EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Elona Onibere	**v**	**Rodman Pearce Solicitors Ltd**

Heard at: Watford **On**: 13-15 December 2021

Before: Employment Judge Bedeau
Ms G Binks
Mrs J Hancock

Appearances

For the Claimant: Mr A Miah, Counsel
For the Respondent: Mr M Bloom Solicitor-Partner

RESERVED JUDGMENT

1. The claim of unfair dismissal is well-founded.

2. The claim of direct disability discrimination is not well-founded and is dismissed.

3. The claim of discrimination arising in consequence of disability is well-founded.

4. The claim of indirect disability discrimination is well-founded.

5. The breach of contract claim has been proved.

6. The case is listed for a remedy hearing on on Monday 11 April 2022, for one day, via cloud video platform, unless otherwise settled.

REASONS

1. In a claim form presented to the Tribunal on 29 November 2019, the claimant, Ms Elona Onibere, made claims of unfair dismissal, disability discrimination, and breach of contract. She worked for the respondent as an Assistant Solicitor.

2. In the response presented to the Tribunal on 23 January 2020, the claims are denied. The respondent asserts that the claimant was dismissed on grounds of capability as she had been absent from work due to sickness for a period of 26 weeks which entitled it to terminate her employment. Her disability is not admitted as she had informed the respondent that she had been "cured" and fully recovered from her medical condition.

3. At a Preliminary Hearing held in private on 25 September 2020 by Employment Judge King, the parties agreed the claims and issues to be determined in this case. The claimant at the time represented herself. The respondent was represented by Mr Clement, of counsel. It was clarified that the claims are unfair dismissal; direct disability discrimination; discrimination arising in consequence of disability; indirect disability discrimination; failure to make reasonable adjustments; and breach of contract.

4. Mr Miah, counsel on behalf of the claimant, confirmed that the claimant was pursuing all claims against the respondent as identified by EJ King.

The Issues

5. The issues between the parties to be determined by the Tribunal are as set out in the case management summary and orders in respect of the preliminary hearing held on and are as follows:

"Unfair dismissal

(i) When was the claimant dismissed which will include determining whether the letters of 29.07.19 and 30.08.19 were sent as the respondent contends?

(ii) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was capability dismissal on 29th July 2019 to take effect on the 30th August 2019. As an alternative, it states that dismissal was for some other substantial reason namely agreeing with the claimant she would be self employed later in September 2019.

(iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the 'band of reasonable responses'?

(iv) 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? The respondent alleges her role would have been at risk in any event.

Remedy for unfair dismissal

(v) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time

anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

b. Has the claimant taken reasonable steps to mitigate her losses?
c. What should the claimant be awarded?

Disability

(vi) The claimant was a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times of her diagnosis with cancer? The respondent disputes knowledge that the claimant was disabled at the relevant time as the respondent contends that the claimant told the respondent she had been cured.

Section 13 Equality Act 2010: direct discrimination because of disability

(vii) It is not in the dispute that the respondent dismissed the claimant.

(viii) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the hypothetical comparator.

(ix) If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

Section 15 Equality Act 2010: discrimination arising from disability

(x) Did the following thing arise in consequence of the claimant's disability:

a. The claimant's sickness absence in 2019?

(xi) Did the respondent treat the claimant unfavourably as follows:

a. Dismissing her as a matter of agreed fact and that this was done by letter without a capability process;

(xii) The respondent accepts that it dismissed the claimant because of sickness absence?

(xiii) If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

a. TBC

(xiv) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Section 19 Equality Act 2010: indirect disability discrimination

(xv) A "PCP" is a provision, criterion or practice. It is accepted that the respondent had the following PCP and applied it to the claimant:

a. Clause 13.5 of the employment contract;

(xvi) Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the characteristic?

(xvii) Did the PCP(s) put *persons with whom the claimant shares the characteristic,* at one or more particular disadvantages when compared with *persons with whom the claimant does not share the characteristic*, in that those with a disability are less likely to maintain attendance and not breach the clause.

(xviii) Did the PCP(s) put the claimant at that disadvantage at any relevant time?

(xix) If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

a. TBC

Sections 20 & 21 Equality Act 2010: Reasonable adjustments

(xx) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xxi) A "PCP" is a provision, criterion or practice. It is accepted that the respondent had the following PCP and applied it to the claimant:

a. Clause 13.5 of the employment contract;

(xxii) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

a. It did not allow her time to receive medical treatment recuperate and rehabilitate following her chemotherapy?
b. She was dismissed

(xxiii) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xxiv) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. Not dismissing her
b. Permitting her to return on a phased return
c. Giving her additional time before considering capability
d. Not applying clause 13.5 of her contract
e. The parties also agreed the claimant would become self-employed in September 2019 as an adjustment. The claimant acknowledged that this is not a reasonable step as the adjustment must relate to the claimant's employment.

