Case: 1801442/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Angela Gates**
Respondent: **Thermos UK Limited**

AT A HEARING

Heard at: **Leeds** **On: 11th, 12th, 13th & 14th January 2021**
Before: **Employment Judge Lancaster**
Members: **Dr PC Langman**
Mr L Priestley

Representation
Claimant: Mr J Anderson, counsel
Respondent: Mr M Sellwood, counsel

This has been a partially remote hearing which has been consented to by the parties. The form of remote hearing was CVP video link (with only Employment Judge Lancaster and Mr Priestley attending the Tribunal on Day 1, only Employment Judge Lancaster attending on Days 2 and 3, and all other attendances being exclusively by CVP). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing

JUDGMENT

The claim is dismissed.

REASONS

Introduction

1. The evidence and submissions only having been completed at 11.55am on Day 4, the tribunal panel then reconvened in private to deliberate and the decision was reserved to be given in writing.

2. The issues in the case were agreed to be as set out in the Case Management Order of Employment Judge Maidment following a preliminary hearing on 23rd April 2020. The material sections of that Case Management Summary are now reproduced as an end note to this decision[i].

3. There is an agreed bundle of documents running to 353 pages. The Claimant produced then produced a supplemental bundle of 65 pages on 7th January 2021: no formal objection is taken to this being admitted. We accept that the Claimant is not personally responsible for the very late disclosure. However, the additional documents (in so far as they have in fact been relied upon at all) are of extremely limited weight. In particular the hand-written notes produced are not proved to be contemporaneous and are therefore merely self-serving statements which do not add to the Claimants' written and oral testimony.

4. The tribunal heard evidence from just two witnesses, the Claimant herself and Mr Mark Snape, the Respondent's Finance Director and her line manager.

Findings of material facts

5. The Claimant resigned with immediate effect from 9th January 2020.

6. The Claimant had been employed continuously since 24th April 2012. The employer was originally BHL Group Ltd and her job title was Customer Services Adviser. The title was subsequently changed to Customer Services Manager but there was no change to her actual job description. The alteration was simply to give her an enhanced status in the eyes of the public, with whom she was required to deal. The Claimant was the only employee ever engaged specifically in customer services. It was a part-time role of 21 hours per week. These were initially worked over 3 days per week, but this was changed on 12th September 2016, at the Claimant's request, to 4 days, with reduced hours and a later start to accommodate her child care commitments.

7. The Claimant began to suffer from depression in 2012. This became worse after 30th December 2016 when she experienced a horribly traumatic event. Since that date she has had significant periods of absence. In addition the Claimant's twin brother was diagnosed with MND, and she also took time off or re-arranged her hours in order to care for him.

8. The Respondent dos not have a written attendance management policy. The Company Handbook refers to a separate "Attendance Management Booklet" but no such document in fact exists. The only identified procedure in the Handbook is to there being an informal attendance meeting after "three separate instances of absence". There is no further definition or explanation of what is meant by this phrase, and no provision whatsoever for any further formal management of attendance after this informal first meeting had been held.

9. The Respondent allowed the Claimant to take all time off without question. This is not, however, because a "reasonable adjustment" was being made. There was no provision, criterion or practice ever applied to the Claimant (nor indeed to any other employee) and which therefore required to be modified so as to remove any disadvantage.

10. Company sick pay is purely discretionary. Within the latest edition of the Company Handbook, revised in May 2018, it is expressly stated that this discretionary pay will normally only be paid for a maximum of 6 weeks in any calendar year. All employees were however in practice paid full pay whilst off sick. This included the Claimant for all

periods of absence until she was notified that her company sick pay would cease from 31st December 2019, at which point she reverted to statutory sick pay. Under the Handbook "entitlement" to enhanced pay it is said "is usually decided by reviewing the record of the past 12 months". In the calendar year 2019 the Claimant had been absent for, in total, at least some 25 ½ weeks. That is 7 weeks from 7th January to 25th February 6 ½ weeks from 20th August to 4th October and 12 weeks from 9th October onwards, together with any other short-term absences which the Claimant may have taken as sick leave. We accept the Respondent's evidence that no other employee had had the same level of sickness absences as the Claimant.

