EMPLOYMENT TRIBUNALS

Claimant: Ms A McMahon

Respondents: 1. Rothwell & Evans LLP
2. Robert Pundick

Heard at: Manchester (by CVP) **On:** 14 and 15 December 2020
4 February 2021
(in Chambers)

Before: Employment Judge Feeney
Mr I Frame (CVP)
Mrs L Taylor (CVP)

REPRESENTATION:

Claimant: In person
Respondents: Mr J Martin, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) the claimant was disabled within the meaning of the Equality Act 2010

(2) The claimant's claims of disability and sex discrimination fail and are dismissed

REASONS

1. The claimant brings a claim of disability discrimination and sex discrimination following a dismissal by the respondent on 10 May 2019. The respondents submitted that they dismissed the claimant for timekeeping problems, extended breaks, continued absences, in particular one absence notified to them unilaterally at 11.00pm the day before.

Claimant's Submissions

2. The claimant submits that the reasons for her absences/any late arrivals at work were due to her menopausal symptoms, that the menopause comprised a disability, and accordinglly that the respondents dismissed her contrary to section 15 because of her disability and failed to make reasonable adjustments.

Respondents' Submissions

3. The respondents submit that the claimant was not disabled within the meaning of the Equality Act 2010, that if she was they had no knowledge (actual or constructive) that she was disabled, and her dismissal was not the result of any matter relating to any disability or to sex, nor did the duty to make reasonable adjustments arise.

The Issues

4. The issues to be determined are:

Disability Status

(1) Did the claimant have a disability in accordance with section 6 of the Equality Act 2010 at the relevant time (10 May 2019) because of early onset menopause.

Direct discrimination because of sex and/or disability – section 13 Equality Act 2010

(2) It is not in dispute that the claimant was dismissed. Was her dismissal less favourable treatment, that is did the first and/or the second respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies on a hypothetical comparator, and during the hearing refereed to a trainee solictor as a potential actual comparator.

(3) If so, was this because of the claimant's sex or disability?

Discrimination arising from disability – section 15 Equality Act 2010

(4) Did the following things arise in consequence of the claimant's disability:

(i) her sickness absence;

(ii) not attending work punctually; and/or

(iii) the need to take extended breaks (although the claimant denies that she did so)?

(5) Did the first and/or second respondent by dismissing the claimant treat the claimant unfavourably because of any of those things referred to in (4)?

(6) If so, has the first or second respondent shown that the dismissal was a proportionate means of achieving a legitimate aim?

Adjustments for disabled people – sections 21 and 22 Equality Act 2010

(7) Did the first respondent have a PCP (that is a provision, criterion or practice) of requiring staff to attend at work and/or to attend at work on time?

(8) Did the PCPs put the claimant at a substantial disadvantage in comparison with persons who were not disabled?

(9) If so, did the respondent know that the claimant was put at this substantial disadvantage and that this was because of her disability?

(10) Did the first or second respondent take such steps as it was reasonable of them to have taken to have avoided such disadvantage? The claimant says the respondents should have spoken to her about the reasons for her non attendance and/or lateness rather than dismissing her, and/or should not have dismissed her.

There was a discussion about whether the claimant's sex discrimination was an indirect discrimination claim and that if she wished to pursue that she would have to apply to amend. Further if the amendment was allowed the respondent indicated they may have to apply for an adjournment as their evidence was not directed to the issues arising in respect of indirect sex discrimination. The claimant after considering the matter decided she did not want to pursue an amendment.

Witnesses and Evidence

5. For the claimant, the claimant herself gave evidence. For the respondents Ron Pundick and Joseph Gilliatt, both directors of the respondent solicitor's firm, gave evidence. We found all the witnesses credible in the main this was really a case where the legal analysis of the facts was at issue not the facts themselves.

6. There was an agreed bundle of documents.

Findings of Fact

The Tribunal's findings of fact are as follows:

7. The claimant became working for Rothwell & Evans, the respondent, a firm of solicitors dealing mainly with conveyancing and personal injury litigation, in September 2017. The firm had two branches: one in Swinton and one in Sale, and employed roughly 20 people, so it was a small to medium sized firm. It had no HR function although it did have a payroll department.

8. The claimant worked in effect in a pool of typists when she started and was quite ambitious. In April 2018 she started a conveyancing apprenticeship which was agreed with Stephen Taylor, one of the first respondent's directors and Head of Conveyancing. The claimant worked for Julie Allsop, who was very supportive of her although obviously with the apprenticeship scheme the claimant had to take on more responsibilities.

9. The claimant understood that complaints had been made about her which caused Mr Pundick, the senior partner, to have a word with her and suggested that

she should concentrate on her secretarial role not her apprenticeship. He did comment "have we even signed up for this?" as he was unaware that this had been arranged. The claimant felt he was unhappy about her doing this apprenticeship. Nevertheless she had the support of Julie Allsop and the claimant continued with the apprenticeship, putting extra hours in to keep up with the apprenticeship and the secretarial workload.

10. The claimant's absence, as far as we were aware, in 2018 was as follows:

- 16 January – indigestion;
- 12 March – absent because he son was ill;
- 11 April – claimant had surgery.;
- On 26 April the claimant made up some hours where she had been absent;
- On 20 June 2018 her son was ill and she was absent;
- 23 August – absent due to stomach problems; Claimant advised Julie Allsop it was an upset stomach and states ' hopefully in tomorrow if the tablets work' but sick note says "actually menopausal"
- 20 September – absent also because of stomach problems.

11. In August the respondent praised the claimant for undertaking extra hours when the firm had left itself short staff due to too nay holidays being agreed.Mr Pundick later advised on 12 September that the firm needed to be more careful about this and that employees needed to book their holidays early as they would continue to eb decided on a first come first served basis.

12. On 20 September the claimant sent an email to Mr Pundick on the advice of Julie Allsop to explain the situation. This stated as follows:

> "Hi, Ron
>
> <u>Being off sick</u>
>
> I just wanted to explain a couple of things. As you know I've had a gynaecological problem recently and have been diagnosed as menopausal which is slightly early for my age. I have all the symptoms and they have become quite unbearable and I can feel so hot like I have flu. I have had blood tests and hysteroscopy and biopsy and I am supposed to be starting HRT but the doctors still haven't had my biopsy results back from the hospital, as I find out tonight at the doctors. Therefore I've been advised to Prozac in the interim.
>
> I am sorry I've been late recently. Once it was simply because I had to change clothes due to the hot flashes. I don't want to become unreliable and

> I'm trying to get a solution, whether it's HRT or whatever, and appreciate your understanding. I also appreciate you've allowed me to do the apprenticeship and I don't want to let you down or think bad of me. I will be in work tomorrow either way."