(xxv) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Breach of contract

(xxvi) To how much notice was the claimant entitled and should this have been paid at full pay or SSP?

(xxvii) Did notice did the claimant receive as a matter of fact and as a payment?

(xxviii) Was this in breach of contract?

Remedy

(xxix) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. *[Specific remedy issues that may arise and that have not already been mentioned include:*

a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
b. did the respondent or claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase/decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")"

The evidence

6. The claimant gave evidence and did not call any witnesses. The respondent called Mr Ademola Akilo, sole proprietor and Managing Partner of the respondent firm.

7. In addition, the parties adduced a joint bundle of documents comprising of 138 pages but some pages were missing from the paginated bundle. These were pages 124-130. In the course of the hearing the respondent produced its unaudited financial statements for the period 1 October 2019 to 30 September 2020. References will be made to the documents as numbered in the bundle.

Findings of fact

8. The respondent is a firm of solicitors now specialising in criminal and immigration law. It's place of business is on the High Street, Luton town centre.

9. During the claimant's employment it also specialised in housing law.

10. She commenced employment with the respondent on 10 December 2014, as an Assistant Solicitor and signed her contract on 12 December 2014.

11. In relation to the termination of her employment, clause 13.5 states the following:

> "If the employee has been absent from the employment for a period of 26 weeks (whether consecutive or in aggregate) in any period of one year as a result of incapacity."

12. The claimant was entitled to be given one month's notice and is required to give one month's notice of termination of employment. (pages 49-57)

13. She specialised in housing law for which the respondent had a legal aid franchise. She engaged in both legally aided as well as private work. We find that much of her work was legally aided. This is supported by her evidence, in paragraph 3 of her witness statement, where she states that her role involved advising legally aided housing clients, instructing counsel and court advocacy work. She also engaged in legal advice to clients, including homelessness, disrepair, and possession proceedings.

14. Mr Ademola Akilo, the owner of the respondent firm, specialises in criminal law.

15. In 2018 there were only two solicitors working in the Housing department, namely the claimant and Mr Olusegun Ajay, Supervising Solicitor.

16. We find that it is a requirement of the Legal Aid Agency that there should be a qualified supervisor in all departments engaged in legal aid work. That included the respondent's Housing department.

17. Mr Ajay left the respondent in June 2018 and was replaced by Mr Ahmar Awan, Supervising Solicitor, on 16 July 2018.

18. The claimant was a fee earner on a salary of £20,000 gross per annum and was given an annual fee earning target. Her target from 2018 to 2019 was £60,000, the equivalent of £5,000 per month. She was expected to open a minimum of seven new files each month.

19. The respondent's financial year runs from September to August.

20. During the period from July 2017 to March 2019, the claimant billed £29,012.65, an average of £1,381.55 per month which was considerably short of her target (107).

21. In the minutes of the Housing department meeting for 21 November 2018, attended by Mr Akilo, the claimant, and Mr Awan, it was noted by Mr Akilo that file openings were not up to the required level to be sustainable as it was at the rate of either one or two files each month. The claimant's 14 files, and Mr Ahmar's 20 files, needed to be increased. She agreed to complete her time recording and all her current files by 28 November 2018. Mr Akilo said that failure to time record was in breach of the Legal Aid

Agency's compliance rules. The matter needed to be resolved by her urgently. It was further noted that:

> "Mr Akilo confirmed that it was vital that the department increase its file opening and thereby increase its billing so as to be sustainable and justify its operation." (121)

22. The unchallenged evidence given by Mr Akilo was that in the month of December 2018, fees billed by the claimant was £700; in January 2019, there were no fees billed by her; and in February 2019, she billed £1,810.89.

23. A further department meeting was held on 11 February 2019. In attendance were Mr Akilo, the claimant, and Mr Awan. In relation to file openings, the claimant and Mr Awan confirmed that the current file opening target for the department was 26, made up of 13 in housing and 13 in community care. The claimant confirmed that she had not opened any files in January 2019. She opened one file in December 2018 but none in November 2018. One file was opened in October 2018. Prior to October 2018, she stated that she had held off opening files to allow Mr Awan to build up his casework. Mr Akilo responded by saying that he did not understand the thought process behind that as the monthly opening targets were not being met. He raised serious concerns at the very low level of files being opened. It was further noted:

> "After considering the department figures for the past two months, he noted that file opening and billing figures were very low. He did not believe it was commercially viable to continue in this pattern.
>
> He noted that in view of the number of files being opened, the work being generated was diminishing. He noted that matter starts (new file opening) were not meeting the targets and that billing for both Legal Aid and private work was not enough to justify the current level of costs. Mr Akilo noted that overheads, including wages had to be paid.
>
> In the circumstances, Mr Akilo, confirmed that redundancies needed to be considered. He asked for suggestions to avoid this eventuality."

