meaning of section 6, that the respondent had actual or constructive knowledge of her disability and that the respondent treated her unfavourably. It is also for the claimant to show that 'something' arose as a consequence of her disability and that there are facts from which it could be inferred that this 'something' was a reason for the unfavourable treatment. The claimant needs to satisfy the tribunal in respect of each of these elements for the burden of proof to shift to the respondent.
142. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of disability. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof.
143. Where the burden of proof shifts, the respondent can defeat a complaint under section 15 by proving either that the reason or reasons for the unfavourable treatment were not the 'something arising' in consequence of the disability, or that the treatment was justified as a proportionate means of achieving a legitimate aim.

Conclusions

144. We have applied the legal principles to our findings of fact and reach the following conclusions on the issues for determination.

Disability

145. The respondent has conceded that the claimant was disabled and accepts that it had knowledge of her disability from 19 May 2017. The claimant contends that the respondent had knowledge of her disability from an earlier date. We have found that the claimant did not inform the respondent of her disability at her interview.

Direct discrimination because of disability

146. We have first considered whether the treatment complained of by the claimant in her complaint of direct disability discrimination happened as alleged by the claimant and whether it amounted to less favourable treatment by the respondent. These are issues 14.6a, b and c in the issues section above.
147. Issue 14.6a: The claimant said the respondent subjected her to less favourable treatment by dismissing her. We have found that the claimant was dismissed by the respondent. A dismissal amounts to less favourable treatment in the sense that it was disadvantageous to the claimant.

148. Issue 14.6b: The claimant also said the respondent failed to provide support for the claimant:
- 148.1. by not paying the claimant when she took time off to attend medical appointments; and
 - 148.2. by adopting a sceptical attitude that required the claimant to prove that she had attended medical appointments etc. before any permission was granted to allow the claimant to attend appointments);
 - 148.3. a further complaint that the respondent failed to give the claimant time off to attend medical appointments was withdrawn at the hearing.
149. We have not found that there were any deductions from the claimant's pay for time off to attend medical appointments.
150. We have not found that the respondent adopted a sceptical attitude to the claimant's requests for time off to attend appointments. We have found that Andrew Waters said 'Yet again' in two of his texts and 'Again???' in another. We have found that this was because the claimant had failed on a number of occasions to attend work without notifying the respondent of her absence, not because he was sceptical about her medical appointments or because he was sceptical about whether she was ill. In his texts Andrew Waters was expressing surprise that the claimant had not attended work again and had not notified the respondent that she was unwell.
151. We have also found that the claimant was not required to prove that she had medical appointments before being allowed the time off. We have found that she did not request permission to attend them. When she had appointments, she told the respondent she would be attending them or put them in her work calendar. We have found that the claimant did provide an appointment card on one occasion with her absence form, but this was not requested by the respondent.
152. We have found that the letters sent by the respondent to the claimant's GP and specialist recorded what the claimant had told the respondent about her ill health, saying 'she states', 'she describes' and 'she says'. However, this was factual. The respondent was recording what the claimant had told them, and asking the claimant's doctors to confirm the medical position. The letters were not, as the claimant suggested, implying that she was fabricating things. We conclude that the respondent was not displaying a sceptical attitude about what the claimant was saying.
153. We conclude therefore that the treatment at issue 14.6b did not happen as alleged by the claimant.
154. Issue 14.6c: The claimant alleged that Andrew Waters wrote to the claimant's oncologist prior to 6 June 2017 without her permission and requested that he provide details of the claimant's medical record did not occur as alleged. The claimant accepted that she got this allegation wrong.

We have found that she asked her oncologist's secretary to send a copy of the latest clinic letter to the respondent. Andrew Waters did not write to the claimant's oncologist prior to 6 June 2017. This alleged act of less favourable treatment did not happen.