13. Mr Pundick replied to the claimant, thanking her for the information, and using a well-worn phrase "a little bit too information but it does help us to be made aware of these problems"

14. In October there was a hiccough regarding time off the claimant needed and Mr Pundick told the claimant he really needed reminding about these things given the company had no HR department.

15. The claimant then appears not to have been off sick again then until 7 December where in fact she said to Mr Pundick she was going to be a little late in as she had a bad counselling session this morning, "I feel sick but I am coming in, sorry for the inconvenience".

16. Just before Christmas there were discussions at the respondent firm because the senior conveyancing assistant, Mr Paul Fitzhugh, wished to retire. After discussions he agreed that he would work three days a week and it was discussed that the claimant, given that she was doing this apprenticeship, could become in effect his assistant, still work part-time but with her primary role being to cover the days he was not in, not to do the same work as him but to make sure that matters kept rolling forward and that any problems were dealt with or effectively resolved.

17. However, the claimant was upset when she saw she had been described as Mr Fitzhugh's PA, and accordingly she resigned on 20 December in an email to Joe Gilliatt, the partner who was in charge of her department. She said:

> "Please accept this as my resignation and one month's notice with immediate effect. Thank you for employing me but I have considering everything and I feel going forward my prospects with Rothwell & Evans are limited."

18. Mr Gilliatt replied, apologising for how the job was described and he stated:

> "When we interviewed you, we discussed your role would be as a typist with the opportunity of developing as a conveyancing assistant in accordance with the knowledge gained from your diploma. You fully understood that you needed to gain significant practical work experience in order to meet the requirements of the course and we are committed to providing you with this exposure. We have discussed our recent staffing restructure and that you would be assisting Paul from January 2019 onwards. To that end you would be a conveyancing assistant/PA to Paul which would require you to telephone clients and solicitors regarding ongoing transactions, etc., etc. It would also require you to assist with any typing or other administrative tasks that Paul or the wider team may require on a day-to-day basis. Your work would be overseen and supervised by Paul and therefore by myself or Cameron if I am not available.
>
> I understand that you do not consider that such a role would meet the requirements of your course and that you wish to resign with immediate effect.

> On behalf of Rothwell & Evans can I thank you for your contribution to date and if you wish to discuss the matter further I am available my email over Christmas or to discuss in the New Year."

19. The claimant replied on 27 December as follows:

> "Thank you for your reply. I appreciate your feedback. In hindsight I feel I've been oversensitive. I am suffering quite badly with the menopause amongst some other personal issues and think I can be quite hasty at times. The Christmas period doesn't help either with the stress levels. I would be grateful if you would accept my retraction herewith but understand completely if you don't…"

20. It was agreed to allow the claimant to retract her resignation, although Mr Pundick (as it turned out later) was not completely happy with this.

21. Accordingly, in January 2019 the claimant's role changed. The claimnat in evidence said she picked up the requirements of the role quickly.

22. The claimant was then absent on 8 January 2019. She emailed Mr Pundick, copying it to Mr Gilliatt, saying that she "did not feel well today at all with my stomach", saying she could not manage to get through on the phone and that she would hopefully be in tomorrow and apologising for any inconvenience. At the same time the claimant sent a sick note in. The sick note said "stomach/gynaecological".

23. The claimant was unaware at this point that sick notes actually went straight to payroll for them to determine when SSP was payable as opposed to full salary, and were never seen by anybody within the firm.

24. In respect of feeling unable to approach Mr Pundick about any menopausal symptoms Mr Pundick in evidence stated that the claimant could have apprached one of the female partners. He did not say that she should do this rater than talk to him.

25. On 22 January 2019 the claimant filled in a sick note and emailed the respondent saying she was ill with flu. Mr Gilliatt informed Mr Fitzhugh and Mr Pundick, and the claimant stated that she hoped to be in the next day.

26. However, the claimant phoned the next day to say that she had got aches and pains and a temperature and would not be in that day either.

27. On 24 January 2019 the claimant did not attend work but did not advise anybody that she was not coming in until 11.00am. She was supposed to work the whole day on that particular day. She said she had flu, she thought she had a virus, she said she could not get out of bed so she had not been able to see a doctor and she doubted she would be in the next day.

28. On 5 February 2019 Mr Gilliatt advised the Mr Fitzhugh and Mr Pundick that the claimant's son was ill and she could not leave him and had no-one else to look after him. She said she had managed to organise cover for the rest of the week "so would be in after today".

29. Mr Pundick replied to Mr Gilliatt saying:

> "I think you and Paul need to have a very serious conversation about how reliable she is. I have had to contact the agent tomorrow to tell him either there will be a second interview or we are not interested. My own view is that she is not reliable enough for the job she has taken on."

30. Mr Gilliatt replied:

> "We think her work is good when she's here. Maybe you/we should have a word regarding her absence to seek some assurance about her future attendance. I have checked with Paul and if that was sorted he doesn't see a problem."

31. The reference to "contact the agent" was a reference to the fact that the respondent had contacted an agency to look into a replacement for the claimant, but after Mr Gilliatt gave the claimant an endorsement this was not pursued any further.

32. On the 5 February Mr Gilliat did advise the claimant that he would need to have a chat with her which caused the claimant to be concerned she would lose her job.

33. On 6 February 2019 the claimant rang and eventually spoke to Joe Gilliatt advising him both her children were ill and she said she was not sure if she would be in the next day. Mr Gilliatt said he had asked one of the staff to check when the claimant had started. This presumably was to check how much service the claimant had and whether she had two years and could make a claim for unfair dismissal.

34. On 6 February 2019 the claimant emailed Mr Gilliatt, copied to Mr Pundick, and said:

> "Further to our conversation about Archie being ill and today I've taken him to the doctors after advice from NHS Direct as his temperature went to 101.3 last night, I have tried to make arrangements for childcare tomorrow so I should be in work. As I mentioned, Rachel has also started with symptoms today too. After what you said about having a chat with me tomorrow about how it's going to work I am now very concerned as it all seems very ominous and I don't see why you couldn't just tell me earlier rather than have me worried now all day and all night about whether I'm going to lose my job. I tried calling to speak to you, you said you were busy which I appreciate, but rather than have me worried until tomorrow I would appreciate if you could possibly speak to me later today about things. I also tried to speak to Ron but he was also unavailable."