11. As recorded in paragraph 4 of Employment Judge Maidment's Case Summary the Respondent's attitude, and in particular that of Mr Snape, towards the Claimant throughout her sickness absences up to May 2019 was extremely sympathetic. In actual fact this continued beyond that date. There are numerous email and text message exchanges between the Claimant and Mr Snape between May and September 2019 which clearly demonstrate that all her requests to rearrange her working days or hours for whatever reason, to take retrospective "sick leave" to cover attendance at one of her brother's appointments on 4th June, to extend her sick leave beyond the anticipated return dates in September because of the situation with her brother, or to take holiday at short notice were unquestioningly accommodated. The tone of Mr Snape's communications is entirely supportive throughout. Also, on regular occasions in this period Mr Snape bought ready meals for the Claimant and left them in the office in an attempt to help her manage the pressures she was under. The Claimant's own evidence is that on Thursday 3rd October, the day before she in fact returned to work having gone off on 20th August, Mr Snape spoke to her in the car park in a reassuring and joking fashion.

12. We do not, therefore, accept the Claimant's evidence that the Respondent's attitude towards her changed, either after May/June 2019 as set out in the list of issues or more particularly in Mr Snape suddenly treating her differently, and in fact deliberately ignoring her, after Friday 4th October 2019. Such a complete change in attitude would have been wholly implausible given the history of entirely positive interactions right up to that point.

13. It is, however, the case that Mr Snape was intending upon the Claimant's return to work to conduct a "protected conversation" (under section 111A of the Employment Rights Act 1996) where she would be offered the option of an exit package. This eventually happened on Wednesday 9th October 2019. The Claimant's own evidence is that Mr Snape said that he felt "uncomfortable" in making this offer. Mr Snape's evidence, which we accept, is that he consciously delayed having the conversation until the Claimant had had some little time to reacclimatise after a lengthy absence. This is also what he said at the meeting on 7th January 2020 when he confirmed that the Claimant's return to work had been noted as difficult which was the reason for not involving and burdening her and giving her time to settle back in. There is furthermore a contemporaneous email from Mr Snape to the Managing Director, Mr Nick Kime, dated 1st October 2019 planning for this protected conversation where he says "I will chat her (sic) early next week as she will need a couple of days to acclimatise and get her head in a better position before I have the chat. If she does not come in this week then I see no choice but to communicate by letter. I am conscious I need to resolve this asap."

14. At around this time the respondent was considering moving into direct online retail sales – a concept referred to as B2C (business to customer). We are satisfied that those initial discussions as to whether that decision to pursue this option should or should not be taken were high level strategic management matters involving only Mr Kime and Mr Snape and that they were confidential. It was only in early September 2019 that a company, Miage, was approached to put forward a proposal as to how this might be effected, and prior to that it was not a matter that any potential service provider was to have been made aware of. It was clearly commercially sensitive information. Miage already operated a direct selling website under authorisation from the Respondent. The written proposal from Mr Chris Armstead of Miage was then received by Mr Kime on 7th September 2019. We are quite satisfied that prior to the final decision being taken to approach Miage there was no consultation with any other employee, that decision was that of Mr Kime and Mr Snape alone. The new direct selling website was not then in fact up and running until April 2020

15. Because such a change to direct marketing would have an impact on the Claimant's role and was anticipated – at least in the short-term - to lead to an increasing demand upon her, and because this in turn would make it increasingly difficult for Mr Snape or Sara Watson, the purchase ledger assistant, to continue cover for her absences in the future a decision was also taken, at or about the same time that Miage were approached, to look at alternative employment options for the Claimant. At the start of that process Mr Kime and Mr Snape were considering offering the Claimant a sabbatical or an exit package. The Respondent sought legal advice shortly before 9th September 2019 and was then informed of the possibility of holding a "protected conversation". Mr Snape intended to hold that discussion when the Claimant returned to work at 1pm on 9th September, as is clear from his email exchange with Mr Kime on the morning of that day when they discussed Mr Armstead's proposal and when Mr Kime asked to be kept informed as to how he got on with her so that "we'll go from there". At that stage the Claimant was told by a colleague, Michael Wilkinson, that Mr Snape wanted to discuss some "helpful options" (plural) with her. The Claimant did not in fact return to work on 9th September. On 13th September 2019 she texted to say that she was "just really struggling" and that she "really can't think about work right now until things settle down". Mr Snape then sent her a message saying, "I have a couple of options which could help and may make things easier for you and your situation, but I do need to discuss then with you". This, again, clearly indicates that a sabbatical was still then in contemplation as one of the two options. We are also quite satisfied that Mr Snape was entirely genuine in expressing the view that he thought the proposals might be helpful to the Claimant. In the event, however, only the exit package was presented to her as a possibility at the meeting on 9th October. As we have noted that meeting was delayed for a few days after he return to work because it is clear that if at all possible, Mr Snape wanted to have that conversation in person and, so far as possible, at a time when the Claimant had "got her head in a better position".