24. In response, Mr Awan suggested that in view of the low level of work in the Housing department, to have one full-time fee earner in housing and the second fee earner undertaking some housing and some immigration work. It was recorded that Mr Akilo responded by saying that that would be dependent on the fee earner's competency and qualification in immigration as required by the Legal Aid Agency's mandatory criteria. (122-123)

25. In a memorandum to the claimant from Mr Awan, after having checked the files, she claimed she had billed since July 2018, he noted that her billing figures were substantially less than claimed. He further stated that the Housing department's file opening figures were low. He was concerned about the figures and the sustainability of the department. The claimant

was invited to demonstrate how she intended to address the lack of file openings and on how to increase her billings. (131-132)

26. Following the Housing department meeting on 11 February 2019, Mr Akilo wrote to the claimant the same day, the following:

> "Dear Elona
>
> Warning of possible redundancies
>
> Further to the meeting of 11 February 2019, I want to explain, in writing, the current position we are now facing. The work in the housing department has diminished significantly in publicly funded and private work resulting in a loss of income such that it is not financially viable to sustain. The overall costs of running the department outweighs the income generated. After giving this a great deal of thought and exploring other options, the company has taken the view that there is a risk that the number of employees required to carry out work in our housing department is too high and we may have to close the department, and that it may therefore have to make redundancies.
>
> We are exploring ways of avoiding any compulsory redundancies. We are considering a number of options including looking at recruitment in the Immigration department and considering voluntary redundancy. If you have other ideas which could help us to avoid the need for redundancies, please let me know.
>
> Where, despite our efforts, redundancies are unavoidable, we may have to make redundancies in the Housing department.
>
> Our current view is that, where compulsory redundancies become necessary, all of the employees in the Housing department are likely to be at risk.
>
> If it becomes clear that we will have to make employees redundant, the Company will have to carry out a selection exercise to identify employees from the department who would be at risk of redundancy dismissal. Where selection is necessary, we would use objective and quantifiable criteria.
>
> We propose to use the following selection criteria attendance record, Complaints record, Supervision qualification and experience. We will take steps to keep any of you who are affected up to date with what is happening. It is likely that the process will take approximately two months. This is the best estimate we can give you at this stage and if things change we will let you know.
>
> We fully appreciate this is a very difficult situation for everyone involved and we will be doing what we can to be as fair and understanding as possible." (58-59)

27. Having considered the evidence, we find that in February 2019, the Housing department was not generating enough fees even to pay for one member of its staff.

28. On 14 February 2019, the claimant became ill. She was under the care of her general practitioner and was being monitored for fibroids. She was unable to go to work and requested time off. On 1 March 2019, she was

diagnosed with yolk sac tumour, which is a type of cancer. She informed the respondent and provided sick notes.

29. In an email dated 28 February 2019, sent to Mr Akilo, she wrote that she had been admitted as an emergency case at Luton & Dunstable Hospital following a visit to her GP the previous day. She attached a sick note and wrote that it was likely that she would remain in hospital until surgery the following week.

30. Mr Akilo's response was to write that the sick note was not legible and requested that she should send him a clear copy. (60)

31. She submitted a further sick note dated 12 March 2019, which had the diagnosis as "gynaecological problems". She was unfit for work for eight weeks. (63)

32. Mr Akilo was kept up to date with her sickness absence, and on 8 April 2019 he had a telephone conversation with her following her surgery. After that the claimant emailed him the same day. His nickname is Barry. She wrote:

> "Dear Barry,
>
> I write further to our telephone conversation this afternoon. Following surgery, I was advised that I have cancer and would require chemotherapy treatment. Please find evidence in support of same. The duration of this treatment is six to nine weeks. In view of this, could you please confirm the length of time I would be receiving Sick Pay.
>
> I look forward to hearing from you as soon as possible." (65)

33. In a letter headed "To whom it may concern" by Dr Laura Morrison, Mount Vernon Cancer Centre, dated 9 April 2019, received by Mr Akilo, the doctor wrote:

> "Re Ms Elona Onibere, dob 15/05/1980…
>
> I can confirm that the above named lady is due to commence treatment at Mount Vernon Cancer Centre and it would be extremely beneficial for her to have her family present to support her during this period of time. (Treatment is due to commence in the next ten days and will continue for at least three months).
>
> Ms Onibere is likely to suffer with side effects that will require some additional assistance with her activities of daily living and we would support her mother being able to travel to the UK as soon as possible to offer this support and assistance.
>
> If you require any further information please do not hesitate to contact me." (66)

34. On 26 February 2019, Mr Awan tendered his resignation and left the respondent on 26 April 2019. The respondent, therefore, in compliance with the Legal Aid Agency's rules, had to cease taking on new housing law cases from the date of his resignation. Old files were to be completed and closed. The Housing department was also closed when Mr Aran left. At the

same time the respondent ceased to do any community care work from the end of April 2019.