35. On 12 February Mr Pundick noticed that the claimant did not turn up on 7 and 8 February 2019, and as far as he was aware she had told them she was coming in. He mentioned that when she was off in January with flu her daughter came in twice to ask if her mother was there. However, as the claimant's daughter lived with her father he believed that it was possible she did not know the claimant was off work sick.

36. In cross examination Mr Pundick did say that he understood that husbands were not always available to cover childcare issues. The claimant was obviously in a difficult position due to being a single parent with an uncooperative ex partner. The claimant had an arrangement whereby each parent did one week on one week off but obviously if it was 'her' week the claimant would not be able to leave a 10 year old at home with a temperature of 101/3 without a responsible carer and after believing she could source some cover it transpired she could not however the claimant led the respondent to believe she would be back in work so that they felt more let down when this did not happen. The claimant did later sent the respondent a message about how she could work from home in the future if they could set her up, there was no formal reply from the respondent but they advised that their software at the time would not support her proposal.

37. The claimant says after this is downplayed her symptoms as much as possible and we accept this was the case.

38. On 19 February 2019 the claimant had to take some time off to attend the dentist.

39. On 2 April 2019 the claimant began with a sore eye and she said she would try and get it looked at that day. She was told to go to A & E but she was struggling because she could not go out in the light. Mr Pundick commented internally, "I'm struggling to be civil to her and any sympathy went a long time ago".

40. The claimant advised on 3 April 2019 that she went to A & E but she had to come back as the cover she had for her son was running out, and Mr Pundick advised her to ring Joe Gilliatt.

41. The claimant was then absent with the eye problem that week.

42. She was advised by an optician that she had a corneal ulcer. She had received some cream for it. The claimant did attend work on 4 April 2019 but she was struggling to see and could not work so she went home. She advised the respondent on 4 April 2019 of the difficulties she was having, and later than morning said she had to go home.

43. On 5 April 2019 the claimant emailed at 10.00am to say that she probably would not be back at work until the following Monday.

44. On 9 April 2019 the claimant requested annual leave in order to prepare for her examinations but the respondent advised that they could not accommodate those days as Mr Fitzhugh was off and two other members of staff were absent.

45. Again on 24 April 2019 the claimant asked for two days off in May but this was refused as two members of staff were already on leave on those two days.

46. On 2 May 2019 the claimant emailed the respondent at 11.00pm to say she needed "a short notice day off tomorrow, it's a personal nature, I apologise for any inconvenience". The claimant said she had been feeling very ill by this stage, exhausted, and she had had a vitamin B12 booster injection, however towards the end of the week she was feeling exhausted and just needed a day off.

47. This however promoted the respondent to dismiss the claimant on 10 May 2019. The dismissal letter said:

> "At the end of 2018 you were to be given increased responsibility and hours of work, becoming assigned to Paul Fitzhugh and to become more of an assistant than a secretary. The position was compromised before you even began when you sent an email to the directors advising that you wished to resign. While you soon changed your mind, your dependability was immediately in question. Since then there have been issues with regard to your timekeeping, extended breaks, and in connection with your continued absence. In particular on one occasion emailing at 11.00pm the day before.
>
> In summary your position has become untenable and we wish to terminate your employment from today."

48. The respondents paid the claimant for the rest of the month and for six days' holiday.

49. In respect of the claimant's absences in 2019, following 8 January 2019, she advised the respondent she was absent with flu for 22 January onwards; that she as absent because her son was unwell but then her daughter was also ill so this turned it into at least a four day absence; and then in April she had the eye problem. The claimant says all these absences, apart from the childcare ones, were really connected with the menopause. Whilst it may be known to some of the general population that the menopause can cause a dry syndrome, which may or may not cause a corneal ulcer, it is not something that the claimant advised the respondent of at the time.

50. The claimant advised that she needed three reviews signed off in order to continue with her apprenticeship and that her apprenticeship providers were finding it difficult to contact anybody at the firm to arrange this, and also that the providers had advised they needed to put her on a break in learning until she found another employer who could continue the apprenticeship.

51. On 13 May 2019 the claimant asked if she could appeal the decision and asked for her job back. She said she did not feel she had been as unreliable as the respondent had said, that she thought she had worked hard, performed well and was extremely shocked and perplexed at the sudden dismissal.

52. Mr Pundick replied on 13 May 2019 stating that having spoken to Mr Gilliatt he was not going to reconsider his position. However, he would complete the reviews by the end of the week.

53. Subsequently the claimant also made a subject access request.

54. The claimant also referred to a potential comparator who was at rainee solicitor who had also been absent with illness. The respondent said because he was a trainee his role was not as time critical as the claimant's so it was easier to tolerate his absences. otherwise we had very little information about the comparator.

<u>Disability Impact Statement</u>

55. The claimant was diagnosed as post menopausal some time in 2017. She said that in January 2018 she had stomach cramps, joint aches, night sweats and general fatigue, and she was having occasional unpredictable bleeds. She also said that by the time she visited her GP in March 2018 she was having terrible hot flushes in the day time and night sweats. Her GP referred her to Salford Royal Hospital where she had a pelvic ultrasound and a further investigation. She was confirmed with adenomyosis.

56. In September 2018 the claimant discussed starting HRT with her GP as she felt her symptoms had become "increasingly bothersome over the last few months" and were beginning to impact more on her daily life at home and work. She was feeling more stressed and anxious and would fly into a rage or cry at the slightest mishap. The GP felt he had not got the medical information to start HRT and so prescribed fluoxetine, which could help with the hot flushes and are a mild antidepressant.

57. The claimant was advised that her symptoms might change and she could become perimenopausal rather than post menopausal, and that this could fluctuate for some time.

58. In November 2018 the claimant had a period accompanied by stomach cramps and erratic mood swings. She was also very stressed by Christmas. She says she was quick tempered and forgetful and she stopped taking the fluoxetine.