16. It was also at around this time that the Respondent began to take legal/professional HR advice about adopting a more structured approach to absence management. Although this did not immediately result in the production of any written policy document, the Respondent did specifically consult its advisers about the continuing management of the Claimant, she being the only employee at that stage who had had relevant long-term sickness absence. As an example of this the letter of 23rd

December 2019 inviting the Claimant to what was then described as an "Absence Management Meeting" was written on professional advice.

17. Even though, as we have already found , Sara Watson was not in fact consulted about the possible restructure, let alone that she was consulted about changes to the Claimant's job, she evidently had an inkling in August 2019 of a potential move to direct sales, and it was through her that the Claimant first became aware of this consideration. The Claimant says that she was told in somewhat vague terms by Michael Wikinson, who works in IT, that "he was aware of a new website and something to do with direct selling but that he didn't know about my role changing". The Claimant did not however ask Mr Snape directly about the situation.

18. As a result of what she understood she had had been told by Sara Watson the Claimant became persuaded that her job was at risk. Nothing that she was thereafter told verbally or in writing to the contrary, no matter how clearly it was expressed, has succeeded in persuading her otherwise. Right up to the Absence Management Meeting on 7th January 2020, which was primarily to discuss in conjunction with a Mental Health Job Retention Specialist from Mind ways of getting the Claimant back into work, and where in preparatory discussions with that specialist, Gosia Kowalska, Mr Snape had made it perfectly clear that the Claimant's job was safe, she nonetheless remained convinced – and is still- that there was a hidden agenda, namely that there was in fact no job for her to go back to.

19. The Claimant went off sick on 20th August 2019. The doctor's" fit notes" from this time state this to be non-specific depression and not work-related stress. Clearly however the Claimant "felt like others knew things she didn't and felt her job was at risk" and says that this was, at least in part, the trigger for her absence in August.

20. We agree with Mr Sellwood's description of the Claimant "acutely overthinking" what is going on, tipping into paranoia". This is not a criticism of the Claimant. It is a fact, given her poor mental health. Unfortunately, this does mean that the Claimant's evidence as to what was said or done to her, particularly where this is an after-the-event recollection is generally not reliable.

21. When the Claimant returned to work in October 2019 the planned "protected conversation" was able to be held. It is correct to observe that the Claimant had no prior notice that Mr Snape wished to discuss with her the possible termination of employment, though the earlier communications had indicated that he had something important that he wanted to discuss with her personally. It was a very short conversation lasting no more than five minutes. The Claimant became upset and stopped the meeting, going home shortly afterwards. The entirety of that meeting is properly classified as falling within section 111A. There are no procedural requirements which attach to such a meeting. It is wholly artificial to seek to exempt anything that was said before Mr Snape actually used the words "protected conversation" to describe the purpose of the meeting: though in fact we are satisfied that, having taken legal advice and being mindful of the structure to be followed, he did in fact tell the Claimant that this was what he was doing at a very early stage.

22. We do not accept the Claimant's account that Mr Snape spoke to her in a harsh manner, nor that his first words were abruptly "this has gone on for years now". This is denied by Mr Snape and would have been out of character given his previous friendly

interactions. There is a near contemporaneous reference to this meeting in a follow - up email from Mr Snape dated 14th October 2019, which we are satisfied does in fact reflect the tone of the meeting. In that email he says "we began a protected conversation under s111a Employment Rights Act 1996. As I explained at the time you were under no obligation to have that conversation. This remains the case should you not wish to conclude this conversation. With that in mind we hope this letter reassures you that the Company remains committed working with you to find the best way to move forward".

23. Take away any perceived harshness of tone and anything said by Mr Snape in this regard was simply a statement of fact. The Respondent had over a significant time provided cover for all of the Claimant's absences and had paid her full company sick pay.

23. Mr Snape did say words to the effect that Sara Watson could no longer continue to provide cover for sickness absences. He did not, at this first meeting or subsequently, say that the Claimant would no longer receive "support" in her role. We accept the Respondent's evidence that Ms Watson was not in fact the Claimant's "assistant" as she alleges, although if – outside of the times when she covered for her absences – Ms Watson also did work, ancillary to her purchase ledger role, which fell within the scope of customer services she would have been nominally under the direction of the Claimant as the designated customer services manager.

24. Mr Snape also said that company sick pay could not continue to be paid indefinitely. He did not say, as the Claimant has alleged, that it would end immediately: this is evident from the fact that in the event it continued to be paid for a further twelve weeks. Nor did he say, either at this first meeting or subsequently, that the claimant would not ever receive discretionary sick pay in the future. This is evident from the later conversation on 14th November (originally framed as a specific complaint of unfavourable treatment or breach of contract : 7.1.7 in the list of issues) where there was clearly a discussion about how the discretion as to sick pay might in fact be exercised in the future, including in the hypothetical case of the Claimant becoming seriously ill through cancer and whether she could then be able legitimately to raise a grievance if that conjectural long-term absence were not paid in full whereas a short-term absence of another employee was.