35. From the date Mr Aran tendered his resignation to 3 April 2019, Mr Akilo placed an advertisement for a qualified housing law solicitor with three years post-qualification and supervision experience. The successful candidate was required to be experienced in and had the ability to manage a heavy caseload of publicly funded and private work; and they were required to have excellent communication, organisational and time-management skills, as well as good administrative skills. (133)

36. On 23 April 2019, a recruitment agency emailed the claimant informing her about the vacancy but not details of it. It stated that it was for a full-time housing solicitor to join an established housing law department due to expansion. The claimant enquired as to the identity of firm and was informed that it was the respondent. (71-72)

37. In the claimant's fit-note sent to Mr Akilo on 15 July 2019, but dated 9 July 2019, it refers to her having undergone chemotherapy for ovarian germ cancer and that she was unfit for work from 16 July to 12 August 2019. The doctor further stated that if she returns to work, it should be on a phased return. (78)

38. In her email accompanying the fit-note, she wrote to Mr Akilo stating, amongst other things, that she had been admitted to Watford Hospital for some time and had recently been discharged, and that upon her return home she received the cheque for £75.00 from the respondent and enquired as to what it was for. She further stated that she had not received a cheque for her salary.

39. This was responded to by Mr Akilo the following day who enquired whether the Post Office had left a card for the claimant to collect the letter sent by recorded delivery. (77)

40. She lived alone but since her diagnosis, surgery and treatment, she had been staying with members of her family and friends and was rarely at her home. She said that if a letter was sent to her home recorded delivery, it would not have been received by her while she was away.

41. According to Mr Akilo, as the claimant had been absent from work, he believed, for a period of 26 weeks, he sent her a notice of termination letter giving her one month's notice. Mr Akilo said that it was posted to her home address. He took the decision to terminate her employment because she had been absent from work for a period exceeding the term contained in clause 13.5 of her contract, and there was no work for her to do after the closure of the Housing department.

Notice of termination letter

42. He wrote to her a letter dated 29 July 2019, stating the following:-

> "Dear Elona,
>
> Re Notice of Termination
>
> I write to provide you with one month's notice of termination of employment.
>
> In view of your inability to return to work due to illness from 14 February 2019, your entitlement to statutory sick pay will cease on 29 August 2019.
>
> In the event that you are unable to return to work prior to 29 August 2019, your contract of employment will terminate.
>
> Kindly let me know whether you will be in a position to return to work.
>
> I wish you a speedy return to full recovery and hope that you get well soon to enjoy the best of health.
>
> Kind regards." (79)

43. Mr Akilo told the Tribunal that this letter was sent by ordinary post to the claimant's home address. The claimant denied that the letter was sent on that day, and also denied receiving it.

44. On a day in or around July 2019, Mr Akilo told the Tribunal that he saw the claimant in the Arndale Shopping Centre in Luton during his lunch break and they spoke for a couple of minutes. He asked her how she was feeling, and she replied that she was "cured". He said he was happy for her. She replied that she would be returning to work.

45. The claimant in evidence denied saying to Mr Akilo that she was "cured" of her illness.

46. At 17:17 on 29 August 2019, she emailed him stating:

> "Hope you are well. Please find the latest sick note. I intend to resume work afterwards and will discuss the issue of a phased return in detail in a further email.
>
> I have not been around for a while and upon my return, I noticed that I had not received my cheque for the last month. Please forward same as soon as possible." (81)

<u>Termination letter</u>

47. On 30 August 2019, Mr Akilo wrote to her terminating her employment. He stated:

> "Dear Elona
>
> Termination of employment
>
> I am sorry to inform you that as of 30 August 2019, you will be no longer employed with Rodman Pearce Solicitors.