59. Since 2019 the claimant stated that she experienced almost daily symptoms of low mood, anxiety, brain fog, joint aches, pains and mood swings. Hot flushes and insomnia were intermittent as were the night sweats. She felt stressed and anxious nearly every day. Her joint pain became more persistent and she had numbness in her hands for a few minutes to an hour. Her sleep was disturbed due to her being too hot and then too cold. She was regularly fatigued and says that she started noticing some blurred vision.

60. In April 2019 the claimant woke with extreme photophobia and could not look at any light. She went to A & E but had to return home without being seen because of childcare reasons. The optician confirmed she had a corneal ulcer, possibly due to dry eyes, and she obtained some ointment which it was hoped would resolve the problem. She now uses drops for dry eyes which alleviate the symptoms of blurred vision.

61. During April 2019 the claimant had continued to experience extreme tiredness and decided to try a B12 injection on a recommendation from a friend that it may help. She had the injection on 1 May 2019. She said in her witness statement that although she had a small filip from this she quickly sank into exhaustion again which is why she advised she was taking for a short notice day off.

62. After the claimant was dismissed she became very depressed and has received cognitive behavioural therapy from a psychological therapist team.

63. In October 2019 the claimant was diagnosed with osteoarthritis.

64. After the claimant left the respondent's employment she took a cleaning job which exacerbates her joint pain and stiffness, for which she takes co-codamol or naproxen.

65. The claimant said she does have gym membership but was rarely attending classes and intends to gym the membership as she cannot afford it, although she does cycle for exercise which she intends to take up again.

66. The claimant has now begun a law degree at Salford University which will take six years to complete – three years for the university degree, one year LPC and two years as a trainee. The claimant provided some medical information to the university when she was accepted for the course.

67. In respect of the information provided to Salford University in order that she could obtain additional funding as a disabled student, the doctor stated that the claimant had:

(1) Anxiety with depression diagnosed May 2020;

(2) Menopausal symptoms diagnosed September 2018;

(3) Joint pain – has been referred to a rheumatologist. It says the symptoms began in September 2018 and it had now lasted for more than 12 months.

68. In relation to "what is the impact on normal day-to-day activities" he said joint pain, hot flushes, anxiety symptoms, low mood, lack of concentration, fatigue.

69. On 23 October 2019 the claimant stated that she had been experiencing joint pains, particularly after prolonged activity, she copes with the symptoms during the week; she has been working on her core strength and stability and has been doing yoga and other exercise which will help her. She mentioned intermittent right knee pain and swelling in the popliteal fossa. She mentioned some tiredness. She smokes and consumes five units of alcohol a week. She has two children… There is a family history of deforming arthritis… and of nocturnal paraesthesia in the upper limbs only.

70. It was decided that the claimant's features were due to osteoarthritis and that the cleaning job was contributed to her joint problems rather than any inflammatory joint disease. Core muscle strengthening and stretch exercises were recommended but running was not. She was advised she should use a knee support and a hand compression glove and take ibuprofen intermittently for symptom relief.

The Law

Disability Discrimination

Disability status

63. In view of the knowledge issue (see later) it is relevant to consider Section 9 of the Equality Act 2010 which says that:-

"(1) A person (P) has a disability if –

(a) P has a physical or mental impairment; and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities…

(2) This Act (except part 12 and section 190) applies in relation to a person who has a disability as it applies in relation to a person who has a disability; accordingly excepting that part and that section) –

(a) A reference (however express) to a person who has a disability includes a reference to a person who has had the disability; and

(b) A reference (however express) to a person who does not have a disability includes a reference to a person who has not had the disability."

64. A long-term adverse effect" is defined in Schedule 1 as:

"(1) The effect of an impairment is long-term if –

(a) It has lasted for at least 12 months;

(b) It is likely to last for at least 12 months; or

(c) It is likely to last for the rest of the life of the person affected."

65. There is a statutory code of practice to be taken into account in determining questions relating to the definition of disability issued in 2011, the relevant parts of this are as follows:

A1. A person has a disability for the purpose of the Act if he or she has a physical or mental impairment and the impairment has a substantial or long term adverse effect on his or her ability to carry out normal day to day activities.

A2. This means that in general:

(1) The person must have an impairment that is either physical or mental (see paragraphs A3 to A8).

(2) The impairment must have the adverse effects which are substantial (See Section B.

(3) The substantial adverse effects must be long term, See Section C; and

(4) The long term substantial effects must be effects on normal day to day activities, see Section D.

66. Whilst it is not necessary for the cause of the impairment to be established the effects that are experienced must arise from the physical or mental impairment. B1

concerns the substantial adverse effect requirement and defines it as follows "a substantial effect is one which is more than minor or trivial". The following matters should be taken into account, the time taken to carry out an activity, the way in which the activity is carried out and the cumulative effects of that impairment and how far a person can be reasonably expected to modify his or her behaviour with coping and avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. The effects of the environment should be taken into account and in relation to the effects of treatment that should be discounted and includes therapies as well as drugs.

67. In respect of "long-term", the meaning of long-term is set out at section C1 as follows:

> "The Act states that for the purposes of deciding whether a person is disabled a long-term effect of an impairment is:
>
> (a) which has lasted for at least twelve months; or
>
> (b) whether the total period for which is lasts from time from the first onset is likely to be at least twelve months; or
>
> (c) which is likely to last for the rest of the life of the person affected."

68. Section D addresses normal day to day activities. This is no longer defined as is explained in Section D2 but general day to day activities are seen as shopping, reading, writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. It can include general work-related activities, study and education related activities, interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, keeping to a timetable or shift pattern. They did not include activities which are normal for a particular person or a small group of people however it is not necessarily which is carried out by the majority of people.

69. Section D17 states that some impairments may have an adverse impact on the ability of the person to carry out normal day to day communication activities, for example, they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the persons native language. Some impairments could have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day to day activities. Examples given of a man with Asperger's Syndrome finds it hard to understand non-verbal communication such as facial expressions and non- factual communication such as jokes, he takes everything said very literally.

70. Section D19 says a person's impairment may adversely affect the ability to carry out normal day to day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking new knowledge and understanding spoken or written information. This

includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

71. Regarding whether the impairment is likely to have lasted 12 months where it has not actually lasted 12 months at the time of the alleged discrimination paragraph C3 of the guidance states that the test for this is if "it could well happen". In **SCA Packing Limited v Wall [2009] HL** the test of "it could well happen" was endorsed rather than more probable than not and it was explained that likely meant something that was a real possibility rather than something that was probable or more likely than not. The issue of how long an impairment is likely to last has to be determined at the date of the discriminatory act and not at the date of the Tribunal hearing. Anything that happens after the date of the discriminatory act is not relevant. Account should be taken both of the typical length of such an effect on an individual and any other relevant factors specific to the individual such as general state of health and age.