25. The Claimant after she had gone home early after that meeting was later that day admitted to hospital. It appears that she was released the following day, and the next day, on 11th October 2019, she sent a text to Mr Snape, retracting an earlier message that she had sent in anger, and stating that she would be in touch when she was feeling better. Mr Snape responded immediately by text, and then followed with the more formal letter dated 14th October 2019 to which we have already referred. As promised in that letter the Respondent did not then seek to contact the Claimant for a further four weeks to give her time to recuperate. A second meeting was then arranged for 14th November 2019.

26. This was confirmed in correspondence to be an informal meeting where the Claimant would, however, be asked if she were willing to resume the protected conversation. The Claimant agreed to attend although the date was not suitable for a representative from the Mind Workplace Leeds Job Retention Service also to be present.

27. The Claimant sought at the start of the meeting on 14th November, to make a number of complaints against Mr Snape. We accept on the balance of probabilities that she did raise the fact that he had allegedly discussed with Sara Watson the implications of B2C for her job role, the allegation of his ignoring her when she returned to work on October 4th, the fact that a protected conversation had been initiated without a return-to-work interview and the allegation of his having said "this has gone on for years now". We do not accept that Mr Snape "refused to listen to concerns about the way the meeting on 9th October had been handled". Only one of the four concerns is directly relevant to this complaint, that is the alleged comment about the situation having gone on for years. Mr Snape did not refuse to listen to this concern, he simply disagreed with it factually. Similarly, the Claimant's assertions in respect of Ms Watson and the return to work are not accepted We accept Mr Snape's evidence at he did not "threaten" to adjourn the meeting to take legal advice but that he may well have offered the Claimant the opportunity to raise a grievance if she wished to pursue these disputed questions of fact. In the event the Claimant did consent to the protected conversation being reopened. All further points of discussion apart from the Claimant's initial concerns therefore fall within the ambit of section 111A.

28. Mr Snape did not say at this meeting that from that point forward all sickness absence would be paid at statutory sick pay only. He did not say that the Claimant *would* be disciplined for any further sickness absence nor that if she was seen struggling at her desk or drinking too much tea she *will be* taken down the capability procedure. We are satisfied that what Mr Snape was seeking to explain at this stage was how the more structured approach to absence management which was now to be put in place might apply in practice. This is entirely consistent with the way this issue is later dealt with by Mr Snape at the 7th January meeting where he confirms that following these procedures he was "explaining what things could be brought up". We accept Mr Snape's denial that he ever said the Claimant could now be disciplined simply for drinking tea in the circumstances which he himself had expressly sanctioned if she needed to take a short time away from her desk. Nor did he say that the Claimant *will not* be allowed the same flexibility to attend her brother's appointments or that her "assistant" can no longer assist her in Customer Services. We are satisfied that the entire context of these maters being discussed at all was again in relation to the need for a more structured approach to attendance management and the provision of cover.

29. Mr Snape did not fail to explain what any extra demands on the Claimant would be. We are satisfied that he did so adequately in all the circumstances in the same terms as are expressed in his follow up letter of 20th November 2019. That is to say that he referred to the structural business in the proposed future arrangement with Miage, expressly confirmed that the detailed implementation changes of these changes would be discussed with the Claimant and reiterated that "your role remains in its current form and is key to our customer service offering". This is again mirrored in the discussions on 7th January 2020.

30. We accept Mr Snape's evidence that he did not use the phrase "we cannot continue to treat you with kid gloves".

31. We also accept his evidence that he did ever expressly use the phrase "work is way down your list of priorities" and certainly not with a derogatory connotation. It is, however, possible that in the course of conversation and we have observed in this hearing that it is not always the case that questions and answers with the Claimnt are

not always able to proceed in an entirely orderly fashion – reference may have come up to the Claimant's own text of 13th September 2019 when she had said "I really can't think about work right now".

32. Any reference to back to work chats being awkward will, we are satisfied, have been in relation to the delay in holding the protected conversation on 9th October. It is not that the Claimant was said to be "difficult" but that her readjustment to work was observed to have been difficult. Again, this is precisely what he said at the meeting on 7th January 2020 when he confirmed that the Claimant's returns to work had been noted as difficult which was the reason for not involving and burdening her and giving her time to settle back in.