155. We have found that the dismissal of the claimant was an act of less favourable treatment which happened as alleged by the claimant. We have not found that the other alleged acts of less favourable treatment happened as alleged by the claimant.
156. We therefore have to consider whether the claimant's dismissal was because of her disability. Applying the legal principles regarding the burden of proof, we have to consider whether the claimant has proved primary facts from which we could properly and fairly conclude that the difference in treatment was because of the claimant's disability.
157. We conclude that the claimant has not proved evidence from which we could properly and fairly conclude that the decision to dismiss was because of her disability. The claimant at one stage relied on difference in treatment between herself and Mrs Ellis, who also had breast cancer. However, Mrs Ellis would not be a comparator for the claimant as both had cancer. A comparator would be a person in circumstances not materially different to the claimant who did not have cancer.
158. The reasons given by the respondent for the dismissal of the claimant were her non-performance against her sales targets and unsatisfactory references. These are circumstances which are material to the claimant's case. A comparator would be someone who had the same or similar levels of non-performance and/or who someone whose references the respondent considered to be unsatisfactory. We did not have any evidence that the respondent did or would have treated someone with those circumstances but without cancer any differently to the claimant.
159. Even if we had found that the burden of proof had shifted to the respondent, we would have accepted that the respondent's reasons for the claimant's dismissal, that is the claimant's non-performance against sales targets and unsatisfactory references, were non-discriminatory reasons for her dismissal.
160. For these reasons, the complaint of direct disability discrimination fails.

Discrimination arising from disability

161. The claimant says her sickness absence was "something arising" from her disability. We have to consider whether the claimant's sickness absence was 'something arising' from her disability, that is, whether it arose in consequence of breast cancer or breast cancer treatment. The claimant says that her sleep problems were caused by Letrozole, a medication she was taking because of cancer.

162. There was very little medical evidence before us about the reasons for the claimant's absence from work and the medical cause of her sickness absence. She did not obtain a fit note from her GP for any of the absences. The reasons she gave on her self-certification forms were 'severe kidney infection' (May), "very ill, over tired due to dirty blood caused by kidney damage and scaring caused by Lexitrol. Time off also contributed to by ultra sound x-ray and blood tests and MRI (June) and 'sleep issues with unconscious like symptoms (July).
163. We have found that the claimant started taking Letrozole from March 2017 and that by 6 June 2017 she had stopped taking it. These dates do not coincide with the dates of the claimant's absences from work which were increasing over the period May to July; the claimant had 4 days absence in May, 6 days in June and 10 days in July. Most of the claimant's absences in June and all of her absences in July occurred after she had stopped taking Letrozole.
164. The letter from the claimant's specialist refers to the claimant having problems with Letrozole but said this caused 'urinary and tract infections'. It does not refer to sleep problems at all.
165. The letter from the claimant's GP is the only medical evidence which refers to sleep problems. It was written by a GP at a new surgery which had not at that stage seen the claimant. It says that the claimant's urinary tract infections, not Letrozole, have been documented to cause excessive sleepiness when she has got an active infection. The GP did not describe sleep paralysis, unconscious-like symptoms or narcolepsy. The letter might have been expected to mention these severe symptoms if the GP had been aware of them. There was no mention of these severe symptoms in the GP records.
166. The claimant provided some information from the internet but this was not specific to her case and did not refer to sleep paralysis, unconscious-like symptoms or narcolepsy. The claimant in her evidence said that the cause of her sleep paralysis or unconscious-like symptoms had not been identified, that it would have required investigation at a sleep clinic to identify the cause, and that she did not wish to do this. The claimant said she had been told that Letrozole had damaged her brain or brain proteins and this was why the sleep problems persisted after she had stopped taking Letrozole. However, there was no medical evidence before us to support this.
167. Having assessed the evidence before us, we conclude that it is not possible for us to reach a conclusion on the balance of probabilities that the claimant's sickness absence because of sleep problems was something arising from cancer or cancer treatment. There was no evidence that the claimant's sleep problems were caused by Letrozole or by the ongoing effects of having taken Letrozole.

168. If we had concluded that the claimant's sickness absence was something arising in consequence of cancer, we would have gone on to consider whether the unfavourable treatment complained of by the claimant was because of her sickness absence. The only unfavourable treatment which we have found occurred as alleged by the claimant is her dismissal. Again, we would have accepted the respondent's evidence that the claimant's dismissal was because of her non-performance against sales targets and unsatisfactory references.
169. If we had found that the claimant's unauthorised sickness absence played any part in her dismissal, we would have found that her dismissal was a proportionate means of achieving a legitimate aim, namely the respondent's need to know where its employees are during working hours for reasons including managing the business, meeting customer demands, employee safety and ensuring that there are legitimate reasons for absence.
170. The complaint of discrimination arising from disability therefore fails.