72. Paragraph B6 of the guidance also states that account should be taken of multiple impairments. Where none in isolation has substantial adverse effects account should be taken of whether taken together they would do.

73. In respect of determining the question of disability the tribunal should disregard the effects of medication (Paragraph 5(1) Schedule 1. The tribunal should also take into account how far a person uses coping strategies to manage their condition and if without them there would be a substantial adverse effect bearing in mind what behavioural modifications it would be reasonable to expect the person to adopt in any event.

Direct Discrimination (Disability and Sex)

74. Direct discrimination is set out at Section 13(1) of the 2010 Act which says that direct discrimination occurs where "a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others. It includes someone who is perceived to have a protected characteristic or who associates with someone who has a protected characteristic however these matters were not relied on in this case, rather stereotypical assumptions were in relation to the claimant as a "sufferer from stress". In respect of establishing direct discrimination the claimant has to point to a comparator, in this case as in many cases it was a hypothetical comparator and the 2010 Act says that:

> "On a comparison of cases for the purposes of Section 13, 14 or 19 there must be no material difference between the circumstances relating to each case. This is notoriously difficult to prove a direct discrimination claim and therefore the law and cases relating to the burden of proof and to the drawing of inferences tends to be highly relevant".

75. Section 136 of the 2010 Act addresses the burden of proof and states that:-

> "There are factions which the court could decide in the absence of any other explanation that a person A contravened the provision concerned the court must hold the contravention occurred.

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

76. Whilst the Tribunal may adopt a two-stage process i.e. deciding whether there was less favourable treatment comparing the claimant to an appropriate or hypothetical comparator and then move on to whether that treatment was because of the protected characteristic it is possible for the Tribunal to consider the explanation put forward by the respondent and if satisfied that that is unconnected to the protected characteristic proceed to make a finding in accordance with that view.

77. Guidance on constructing a hypothetical comparator was given in the case of **High Quality Lifestyle v Watts 2006 EAT** and **Owen v AMEC Foster Wheeler 2019 Court of Appeal**:

> "For example, the direct discrimination the comparator may be a person who does not have the claimant's disability and may not have a disability at all."

78. The comparator may have a condition which falls short of the kind of impairment required to satisfy Section 1 of the Act, this is because Section 3(A)(5) focusses upon a person who does not have "that particular disability", the circumstances of the claimant and the comparator must be the same "or not materially different". One of the circumstances is the comparators "abilities but since this is prefaced by including it follows that more circumstances are relevant than simply the comparator's ability".

79. In that case, if the comparator was someone with the same ability skills and experience as the claimant who had a communicable disease which was not HIV positive (where the claimant was HIV positive) and that they would have been treated in the same way, i.e. suspended, then there would no less favourable treatment.

80. The guidance also from case law suggests that the Tribunal should consider the reason why in order to answer the' because of question' **Marks and Spencer PLC v Martins [1998]**.

81. The claimant accepted that in the claim of direct discrimination the respondent must be aware of the fact of the claimant's disability in order to be found to have acted by reason thereof. In respect of deciding whether the claimant has been treated less favourably in the context of the burden of proof it is agreed that it is not sufficient for the employer to have acted unreasonably, however the Tribunal is entitled to look at a number of different factors to decide this question, this is often described as a drawing of inferences and one inference could be drawn where an employer acts in an extraordinarily unreasonable way, with no proper explanation for why it has acted in that way. This combined, with other matters, such as lack of credibility in the witnesses which suggest they have something to hide can lead to an inference.

82. As referred to above the Tribunal can consider the respondent's explanation at an earlier stage and does not have to follow a two-stage approach. This was

established in **Laing v Manchester City Council [2006]** as confirmed in **Madarassy v Nomura International Court of Appeal [2007]**.

83. *I*n respect of establishing causation another relevant authority is **O'Neill** vs **Sir Thomas Moore Upper School 1996** where EAT stated that the Tribunal must answer the question is what the effective and predominant or the real and efficient cause of the act complained of – it need not be the only cause.

Section 15 – discrimination arising out of disability

84. The claimant makes a claim under section 15, something arising in consequence of disability. Section 15 states 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."

85. An employer also has a defence to a section 15 claim if they can establish they had no knowledge of the claimant's disability (section 15(2)) or that they could not be reasonably expected to know the claimant was disabled. **In A Ltd vs z EAT (2020)**it was said a respondent needs to know there is an impediment, that it has a substantial effect and is longterm**.**

86. The employer, in accordance with the EHRC Employment Code, must do all it reasonably can to find out if the person has the disability, and knowledge held by the employer's agent or employee, such as Occupational Health adviser etc., will usually be imputed to an employer.

87. However a respondent need not have knowledge that the 'something' has arisen as a result of the claimant's disability although that might be relevant to justification. So if a claimant is dismissed for absence which the respondent does not know is a result of the claimant's disability (although obviously at the same time they would have had to have knowledge of the disability) there would still be a section 15 claim.

88. In respect of justification (i.e. 15(1)(b)), in **Hardys and Hansons PLC v Lax [2005]** Court of Appeal it was said,

> "It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate…A critical evaluation is required and is required to be demonstrated in the reading of the Tribunal. In considering whether the Employment Tribunal has adequately performed its duty appellate courts must keep in mind the respect due to the conclusions of the fact-finding Tribunal and the importance of not overturning a sound decision because there are imperfections in the presentation. Equally the statutory test is such that just as the Employment Tribunal must conduct a critical evaluation of the scheme in

question, so the appellate court must critically consider whether the Employment Tribunal has understood and applied the evidence and assessed fairly the employer's attempts at justification."

Section 20 – Reasonable Adjustments

89. The claimant also makes a reasonable adjustment claim. Section 20 says:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person this section, sections 21 and 22 and the applicable schedule apply, and for those purposes a person on whom the duty is imposed is referred to as A.
>
> The duty comprises the following three requirements:
>
> (1) a provision, criterion or practice of A's puts a disabled person at
>
> (2) a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, and
>
> (3) the employer is required then to take such steps as it is reasonable to have to take to avoid the disadvantage.