33. We have already dealt with the comment about the Claimant being potentially on "dodgy ground" is she sought in a future grievance to contrast her long-term sickness absence, for say cancer, with a shorter-term absence of another non-disabled colleague. This, it is now accepted, was a purely hypothetical argument and has no bearing on the present case.

34. At the conclusion of the meeting on 14th November 2019 it was the common understanding that both the Claimant and Mr Snape wished to move towards a return to work as swiftly as possible, possibly with a variation in hours. The Claimnt did not raise any complaint about anything which had allegedly been said or done by Mr Snape at that meeting. On 17th November 2019 the Claimant confirmed in writing that she was not interested in any settlement agreement to terminate her employment and that therefore concluded the "protected conversation".

35. On 18th November 2019 the Claimant requested a further meeting together with her allocated job retention specialist from Mind, which she described as "mediation". Mr Snape then engaged in correspondence with that person, Gosia Kowalska, and also met with her privately on 26th November 2019. Following that meeting Ms Kowalska informed the Claimant by telephone that Mr Snape had expressly confirmed that her job was safe. It is clear that both Mr Snape and Ms Kowalska envisaged that the next stage would be a sickness absence review meeting with the Claimnt at which she, Ms Kowalska, would also be present.

36. On 28th November 2019 Mr Snape wrote to the Claimant putting her on notice that her company sick pay would expire on 31st December.

37. Following further communication with Ms Kowalska shortly before Christmas the proposed sickness absence review was arranged, at Ms Kowalska's convenience for 7th January 2020. Ms Kowalksa did not consider that any other meeting was necessary. There was to be no separate "mediation" as a precursor to the absence review. This was a single meeting at which Ms Kowlska would fulfil the entirety of her designated role in seeking to facilitate a return to work: she was not to act as an independent mediator conciliating or determining any workplace dispute.

38. The invitation letter was dated 23rd December 2019. It is headed "Absence Management Meeting" and is described as a meeting to discuss ongoing absence. The agenda included consideration of any reasonable adjustments or alternative roles to assist a return to work, and generally planning the way forward and the next steps to be taken. There is no reference to this forming part of any formal capability or

attendance management procedure. In a further email of 2nd January 2020 Mr Snape expressly confirmed that "This is not a disciplinary meeting or a meeting after which any sanction will be made". He also confirmed that a second part of the meeting might be used to address any other concerns which the Claimant may have.

39. There was further correspondence between Mr Snape, the Claimant and Ms Kowalska regarding the attendees at the meeting, its recording and its structure but we are satisfied that these were dealt with appropriately in all the circumstances. No objection was in fact taken at the outset of the meeting itself. It therefore went ahead with Mr Snape conducting the meeting, Ms Kowalska actively participating and Mr Michael Griffiths taking a note, with accommodation if necessary, for him to leave should the Claimant wish to raise any matters of a confidential nature.

40. The Claimant expressly acknowledged in evidence that she was not badly treated at that meeting. There is a note of the meeting which is not materially in dispute, and which shows that the meeting was indeed conducted in a perfectly proper fashion. A phased return to work was anticipated.

41. The Claimant however persisted in her view that there was an "agenda" and indicated that she intended to put in an unspecified grievance. Later that same day, 6.21 pm on 7th January 2020, she emailed Mr Kime confirming that she would in due course raise a formal grievance alleging "attempted constructive dismissal" and breaches of the Equality Act 2010 and the Health and Safety at Work Act 1974. This was not itself a grievance and no detail whatsoever was provided. Mr Kime did not reply to that email, but he was out of the office on 8th January 2020.

42. At 8.47 pm on 8th January 2020 the Claimant sent a further email to Mr Kime and Mr Snape again claiming that she required more information about any future changes to her job role.

43. She did not afford any opportunity for a reply to that request (though a draft email was sin preparation reiterating what she had already been told) before resigning with immediate effect at 10.52 am on 9th January 2020. Her resignation was acknowledged at 3.26 pm. She then sent a further angry email to Mr Kime later that evening but retracted on 11th January 2020 referring to "an irrational impulsive decision".

The application of these facts to the identified issues

Unfair Dismissal

44. The Respondent did not fail to consult the Claimant on planned changes to the express terms of her employment contract. It did not involve her in the strategic decisions as to whether to move to B2C, but that is no part of her contractual responsibility. Once that decision had been taken it proposed to involve the Claimant fully in discussions as to how any changes in the customer services function would be implemented. At the point when she resigned the new website was not yet operative and there were therefore no changes to the Claimant's job description.