Reasonable adjustments

171. The claimant said that the respondent had a provision, criteria and/or practice (PCP) of requiring the claimant to work from the office instead of working from home.
172. We have found that the claimant did work from home from time to time, for example on 11 and 19 July 2017, and that she was able to do so by telling the respondent that she would. She did not have to ask the respondent's permission. We conclude therefore that the respondent did not have a PCP of requiring the claimant to work from the office instead of working from home.
173. The absence of a PCP means that this complaint must fail. For completeness, we have gone on to consider the other elements of the complaint. As the claimant could work from home when she chose to do so, she was not at a substantial disadvantage compared to people who were not disabled by not having sufficient time in the office to carry out her work.
174. The claimant has accepted that the requirements she requested of the respondent before her employment started were made for business reasons, to enable her to do her job efficiently, not because of her disability. They were made because the claimant felt that the respondent should have had systems to allow full access for remote working. The claimant felt that this was in line with modern workplace approaches including those of the respondent's competitors.
175. The claimant did not tell the respondent that she was disadvantaged because of her disability by not being able to work from home. When she referred to reasonable adjustments in texts on 12 and 19 July 2017 the

respondent asked her to say what reasonable adjustments she was seeking and she did not respond. When the respondent's IT officer invited staff to test a system which would have permitted full remote access, the claimant did not reply.

176. There was no evidence before us that the respondent could reasonably have been expected to have known that the claimant was likely to have been placed at a disadvantage by her disability in respect of the need for home working.
177. The complaint of failure to make reasonable adjustments fails.

Harassment related to disability

178. We have considered the claimant's complaints of disability-related harassment which are set out in paragraphs 14.20a to 14.20e in the issues section above. More detail about these complaints was given in the claimant's further particulars of 26 July 2018.
179. Issue 14.20a: The claimant's further information dated 26 July 2018 says that this complaint of harassment refers to the emails sent to her by Andrew Waters on 2 June 2017 (page 312) and 5 June 2017 (page 313). (She also referred to an email sent on 30 May 2017, but there was no email of that date from the respondent.) The claimant said that these two emails had the purpose of humiliating her and creating a hostile environment.
180. The email of 2 June from the respondent to the claimant was an email sent in response to an email from the claimant saying she thought the respondent was aware about an upcoming appointment. It said, 'Alison, Neither Gary or myself are aware of your appointment on Monday.' The claimant replied saying, 'Sorry, I thought I'd told you.'
181. The respondent's email was related to an oncology appointment and was therefore related to the claimant's disability.
182. The respondent's email was in neutral/factual terms. It was sent in response to the claimant saying she thought she had told the respondent about an appointment, and it clarified the position to the claimant which was that she had not. The email cannot be said to have been unwanted conduct. It did not have the purpose of humiliating the claimant or creating a hostile environment for her, it had the purpose of clarifying something to the claimant.
183. (The claimant did not rely on the effect of the email. In any event, there was no evidence that she found the email humiliating or that it created a hostile environment. Her reply to the email was in very matter of fact terms. Even if the email had those effects, it was not reasonable for it to do so, considering the context in which it was sent and in particular when read together with the email from the claimant to which it was responding.)

184. We conclude that this email was not an act of harassment by the respondent.
185. The email of 5 June 2017 said, 'Alison, Myself and Gary wanted to discuss this and a few other matters this morning, but for obvious reasons were unable to'. It referred to the fact that the claimant had not attended work that morning.
186. This email was related to the claimant's sickness absence on 5 June 2017. The claimant said in her absence form that the reason for her absence on this day was because she was 'very ill and over tired due to dirty blood caused by kidney damage and scaring caused by Lexitrol'. We have decided that this absence was not something arising from disability, for the reasons set out above. For the same reasons, we conclude that this email relating to sickness absence was not related to the claimant's disability.
187. Even if we had found that this email was related to the claimant's disability, we would not have found that it amounted to unwanted conduct or that it had the purpose of humiliating the claimant or creating a hostile environment for her. Again, there was no evidence that her perception was that the email was humiliating or that it created a hostile environment for her. If it had those effects, it was not reasonable for it to do so, considering what it said and the fact that its contents were in neutral/factual terms.
188. We conclude that this email was not an act of disability-related harassment by the respondent.
189. Issue 14.20b: The claimant's further information said that this complaint of harassment refers to the letter sent by Andrew Waters to the claimant's oncologist on 4 July 2017 (page 386). The claimant said that the letter had the effect of creating an intimidating and degrading environment for her.
190. The letter was related to the claimant's disability as it was sent to the claimant's oncologist.
191. The claimant had expressly consented to the respondent obtaining a report from her GP. That consent form did not extend to her oncologist. However, the claimant had asked her oncologist's office to send some correspondence to the respondent, and this had been sent directly to Andrew Waters, not via the claimant. Andrew Waters obtained the oncologist's contact details from the correspondence he had with the oncologist's office which was sent at the request of the claimant. His letter was clearly a follow up to that correspondence. He made clear in his letter that he understood that express consent from the claimant may be required. On receipt of the letter, the claimant's oncologist called her to ask for her permission, and she gave it.
192. In the circumstances, the respondent's letter to the claimant's oncologist cannot be said to have been unwanted conduct. Further, it did not have

the effect of creating an intimidating and degrading environment for her, the claimant's perception about this request was that she had nothing to hide. If the respondent's letter did have those effects, it was not reasonable for it to do so, considering the circumstances.