90. In **The Royal Bank of Scotland v Ashton [2011] EAT** it was stated that the PCP must be a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled, and by comparing to non-disabled comparators it can be determined whether the employee has suffered a substantial disadvantage. The correct comparators are employees who could comply or satisfy the PCP and were not disadvantaged.

91. In **Environment Agency v Rowan EAT [2007]** the EAT said:

> "A Tribunal must go through the following steps:
>
> (1) Identifying the PCP applied by or on behalf of the employer;
>
> (2) The identity of non-disabled comparators where appropriate;
>
> (3) The nature and extent of the substantial disadvantage suffered by the claimant."

92. Serota J stated:

> "In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments…without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed amendment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

93. Paragraph 21 of schedule 8 to the Equality Act provides that:

> "A person is not subject to the duty if he does not know and could not reasonable be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace or a failure to provide an auxiliary aid."

94. This encapsulates the idea of constructive knowledge i.e. that either someone within the respondent's organisation who is responsible for these matters, such as Occupational Health, knows of the substantial disadvantage, or that the respondent should have known from all the factors available but closed their eyes to it. This is also referred to above in respect of section 15 claims.

95. Further, the adjustment has to be reasonable and effective. Section 18B(1) of the Disability Discrimination Act 1996 (these matters are no longer in the Equality Act but they are useful to have in mind in considering what would be a reasonable adjustment) set out some factors to take into consideration as follows:

> "(1) The extent to which the step would prevent the effect in relation to which a duty was imposed.
>
> (2) The extent to which it was practical for the employer to take the step.
>
> (3) The financial or other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.
>
> (4) The extent of the employer's financial and other resources.
>
> (5) The availability to the employer of financial or other assistance with respect to taking the step.
>
> (6) The nature of the employer's activities and size of its undertaking and matters relevant to a private household."

96. In respect of reasonable adjustments, the claimant is required to establish the PCP relied on and demonstrate substantial disadvantage. The burden would then shift to the respondent to show that no adjustment or further adjustment should be made (**Project Management Institute v Latif**).

Conclusions

97. We have started in our conclusions with deciding what were the true reasons were the claimant's dismissal. The claimant's absences began to be a problem in 2019. Prior to that no real issues had been raised with her when she had either been off sick, had to look after her child or attended hospital appointments. We find this points to the fact that in 2018 it was, as Mr Gilliatt said, much easier to cover the claimant's job and on occasions she made up her hours after being off sick, and she also had the support of Julie Allsop who was willing to work flexibly with her. Accordingly, the respondent was able to tolerate absences in 2018. Indeed the respondent was happy to accept the claimant's retraction of her resignation in December 2018 when they already knew that the claimant was suffering from an early menopause.

98. However, in 2019 the claimant began working as Paul Fitzhugh's assistant and this all changed. We can understand that the claimant could not make her hours up another time in this role: she had to do the work in real time covering when Mr Fitzhugh was not there in order to keep conveyancing matters ticking over or to attend to anything urgent. Mr Fitzhugh had wanted to retire but agreed to work three days a week, but the success of this was very much dependent on the claimant being in the office on the days he was not there at least, and to be available for any planned work or emergencies. Accordingly, the respondent was much more concerned in 2019 about absences and reliability.

99. In addition we find it was not just the absences: it was the frequency of them at the beginning of the year and their length. In addition the failure of the claimant to keep the respondent informed of when she was coming in, and on at least one occasion saying she was going to come in and then not turning up without giving then notice. In addition, the last minute day off emailed to Mr Pundick at 11.00pm the day before, which was not a request but simply informing them that she would be off was, in Mr Pundick's opinion, the last straw. Essentially in this job reliability was critical and the claimant became unreliable.

100. Accordingly, we find that it was not simply a matter of absences, whatever the cause for the absences were.

101. In addition, the respondent did refer to other matters in their dismissal letter – lateness and extended breaks. We do not find these were as critical as the reliability element. There is very little email traffic amongst the partners and directors and about this although Mr Pundick said in evidence that the staff had complained to him. However, these matters were not substantially the reason for the dismissal, and indeed Paul Fitzhugh and Joe Gilliatt were on the claimant's 'side' when Mr Pundick suggested that there was a problem in the email of 5 February and stated that her work was good if the absences could be resolved.

102. In addition Mr Pundick was on the claimant's 'side' when there was some scepticism about whether the claimant was off with flu because her older daughter had attended the office, and felt this was explicable as indeed it was as the daughter lived with the claimant's ex-husband and therefore was not aware of when her mother was ill, it also exemplified Mr Pundick was not completely negative about the claimant.

Direct Sex Discrimination

103. In relation to the claimant's Sex Discrimination Act claim, it is clearly a direct discrimination claim. There was a discussion at the beginning of the hearing about an indirect discrimination claim but ultimately that was not pursued by way of amendment.

104. The claimant's case was that because the respondent had factored into the reasons for her dismissal her absences in February along with other absences, and that her absence in February was because her child was ill and she could not arrange alternative childcare cover, that this was direct discrimination.

105. There was no evidence to assist us in respect of a hypothetical comparator and we would find in relation to a speculative hypothetical comparator that a man

who was off sick looking after his 10 year old child, who also had failed to inform the respondent of absence, had told them he was coming in and then did not without contacting them, and who told them he was having a day off at 11.00pm at night, would have been treated in a similar way.

106. We have considered whether the burden of proof should shift in this case due to inferences. The claimant raised some matters in her submissions which in effect pointed to a culture of sexism: the lack of women in the department, the comment Ron Pundick made regarding husbands , and the suggestion she should have gone to a female partner to talk about any issues regarding her menopause she did not want to discuss with him.

107. We find that these matters are sufficient, along with the "too much information" comment, to move the burden of proof to the respondent. However, as we have set out above, we find that the reason for the claimant's dismissal was her unreliability of which the one absence due to needing to look after her ill son was only a small part, and there was no indication in fact that the respondent was actually going to dismiss the claimant immediately after this as they did not pursue the possibility of an agency candidate for her role, and in fact no action was taken until the confluence of the April absence followed by the annual leave incident. Accordingly it was not a significant cause of her dismissal.

Disability Status

108. We find that the claimant does meet the definition of disability within the meaning of the Equality Act 2010 on the basis of cumulative effect.