45. The Respondent did not criticise the Claimant's absence relating to her disability and care responsibilities in a meeting on 9 October 2019

46. The Claimant was lawfully offered a termination package under the provisions of section 111A Employment Rights Act 1996. Although her sickness absence was a material factor in making this offer, it was not an act of discrimination. Because it was not therefore improper behaviour within section 111A (4) all reference to these "protected conversation" is inadmissible on the unfair dismissal claim. When the Claimant rejected the settlement offer her job was not at risk.

47. the Claimant was told her role would potentially be more onerous, but the Respondent did not fail to give any appropriate indication of what the new role would be. The Respondent did not withdraw any assistance she had previously been getting whilst actually at work. Nor in fact did it ever cease to make arrangements to cover her continuing sickness absence or initiate any absence management process to sanction her in respect of those absences. The Respondent was not trying to set her up to fail. This was apparently a tentative suggestion made by Ms Kowalska when she was first consulted by the Claimant and solely on the basis of the Claimant's account; it was not a view she ever repeated in the course of her subsequent dealings with Mr Snape, and particularly not in respect of the meeting on 7th January 2002.

48. Mr Snape did not refuse to listen to concerns about the way the meeting on 9 October 2019 was handled in the meeting on 14 November 2019 nor did he threaten to adjourn the meeting to obtain legal representation.

49. The Claimant was not, as set out in paragraphs 27 to 33 above, subjected to discriminatory comments as described in paragraphs 22.1 to 22.9 of her grounds of complaint on 14 November 2019

50. The Claimant was not "warned" on 14 November 2019 that she would be on dodgy ground if she raised a grievance in the future about less favourable treatment. This was an immaterial and hypothetical argument, which has no relevance to this case.

51. The absence management procedures instigated against the Claimant on 23 December 2019 for absence related to her disability were perfectly proper and appropriate.

52 The Respondent did not refuse to discuss the Claimant's mental health condition and her triggers in the meeting on 7 January 2020. There was an appropriate level of discussion as facilitated by Ms Kowalska.

53 The Respondent did not fail to clarify on 14 November, 17 November, 29 November 2019 and 2 January and 8 January 2020 what the extra demands on her role were, and of course there was never any question of her "assistance" being removed.

54. There is no "last straw" arising out of Mr Snape's conduct in the meeting on 7 January 2020 or the Respondent's subsequent failure on 8 January 2020 to provide any clarification on the Claimant's concerns. The Respondent acted entirely properly in holding an absence review meeting in consultation with Ms Kowalska, it is a wholly innocuous act in the circumstances, and there was no reasonable opportunity to respond to the demand of 8th January. Even if there had been any previous fundamental breach this would not therefore act so a to reactivate that breach.

55. There is no fundamental breach of contract. Discounting, as we must, the protected conversations all that is left are unsubstantiated claims that the Claimant was not "consulted" about a strategic management decision, that she was ignored on a return to work in October 2019, that she voiced these concerns at a meeting on 14th November 2019 but did not pursue them in a grievance, and that she was then invited (clearly with reasonable and proper cause) to an absence review meeting following which she resigned.

Direct discrimination

56. The Claimant was not told that she would be disciplined if she was found "struggling" at her desk or taking too many of her "tea breaks" when she was struggling.

57. The Claimant was not told that all sickness absence would be paid at statutory sick pay rates.

58. The Respondent did not fail to consult on proposed changes to her role or tell her that the flexibility she was afforded to care for her brother would be removed or that she would be disciplined for any further sickness absence (less favourable treatment by association).

59. The Claimant has not therefore established that she was subjected to any less favourable treatment.

"Disability Related Discrimination" (section 15 Equality Act 2010)

60. The Claimant not being "consulted" about changes to her role at the strategic decision-making stage was not unfavourable treatment and was not because of anything arising in consequence of her disability.

61. The Claimant being offered a termination package can reasonably be construed as a detriment at the time, even though it could only take effect with her express consent and ceased to be relevant after 17th November 2019. The Claimant was not however "incentivised" to accept the offer by threats of disciplinary action.

62. When the Claimant refused the termination package, the Respondent did not promise that the support system she used during sickness would be removed or that she would be disciplined if she had any more sickness absence.

63. The Claimant being subsequently invited to a sickness management meeting is not unfavourable treatment when its express purpose was to provide support for the Claimant getting back into work and could give rise to no sanction. The Claimant could not reasonably consider it a detriment to be invited to such a meeting where she had been absent for 13 consecutive weeks, had exhausted her company sick pay, and when she had explicitly sought the assistance of Ms Kawalska to facilitate getting her back into work. Clearly however that meeting was called because of the sickness absence arising from the Claimant's disability. Equally clearly it would be justified as a means of managing long-term absence.