> After careful consideration, I think this is the best decision, because of your inability to return to work due to long term illness.
>
> Your contract of employment provides that where you have been absent from work for 26 weeks continuously, the contract of employment comes to an end.
>
> From 30 August 2019 on, you won't be eligible for any statutory sick pay or salary associated with your position. Please return any company property before 30 September 2019 to the office.
>
> You were entitled to your statutory sick pay up until 29 August 2019 and we will also pay you for your remaining annual leave entitlement.
>
> If you have questions or require further clarification, do not hesitate to contact me. We wish you a speedy recovery and every success in your future endeavours." (82)

48. Mr Akilo acknowledged that the claimant had not been absent for 26 weeks when he sent the termination letter. He told us that as she was not able to return to work by 29 August, he sent the letter the following day. By that date her entitlement to statutory sick pay had expired. He had mistakenly believed that the contract entitled him to terminate her employment because of her continued absence from work. He further stated that he did not know at the time that having been diagnosed with cancer, she was a disabled person as defined in the Equality Act 2010. He acknowledged that with hindsight he should have taken specialist employment advice and apologised to her for any distress he may have caused. He accepted that he should not have taken the decision to terminate her employment without entering into a period of consultation with her. The consultation would have discussed her health at the time and specifically the fact that the Housing department had closed, consequently, there was no role for her to undertake.

49. The claimant's case is that she did not receive the notice of termination and the termination letters on or shortly after the date on them. The first time she became aware of her termination was on 12 September 2019 when she was sent an email by Mr Akilo with the termination letter which was sent to her in response to her email to him on 12 September 2019 at 15:28, in which she stated that her current fit note was due to expire on 15 September 2019 and that she intended to return to work on 16 September, on a phased return basis. It was not until 19:40 on 12 September 2019, when Mr Akilo attached a copy of the termination letter. (82-85)

50. We bear in mind that although she stated that she was going to resume work on a phased return basis in her email of 29 August 2019, at 17:17, in response, Mr Akilo did not inform her in his email of 5 September 2019, that he had earlier sent her a notice of termination of employment. Further, in the termination of employment letter, dated 30 August 2019, there is no reference to the alleged earlier notice of termination letter dated 29 July.

51. The font used for the claimant's address on the notice of termination letter is different when compared with the font used in the termination letter. The termination letter, as we have already found, makes no reference to Mr Akilo having sent the claimant notice of termination dated 29 July 2019. We find that the notice of termination letter was not sent by Mr Akilo to the claimant. We further find that the termination letter, dated 30 August 2019, was also not sent on that day or the day after. It was sent to the claimant for the first time as an attachment to the email by Mr Akilo on 12 September 2019. We also find that in order to cover himself, possibly after taking legal advice, he drafted the notice of termination letter. The claimant was clear in evidence that she never received the notice of termination letter and we accepted her evidence.

<u>Working as a self -employed Consultant</u>

52. She met with Mr Akilo on 13 September 2019 to discuss working on a consultancy basis in housing. We find that during the meeting he informed her that the Legal Aid Agency contract was void because of the absence of a suitably qualified Housing Supervisor. Without a qualified supervisor that work could not continue within the firm. The same applied to community care work. He suggested to her that if she was able to take on a limited amount of work on a consultancy basis it would provide her with an income. For that reason, he suggested they should enter into a consultancy arrangement.

53. In his email dated 17 September 2019, sent her, he stated that he was writing to confirm their agreement to her new role as a self-employed consultant to the respondent. He invited her to confirm when she would be able to resume work and asked for her unique tax reference number. (86)

54. Her response, on the same day, was to challenge her dismissal. She stated that paragraph 14 of the contract of employment stipulated that he was required to give her one month's notice of termination and asserted that that provision had not been complied with, therefore, the termination letter contravened her terms and conditions of employment. She then referred to the provisions in the Equality Act 2010, in relation to the treatment of a disabled person suffering from cancer. She stated that reasonable adjustments should have been made including a phased return to work and obtaining medical reports regarding her health. These were not discussed prior to terminating her contract. She was willing to resume work under her previous terms and conditions. (87-88)

55. The following day, 18 September 2019, Mr Akilo emailed her attaching a copy of the notice of termination to her address dated 29 July 2019. He replied to her grounds of appeal stating that the respondent could not employ her under the terms and conditions of her contract of employment. He further stated that the housing law department did not have sufficient work to afford or to justify employing her as a solicitor, as discussed during

the meeting in February 2019. He then referred to the meeting on 13 September, and that the respondent was amenable to working with her on a self-employed consultancy basis, sharing the fees. (89)

56. We find that it was not until the claimant raised the issue of not having received a notice of termination prior to the termination of her employment, that led Mr Akilo to send her the notice of termination on 18 September 2019. As stated earlier in the judgment, we find that the notice of termination had not previously been sent to her.

57. The claimant considered her letter dated 17 September 2019, was either her grounds of appeal or a grievance. She told the Tribunal that there was no appeal meeting, and she was struggling financially.