109. The claimant had symptoms from 2017, and accordingly she meets the 12 month test. However, we find that the effects on her were not substantial and adverse. On the balance of probabilities, the claimant provided very little corroboration or contemporaneous evidence of her symptoms.

110. The claimant stated that she had "brain fog or lack of concentration" and that she compensated for this at work by working longer hours. We do not reject this as a proposition as a coping strategy, however the claimant's own witness statement said that when she moved to work for Mr Fitzhugh she became proficient "fast" and therefore this sits ill at ease with the claimant indicating that she was struggling and taking a lot longer to do things.

111. There was also little evidence of the claimant working particularly long hours as she asserts, when she discussed her additional hours with Mr Gilliat in an email exchange of 9 August she said she often stayed late to do her college work, and that some of her hours where due to coming in late.

112. In respect of stomach problems the claimant states this was pain related to her menopause, accepting that however there was no evidence regarding how this affected her day to day activities. The claimant was clearly absent from work on some occasions due to this although the way they were described at the time did not suggest they were menopausal – reference for example to hoping the tablets will work – accordingly it is not clear that everytime the claimant was absent from work due to stomach problems this was connected to the menopause. In any event she had two absences in 2018 due to stomach problems and two in January 2019 ending

in the middle of January. Accordingly we find those absences if we accept that her absence from work indicated a effect on her day to day activities, were insufficient to meet the test for substantial, nor that it was recurring given there was no further absence after January 2019.

113. In respect of insomnia, we noted that this was not mentioned in the claimant's doctor's evidence to Salford University. The claimant herself described it as "night sweats" which we find does not simply equate with insomnia. In cross examination the claimant said that she sometimes suffered from insomnia, but to the panel she said, "two or three times a week" which is more than sometimes.. Accordingly, we have found her evidence now of her recollection of how she felt at the time slightly unreliable.

114. In respect of fatigue, the claimant could not help us to distinguish between fatigue resulting from her busy lifestyle, being a single parent and working in a demanding job and studying, with fatigue resulting from the menopause. The B19 injection does support the claimant feeling tired however there was no evidence it was a constant rather than on this one occasion. Accordingly, we have found that the claimant has not met the test.

115. In respect of joint pain the claimant appeared to develop this after her dismissal when she took up a cleaning job which due to the movements involved exacerbated any pre existing problem. There was a dearth of corrobative evidence regarding her joint pains prior to her dismissal but we accept she had some.

116. Therefore we find that the claimant's symptoms considered individually were insufficient to meet the test of "more than minor or trivial".

117. However we have also considered the cumulative effect of her symptoms whilst they were they scattered, had a limited effect on her day to day activities on a stand alone basis as considered above when they are considered together and different symptoms would have combined at different times(such had nighttime hot flushes and fatigue) to produce a substantial effect i.e. more than minor or trivial . Its in the nature of this particular impairment that the effects are unpredictable, sometimes severe sometimes not and we have considered that in reaching our decision. We have also bourne in mind that in the environment the claimant was working in she would have as she said played down her difficulties in order to appear more healthy than she actually was and hence more reliable.

Knowledge

118. If we are wrong on this and the claimant was disabled within the meaning of the Equality Act 2010,then we find the respondent did not have knowledge that the claimant had a disability, actual or constructive.

119. In relation to constructive knowledge, did the respondent "turn a blind eye" to the claimant's symptoms . The first suggestion of this is Mr Pundick's response to the 20 September email when he says 'too much information' whilst this is a common expression and is often meant to be funny it is one which generally would have the effect of closing down that conversation and it does suggest that the respondent did not want to know about anything relating to the claimant's

menopause. However it clearly did not entirely deter the claimant from mentioning her menopause as she referred to it again in December.

120. Further, the claimant's comments on 20 September were to explain her lateness not any other symptoms, and for the menopause to be seen as a disability the respondent would have needed more information. The only other information they had was that she said she was being affected in December by the menopause and that had led to her making hasty decisions, but that gave the impression that it was a one-off event in the context also of Christmas and some personal problems. We find that would not have alerted the respondent to any underlying problem or put them on enquiry.

121. In her evidence the claimant said that by putting gynaecological or menopausal on her sick notes she was alerting the respondent by a different channel. She was unaware that these sick notes were not seen by anyone other than payroll and it does raise the question of whether the information thereby was passed onto the respondent and that the respondent should be considered to have deemed knowledge because of this . We find that this in this particular situation is not the case as it was a purely mechanical process for the paying of sick pay and that there was pathway to anyone in any form of responsibility..

122. The claimant submitted one sick note in 2018 which referred to the menopause as being the reason for her stomach but says "really due to the menopause", and one in 2019 which said that "stomach/gynaecological. We find that would be insufficient in any event for the respondent to have knowledge that the claimant had a disability as gynaecological does not necessarily link to the menopause and therefore the impression was two unlinked absences which is clearly insufficient to alert the respondent to a substantial adverse effect or longterm given that there were only two mentions and four one day incidents between August 2018 and January 2019.

123. In addition should the respondent have questioned her about her absence or held a return to work interview? We are not surprised from our own knowledge that a small solicitor's firm would not consistently undertake return to work interviews or something similar. We do not find that shows the respondent was deliberately avoiding finding out about the claimant's absence, the respondent had pointed out the claimant in relation to other matters that they did not have a HR department and Mr Pundick was struggling to keep on top of holidays and absences..

124. In addition, we also find this was the case because the claimant was quite reasonably detailed about her absence in relation to 'flu, saying that she had a virus, etc. We find that in those circumstances it was also reasonable for the respondent not to make further enquiries. The claimant made direct contact with managers and quite straightforwardly said she had flu or stomach problems.

125. We do not believe there would have been any reason to expect the respondent to know the claimant's eye problems in April were connected in any way to the menopause, although we accept that in fact it could have been as dry eyes are a symptom of the menopause but we would not expect the person in the street to necessarily know this.

126. In cross examination the claimant also said she played down her symptoms as she did not want to appear unreliable. Whilst we have sympathy with the claimant and understand why she did this, it does mean that there was little to trigger anything in the respondent's mind to make them make further enquiries.

127. Therefore in conclusion we find that the respondent did not have the requisite actual or constructive knowledge that the claimant was disabled.

128. This means that the claimant's other claims cannot succeed, however we have gone on to consider the section 15 and the reasonable adjustments claim.