64 The Claimant was not chastised on multiple occasions by the Respondent and told that "this has gone on for years now", they can no longer treat her with "kid gloves" and that "work was way down your list of priorities".

65. The holding of a protected conversation was, however, a proportionate means of achieving a legitimate aim. That aim is expressed as" seeking to manage the Claimant's ongoing absence in line with its policies so as to be able to maintain an efficient workforce and meet its business needs". Although there was no written policy the Respondent was in the process of taking appropriate advice on a more structured approach. The Claimant herself accepted in evidence that this was, in principle, a sensible change. As the employee with the most extensive levels of sickness absence any such a structured approach would necessarily impact upon the Claimant in the future. Within that incipient policy it also took advice, at an appropriate juncture in the Claimant's employment given her personal circumstances and the restructuring of the business, on a protected conversation. This is explicitly sanctioned by statute. It was an entirely voluntary process, which the Claimant was entitled to and did reject as inappropriate for her. The offer was not pursued after the Claimant rejected it. Thereafter the Claimant continued to be properly managed in line with the incipient policy, which resulted in the perfectly reasonable invitation to a review meeting even though the existing written procedure made no express provision for such a necessary step in the course a long-term sickness absence.

Failure to make reasonable adjustments

66. It is accepted that the Respondent did apply the following provision, criteria and/or practice ('the provision') generally, namely its requirement for employees to maintain regular attendance and perform their duties at work and their policy regarding the monitoring of sickness absence.

67. The Claimant was more likely to be absent from work due to triggers causing flare-ups in her symptoms of depression.

68. She was not, however, threatened with disciplinary action.

69. Nor was she subsequently placed on an absence management procedure which caused a further decline in her mental health. She was simply called to a non-disciplinary review meeting.

70. The Respondent did not fail in its duty to take such steps as were reasonable to avoid any disadvantage flowing from her poor attendance record. It had afforded great flexibility to the Claimant in the past and the incipient more structured approach to absence management had not in fact resulted in any disadvantage to the Claimant. Continued payment of non-contractual sick pay well beyond the anticipated six weeks maximum and where due notice of discontinuation had been given is not a reasonable adjustment where the intention is to effect a return to work.

71. The Respondent cannot make an adjustment by "not removing the support previously provided" where such support had not in fact been removed.

72. The proposed adjustment of “considering the Claimant’s mental health condition and how triggers might be avoided” is imprecise. In any event the Respondent did just that at the absence review meeting as facilitated by Ms Kowalska.

EMPLOYMENT JUDGE LANCASTER
DATE: 2nd February 2021

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[i] **The complaint(s)**

1. By a claim form presented on 6 March 2020, the Claimant brought complaints of (constructive) unfair dismissal and disability discrimination. The Respondent defended the claims.
2. The Claimant maintains that she was a disabled person at all material times by reason of her suffering from depression from 2011. The Respondent accepts that the Claimant was for this reason disabled.
3. In addition, some of the Claimant’s complaints are based on her association with her twin brother, said to be also disabled by reason of him having been diagnosed as suffering from motor neurone disease from January 2019. Again, the Respondent accepts that the Claimant’s brother was for this reason a disabled person.
4. The Claimant portrays a picture of the Respondent as a sympathetic employer in terms of previous periods of sickness absence due to her own condition and related to her need to care for her brother. However, she maintains that the Respondent’s attitude changed after May/June 2019 when she disclosed that her brother had only 9 – 12 months to live. She says that she was told of changes in August 2019 to her customer services manager role with no prior consultation in circumstances where other colleagues had been consulted with. Following an absence due to sickness, she then complains, in particular, of the attitude of Mr Snape at a meeting on 9 October and of comments made at a further meeting with him on 14 November related to how she would be treated in the future. She refers to seeking clarification as to the Respondent’s position but then being invited to an absence management meeting on 7 January 2020. On that day she raised a grievance. She sought further clarity regarding the Respondent’s position the following day and on 9 January resigned from her employment in circumstances which she says amount to a constructive dismissal.
5. The Respondent maintains that some of the Claimant’s complaints are out of time although not any complaint relating certainly to her (constructive) dismissal. It is appropriate that any time issues be left to be determined at the final hearing given that the Claimant is maintaining that her treatment formed part of a continuing course of conduct.