58. On 25 September 2019, she signed the self-employment consultancy contract. (92-100)

59. She commenced work with the respondent as a Consultant Housing Solicitor on or around 25 September 2019. The consultancy agreement stipulated that the fees were to be 60% of the net legal fees recovered on cases introduced and worked on exclusively or ostensibly by her as consultant, to be paid by the respondent. The respondent agreed to pay 35% of the net legal fees recovered on cases introduced by it and worked on exclusively by her.

60. We find that the work the claimant agreed to undertake on a consultancy basis, was private client work.

61. While working as self-employed consultant, there was a disagreement between her and Mr Akilo. It centred around, it seemed, her claiming for work on cases she had worked on when employed as an Assistant Solicitor, which were closed, but the fees had not been billed. Mr Akilo's position was to say that she should not be paid for such work, but the claimant took contrary view. The relationship broke down on 23 October 2019 and she did not return to work.

62. On 1 June 2020, she obtained employment as a Housing Solicitor with another firm in Luton.

Respondent's unaudited accounts

63. During the hearing Mr Akilo disclosed his firm's unaudited financial accounts for two years, up to 1 October 2019, and to 30 September 2020. In relation to turnover for 2019, it was £269,456. For 2020, it was £229,759. The gross profit for 2019 was £269,456, and for 2020, it was £229,759. With deductions for administrative expenses, operating income, interest and other charges, tax on profit, the profit loss for 2019 was -£18,762. For 2020 it was a profit of £13,441.

64. By the end of the financial year 2019, we find that the respondent was operating at a loss.

65. The claimant had an expired Level 1 Immigration Law qualification which allowed her to give advice on immigration matters. Mr Akilo, early on in her employment, wanted her to sit the Level 2 qualification in Immigration but she was not interested, and the matter was not pursued any further. It is not part of the claimant's pleaded case that the respondent had failed to offer her work in its immigration department. She did not in her evidence say that she was willing to engage in that work.

66. We find that for the period from September 2018 to August 2019, the gross turnover in housing law private work was less than £5,000. It was not sustainable to take on the claimant to do that work on a part-time basis.

<u>Respondent's admissions</u>

67. As part of his evidence, Mr Akilo made a number of admissions: he accepted that, procedurally, he should have consulted with the claimant before he terminated her employment; that the decision to terminate her employment was due to the fact that she had exceeded 26 weeks' absence; her absence was something arising in consequence of her disability as she had been diagnosed with cancer and was being treated for it; and that her dismissal was unfair on procedural grounds only. He also told the tribunal that he had attended several diversity and equal opportunities training course in which he was trained on disability discrimination issues and on reasonable adjustments.

68. He, however, asserted that had he consulted with her it would still have resulted in the termination of her employment, and that the termination of her employment was a proportionate means of achieving a legitimate aim as her continued employment was no longer sustainable. Further, even if she was treated unfavourably because of something arising in consequence of her disability, her employment would legitimately and lawfully come to an end at the same time. He did not accept that any adjustments over and above the consultancy arrangement would have been reasonable in all the circumstances as her continued employment was no longer sustainable.

Submissions

69. We heard submissions from Mr Miah, counsel on behalf of the claimant, and from Mr Bloom, solicitor on behalf of the respondent. We do not propose to repeat their submissions verbatim having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. We do, however, summarise the salient points and the authorities they have referred us to.

70. Mr Bloom submitted that in relation to breach of contract claim, the claimant received her termination letter on 12 September 2019. Statutory sick pay expired on 30 August 2019. She is entitled to 3 weeks' pay in the sum of £1,142.61 in accordance with the provisions of section 88 Employment Rights Act 1996.

71. In relation to the unfair dismissal claim, the respondent had accepted and conceded that it made a few errors and do not cover itself in glory. It does not specialise in employment law. Mr Bloom asked the tribunal to make a finding that the claimant was dismissed unfairly on procedural grounds. The wrong reason was given for dismissing her, namely that she had been absent for 26 weeks. There was no consultation, however, her employment would have come to an end at the same time, on 30 August 2019. She is entitled to the basic award and not entitled to the compensatory award except in respect for loss of statutory rights.

72. He submitted that it was clear that the claimant was not achieving her targets. Overheads outweighed the income coming into the Housing department. Once the Housing Supervisor left at the end of April 2019, publicly funded housing law work without a supervisor could no longer continue.

73. The claimant was later engaged in consultancy work and was required to "eat what she killed." It was a different arrangement which, in the end, did not work out.

74. Applying Polkey, there was no loss after 30 August 2019.

75. As regards the direct disability discrimination claim, Mr Bloom asked, was the claimant treated less favourably? He submitted that the respondent believed that it had the contractual right to terminate her employment after 26 weeks. She was absent, and it dismissed her for that reason. A comparator would not have been treated any differently.