193. We conclude that this letter was not an act of harassment by the respondent.
194. Issue 14.20c: The claimant's further information said that this complaint of harassment referred to the letter sent by Andrew Waters to the claimant's GP on 23 June 2017 (page 355). The claimant said that the email had the effect of making her feel intimidated, constantly harassed and like she was walking on egg shells.
195. The respondent's letter to the claimant's GP was mainly focused on the claimant's sickness absence and sleep problems which we have decided were not related to the claimant's disability. However, it referred to the claimant's previous cancer treatment and was therefore related to her disability.
196. The claimant had expressly consented to the respondent obtaining a report from her GP and had completed a consent form when requested by the respondent. We have found that the respondent's letter to the claimant's GP recorded what the claimant had told the respondent about her ill health in a factual manner. It was not, as the claimant suggested, implying that she was fabricating things.
197. In the circumstances, the respondent's letter to the claimant's GP cannot be said to have been unwanted conduct. If the claimant's perception was that the respondent's letter to her GP made her feel intimidated, constantly harassed and like she was walking on egg shells, it was not reasonable for it to do so, considering the circumstances.
198. We conclude that this letter was not an act of harassment by the respondent.
199. Issue 14.20d: The claimant's further information said that this complaint of harassment referred to the email sent by Andrew Waters to the claimant on 12 July 2017 (page 400). The claimant said that the email had the effect of creating an offensive environment that was extremely degrading for her.
200. In this email the respondent referred to reasonable adjustments. We conclude that the respondent's email was related to the claimant's disability.
201. The email of 12 July 2017 to the claimant was responding to a text from the claimant which said, 'I'm sorry I'm ill, but you are not making things easier for me' and concluded by saying, 'We need to have a discussion about reasonable adjustments'. Andrew Waters' reply started by saying

'Myself and Gary find your comment below totally unfair'. The claimant said that the respondent was saying that she had been totally unfair by asking them to make reasonable adjustments. We have found that the claimant misunderstood this, and the respondent was suggesting that it was unfair to say that they had not made things easier for her. They felt, as the email concluded, that they had been more than accommodating and patient with her. They asked her to elaborate on why she felt they were not making things easy, and what she would deem as reasonable adjustments.

202. We also conclude that the email was unwanted conduct in that it set out a different view to that put forward by the claimant. However, we do not find that it had the effect of creating an offensive and extremely degrading environment for the claimant. The claimant had misunderstood the email, and if it did have this effect, it was not reasonable for it to do so.
203. We conclude that this email was not an act of harassment by the respondent.
204. Issue 14.20e: The claimant's further information said that this complaint of harassment referred to the emails sent by Andrew Waters to the claimant on 18, 22, 23 and 24 August 2017 when she was asking for the appeal hearing to be postponed. There were no emails from the respondent to the claimant on 18, 22 or 24 August 2017. We understand this complaint to be about the emails from the respondent on 21 and 23 August 2017 (pages 456, 465, 466, 469 and 470). The claimant said that these emails had the effect of degrading her as no consideration was given to the fact that breast cancer medication can bring on extreme side effects and bouts of sickness which the claimant had no control over.
205. These email exchanges were about the arrangements for the claimant's appeal hearing and her request to postpone the hearing. This request was made and the emails were sent because the claimant was on holiday in Cornwall at the time of the hearing, not because she was unwell or for any reason related to the claimant's disability. We conclude that the respondent's emails which are the subject of this complaint were not related to the claimant's disability.
206. We conclude that these emails were not acts of harassment by the respondent.
207. The claimant's complaints of harassment fail.
208. The employment judge apologises to the parties for the delay in promulgating this reserved judgment. Conclusion of the judgment was delayed by changes in working arrangements required by the covid-19 measures.

Employment Judge Hawksworth

Date: 1 June 2020

Judgment and Reasons

Sent to the parties on: ..05/06/2020....

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For the Tribunal Office

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