The issues

6. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

7. **Unfair dismissal claim**

   7.1. The Claimant maintains that the Respondent acted in fundamental breach of her contract of employment and in particular in breach of the implied duty of trust and

confidence. The treatment she relies upon as singularly and, more particularly, cumulatively amounting to such fundamental breach of contract is as follows:

7.1.1. the Respondent failed to consult the Claimant on planned changes to the express terms of her employment contract. The Claimant maintains that the reason for this was because the Respondent had decided that, due to her sickness absence and caring responsibilities for her brother, she was not going to fit in with the planned changes and restructure

7.1.2. the Respondent criticised the Claimant's absence relating to her disability and take care responsibilities in a meeting on 9 October 2019

7.1.3. the Claimant was offered a termination package because of her sickness absence, which the Claimant maintains was an act of discrimination

7.1.4. the Claimant was told her role would be more onerous, but the Respondent failed to give any indication of what the new role would be. Further, the Respondent withdrew the assistance she had previously been getting. The Claimant maintains that the Respondent was trying to set her up to fail

7.1.5. Mr Snape refused to listen to concerns about the way the meeting on 9 October 2019 was handled in the meeting on 14 November 2019 and threatened to adjourn the meeting to obtain legal representation

7.1.6. the Claimant was subjected to discriminatory comments as described in paragraphs 22.1 to 22.9 of her grounds of complaint on 14 November 2019

7.1.7. the Claimant was warned she would be on "dodgy ground" if she raised a grievance in the future about less favourable treatment on 14 November 2019

7.1.8. the absence management procedures instigated against the Claimant on 23 December 2019 for absence related to her disability

7.1.9. the Respondent refused to discuss the Claimant's mental health condition and her triggers in the meeting on 7 January 2020

7.1.10. the Respondent failed to clarify on 14 November, 17 November, 29 November 2019 and 2 January and 8 January 2020 what the extra demands on her role were and how she would meet them when her assistance had been removed

7.1.11. the Claimant relies as a last straw on Mr Snape's conduct in the meeting on 7 January 2020 and the Respondent's subsequent failure on 8 January 2020 to provide any clarification on the Claimant's concerns.

7.2. Does the Claimant prove such treatment occurred? If so, did the treatment singularly and, more particularly, cumulatively amount to a fundamental breach of her contract of employment so as to entitle her to resign with immediate effect? Did the Claimant resign in response to the fundamental breach of contract or did she delay in resigning so as to be regarded as having affirmed her contract of employment?

7.3. If the Claimant was dismissed, does the Respondent show a potentially fair reason for dismissal and that it acted fairly and reasonably in all the circumstances?

7.4. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

7.5. The Claimant also claims that her constructive dismissal was a discriminatory dismissal.

8. **Section 13: Direct discrimination because of disability**

8.1. Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act, namely.

8.1.1. the Claimant being told that she would be disciplined if she was found “struggling” at her desk or taking too many of her “tea breaks” when she was struggling.

8.1.2. The Claimant being told that all sickness absence would be paid at statutory sick pay rates

8.1.3. the Claimant being less favourably treated because the Respondent failed to consult on proposed changes to her role and telling her that the flexibility she was afforded to care for her brother would be removed and she would be disciplined for any further sickness absence (less favourable treatment by association)

8.2. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the hypothetical comparators and two colleagues in respect of the alleged lack of consultation.

8.3. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

8.4. If so, what is the Respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment?

9. **Section 15: Discrimination arising from disability**

9.1. The allegation of unfavourable treatment as “something arising in consequence of the Claimant’s disability” falling within section 39 Equality Act is:

9.1.1. the Claimant not being consulted about changes to her role

9.1.2. the Claimant being offered a termination package and then being incentivised to accept the offer by threats of disciplinary action

9.1.3. when the Claimant refused the termination package, the Respondent promising that the support system she used during sickness would be removed and that she would be disciplined if she had any more sickness absence, the Claimant being subsequently invited to a sickness management meeting

9.1.4. the Claimant being chastised on multiple occasions by the Respondent and told that “this has gone on for years now”, they can no longer treat her with “kid gloves” and that “work was way down your list of priorities”.

9.2. Does the Claimant prove that the Respondent treated the Claimant as set out above?

9.3. Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability? The Claimant maintains that the aforementioned treatment was due to her cumulative sickness absence and the Respondent's attitude towards it, including its belief that she would need further time off in the future.

9.4. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

10. **Reasonable adjustments: section 20 and section 21**

10.1. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely its requirement for employees to maintain regular attendance and perform their duties at work and their policy regarding the monitoring of sickness absence?

10.2. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that she was more likely to be absent from work due to triggers causing flare-ups in her symptoms of depression as a result of which she was threatened with disciplinary action and subsequently placed on an absence management procedure which caused a further decline in her mental health.

10.3. 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 required and they are identified as follows:

10.3.1. not removing the support previously provided

10.3.2. considering the Claimant's mental health condition and how triggers might be avoided.