76. With regard to the section 15 claim, the respondent acknowledged that the claimant was absent in 2019. It had dismissed her without following a capability process. She was dismissed because of her absence by reason of the disability.

77. Was it a proportionate means of achieving a legitimate aim, to dismiss her?

78. Mr Bloom submitted that the respondent's justification defence is the following:

> "Insofar as the claimant's claims discrimination arising from the disability, section 15 Equality Act 2010, and indirect discrimination, section 19 Equality Act 2010, the respondent submits that its decision to terminate the claimant's employment, i.e. to dismiss her was a "proportionate means of achieving a legitimate aim". The total lack of turnover and profitability of the Housing Department meant that the continuation of the Department and the claimant's employment as a housing lawyer was no longer sustainable. It is a legitimate aim of any employer to terminate an employee's employment in such circumstances. Further, it was a "proportionate" decision in all the circumstances as a result of no reasonable alternatives being available. In addition, but secondary to the sustainability submission, the respondent no longer had a Qualified Supervisor in Housing Law in the practice from end of April 2019. The Legal Aid contract as a

> result became void. There was insufficient Private Housing Law work available to justify the claimant's continued employment."

79. Legal aid was the bulk of its working income but with the loss of a supervisor, the respondent could no longer engage in that work. Cost was a consideration as the Housing department was no longer profitable. He relied on the judgment of Underhill P in Woodcock v Cumbria Primary Care Trust UKEAT 0489_09_1211, and Bolton St Catherine's Academy v O'Brien 2015 UKEAT 0051_15_1809, in which costs may be a legitimate aim.

80. The loss of the legal aid contract led to the decision to dismiss which was a proportionate means of achieving the legitimate aim. Even if the tribunal were to find against the respondent on justification, there was no loss of income as her employment would have ended on 30 August 2019. She is only entitled to injury to feelings.

81. A similar approach was taken in relation to the indirect disability discrimination claim in respect of the justification defence.

82. As regards the claim of failure to make reasonable adjustments, the provision, criterion, or practice was the application of clause 13.5 of the claimant's contract of employment. There was no evidence given that the respondent did not allow the claimant to receive medical treatment and to recuperate. It is accepted that she was dismissed.

83. In relation to the proposed steps, it was not reasonable to have kept her on as an employee given the parlous financial state of the business, in particular, the Housing department. The respondent was operating at a loss, paragraph xxiv (a) of the List of Issues.

84. In relation to (b), a phased return to work was not possible and not a reasonable adjustment as the respondent was losing money.

85. Giving additional time before considering dismissal, (c), the respondent had given her time from February to 30 August 2019 and could not continue beyond that date having regard to its poor financial state.

86. As regards (d), not applying clause 13.5 of her contract, such a step would not be reasonable given the respondent's financial circumstances. It was loss-making.

87. As for (e), agreeing to the claimant becoming self-employed, this adjustment to her work was after her employment was terminated, therefore, outside the jurisdiction of the tribunal. In any event, she signed the contract and lost her employment rights as a consequence.

88. Mr Miah, who only met the claimant immediately prior to the hearing, submitted that the fact that a solicitor is not an expert in a particular area of the law, is not an excuse. Credibility is in issue. The letter of 30 August 2019 is clear. No reference was made to earlier correspondence, in particular, the notice letter. The claimant was dismissed after "careful consideration". The file copy does not have the letterhead. There was no

evidence of the respondent earning £5,000 a year in private housing work. She was not invited to work as a Supervisor notwithstanding the respondent had advertised such a post. He invited the tribunal not to accept the evidence given by the respondent.

89. In relation to discrimination arising in consequence of disability, Mr Miah submitted that the claimant was dismissed because she was disabled. Polkey was not applicable. She was not redundant nor in a redundancy situation as she continued to work on a self-employed basis with private clients.

90. As regards failure to make reasonable adjustments, Mr Miah went through the list of issues. He said that the provision, criterion, or practice, was the application of clause 13.5 of the claimant's contract.

91. The substantial disadvantage was that the claimant was not allowed time to receive medical treatment, to recuperate and rehabilitate following her chemotherapy, paragraph 5xxii. When she informed the respondent that she would return to work on a phased return, the next day the termination letter was sent, and she was dismissed.

92. In considering paragraph 5xxiv, the respondent did not have to dismiss her as she could do other lower level work, (a).

93. She could have returned on a phase return, (b).

94. She also should have been given time adjust to her work on a phased return for a few weeks, not on a full-time basis, before considering capability, (c).