Direct discrimination (disability)

129. Considering the reasons why we have found the claimant was dismissed it inevitably follows that we will find that there was no direct discrimination on the grounds of disability.

130. Having put to one side our finding that the claimant is not disabled and the respondent did not know that, we consider that the claimant was dismissed because of a combination of absences, short notice absences and a failure to advise the respondent of a continuing absence in the context of her new role as Conveyancing Assistant supporting Mr Fitzhugh. We have made this finding on the basis of evidence we have reiterated before but for emphasis we have found this because the respondent had tolerated the claimant's absences before the change in job role. After the change in job role they were extremely anxious to keep Mr Fitzhugh happy so that he would continue to work for them and not fully retire. Her role became critical and her absences were much more keenly felt and put the respondent at risk. The change in job role, which made all the difference, had no connection to the claimant's disability.

131. If we find that the claimant was disabled and the respondent knew she was disabled, the claimant still has to show that the reason for her treatment was the fact she was disabled by comparing herself to someone else who had absences, was not disabled or had a different disability and was not dismissed.

132. The claimant did refer to a comparator who the respondent stated was a trainee solicitor on a two year contract and was learning the job and therefore their presence in the workplace was not as critical as the claimant's, and accordingly that he was not a proper comparator. We had very few details about this individual, however we accept the respondent's explanation as it accords entirely with our findings regarding the claimant's critical role.

133. The evidence we have relied on includes the fact that:

- the reason for dismissal was given in the respondent's letter;
- the evidence is consistent with that;
- the respondents gave the claimant the opportunity to do her apprenticeship, they in effect promoted the claimant albeit she did not get a salary rise;

- they allowed her to retract her resignation when they need not have done so.

134. The email trails are consistent with the concerns increasing following the change of job, and at various times responsible members of staff supporting the claimant.

135. Accordingly, taking all this evidence in the round, there was no evidence that the claimant being disabled was the reason for her dismissal, and that had somebody in her role been absent but not been disabled that they would not have been dismissed.

Section 15

136. The matter we have to consider here is whether the respondent treated the claimant unfavourably "because of something arising in consequence of disability and they cannot show that the treatment was a proportionate means of achieving a legitimate aim".

137. If the claimant could establish that her absences were because of the menopause then she could establish that the respondent did dismiss her for something arising in consequence of the disability (assuming of course that we are wrong on our other findings: disability and knowledge). However, the evidence that the claimant presented to the respondent at the time and all the evidence which the respondent had did not suggest that the claimant's absences were all in relation to the menopause. In fact the claimant was adamant that she had quite serious flu at one point and the only matters which could be considered to be related to the menopause was the 8 January 2019, and potentially the two referred to in the sick notes which went directly to the respondent's payroll department. In relation to these absences, that was not why the claimant was dismissed.

138. The claimant was dismissed ultimately because she took short notice absence and because she had the dry eye absence. The respondent knew this was the reason for the absence and as referred to above in the law section it was not necessary for the respondent to know the dry eyes arose because of the menopause. However objectively we have to find it did arise as a result of the disability It is true that dry eyes can be caused by the menopause, however the claimant did not have any definitive evidence that the dry eyes she had at this stage could be linked to the menopause at the time. We accept on the balance of probabilities it was likely to eb caused by the menopause. However, it was not just because of this absence, as the respondent did not dismiss the claimant following this absence but when she unilaterally notified a days leave. Nevertheless, the dry eye absence was a significant factor. Further we accept that some of the claimant's tiredness was due to the menopause then it is arguable her need for a day off at short notice was something arising from her disability. Accordingly, the reasons for the claimant's dismissal did relate to something rising from her disability.

139. However we consider that the dismissal in the circumstances was a proportionate means of achieving a legitimate aim. The claimant's absence levels were alarming between January and May in the context of the role she now had to perform and the fact that this was a small business they needed somebody

specialised and reliable who could support Mr Fitzhugh, and it was not a question of there being a pool of people who could cover for each other if someone was off sick.

Failure to make a reasonable adjustment

140. If the duty arises i.e. again if our previous findings are incorrect, then the PCP in this case was that the respondent required reasonable attendance levels. The claimant therefore contends that the respondent should have tolerated her sickness absence and not required such regular attendance, whilst the reasonable adjustments proposed are that the respondent should have talked to her about her absences and not dismissed her that would logically require the respondent to consider tolerating unpredictable absences.

141. However, the claimant has not persuaded us that she was unable to maintain a regular attendance due to her disability, as the evidence that her absences were due to her disability was limited. She clearly had absences for other matters and therefore it was not a question of her absences being entirely disability related. Neither was her unreliability a matter which put her at a substantial disadvantage because of her disability, her unreliability stemming from her failure to keep the respondents properly informed of when she would be attending work.

142. If this is wrong we have considered whether there could have been a reasonable adjustment to allow the claimant to attend work less regularly, and we find that this would not have been a reasonable adjustment in this case given the claimant's role in supporting Mr Fitzhugh, given the combination of absences, lack of notice and the short notice for the taking of annual leave.

143. We have also considered the question of knowledge in the specific context of reasonable adjustments and find that the respondent did not know and could not been reasonably expected to know that the claimant’s absences were due to the disability in view of the fact she had referred initially to being late (20 September) and impulsive(December) as the effects of the menopause. There were two references to menopause and gynae ogical in the sick notes but we find even if the respondent is deemed to have knowledge of them they were insufficient to establish a substantial disadvantage. The claimant’s major absences were flu and dry eyes followed by short notice unilateral leave – whilst the claimant has given evidence that this was due to menopausal related fatigue the respondent could not have known that at the time.

144. Therefore the respondent did not know that that the requirement for regular attendance put the claimant at a substantial disadvantage because of her disability .

145. In respect of justification we find that the respondent was justified in requiring regular attendance due to the claimant’s critical role.

146. In respect of the reasonable adjustments contended for the discussing the matter would not have achieved anything as the claimant could not prevent absences and not dismissing the claimant would have left the respondent with an unreliable employee and no cover for Mr Fitzhugh when he was not in the office.

147. It was not specifically contended that the respondent should have considered returning the claimant to her ‘old’ job as it had not been raised the respondent did not

address this in evidence although obviously it would have depended on there being a vacancy.

_____

Employment Judge Feeney

Date: 12 MARCH 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

17 March 2021

FOR THE TRIBUNAL OFFICE