95. It was not reasonable to apply clause 13.5 of the contract, (d).

96. Mr Miah said that the claimant was not relying on the parties agreeing that she would become self-employed, as a reasonable adjustment, (e).

97. With reference to the justification defence, the burden is on the respondent to show no less drastic means were available, such as, doing work other than housing. Cost alone cannot be a legitimate aim. In any event the respondent's income level was roughly the same.

98. The decision to dismiss was disproportionate as it was reasonable to wait a little longer to see whether the claimant could return to work.

99. There was a clear breach of contract.

The law

100. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of capability is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

101. Dismissal on grounds of capability requires that the employee is given a warning and a chance to improve, Polkey v AE Dayton Services Ltd [1988] ICR 142, House of Lords; Burns v Turboflex Ltd UKEAT 377/96; and the ACAS Code of Practice.

102. Under section 13, EqA direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

103. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

104. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

105. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is able to make positive findings on the evidence one way or the other.

106. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In

Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

107. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

108. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

109. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

110. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

111. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

112. The tribunal could skip the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex.

113. A similar approach was given by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

114. In relation to discrimination arising in consequence of disability, section 15 provides,

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

115. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

116. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

117. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

118. Section 19 EqA, on indirect discrimination, states:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

119. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

120. In the case of Seldon v Clarkson Wright & Jakes [2012] ICR 716, a judgment of the Supreme Court, Lady Hale held that,

> "The measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so…, paragraph 50 (5).
>
> The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen…, paragraph 50 (6)
>
> 55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

121. We have considered the landlord and tenant case of Akerman-Livingstone Aster Communities Ltd [2015] UKSC 15 on justification. In the case of Heskett v Secretary of State for Justice [2020] EWCA 1487, the Court of Appeal held, in relation to costs being a legitimate aim in an indirect age discrimination claim, that if the measures taken were a proportionate means of achieving a legitimate aim, then it could be justified. In that case the claimant, a probation officer, who was employed by an agency of the Ministry of Justice, appealed against a decision that the agencies progression policy did not amount to indirect age discrimination. In 2010 the government announced a policy limiting pay increases across the public sector. Under the previous policy, a probation officer could progress three pay points each year. Under the new policy, the officer could progress only one pay point per year. It would, therefore, take the appellant 23 years to progress from the bottom to the top of his pay band, rather than seven or eight years. Under the new policy, older employees at the top or near to the top of the band would earn significantly more in salary and accrue greater pension benefits than those lower down the band. The Employment Tribunal found that the progression policy was prime facie discriminatory, but that it was justified. It acknowledged that the government's aim in issuing a pay cap had been a cost-cutting exercise, but that the agency had issued the new policy as a temporary measure, not simply to cap pay, but to enable it to operate within its means. The tribunal also relied on the fact that the agency was giving active consideration to changing the system to reduce the age discriminatory effects. The Employment Appeal Tribunal upheld the tribunal's judgment. The claimant appealed and submitted that the respondent could not rely on cost alone. On reviewing the authorities, the Court of Appeal held that an employer could not justify the discriminatory payment to A of less than B simply because it would cost more to pay A way the same. It followed that the essential question was whether the employer's aim in acting in the way that gave rise to the discriminatory impact could fairly be described as no more than a wish to save costs. If so, the defence of justification could not succeed. If not, it would be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim was legitimate. The distinction involved might sometimes

be subtle, but it was real. The “cost plus” label was not wrong, but it should be avoided, as it could lead the parties and tribunal to adopt an inappropriately mechanistic approach rather than asking the central question. An employer’s need to reduce its expenditure, and specifically its staff costs, to balance its books could constitute a legitimate aim for the purpose of a justification defence. There was no principled basis for ignoring the constraints under which an employer was in fact having to operate. That was particularly so where the action complained of was taken in response to real financial pressures. However, while an employer could rely on a real need to reduce staffing costs as a legitimate aim, it still had to show that the measures complained of represented a proportionate means of achieving that aim, having regard to the disparate impact on the group in question, and whether that aim could have been addressed in a way which did not have a discriminatory effect. The tribunal was entitled to treat the agency’s need to observe then constraints imposed by the pay freeze, as a legitimate aim.

122. In paragraph 4.29 Equality and Human Rights Commission Code of Practice in Employment, an employer solely aiming to reduce costs cannot expect to satisfy the test that it is a legitimate aim.

123. Section 20, EqA on the duty to make reasonable adjustments, provides:

> “(1) Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A’s put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage.”

124. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

(1) the provision, criterion or practice applied by or on behalf of an employer, or

(2) the physical feature of premises occupied by the employer;

(3) the identity of a non-disabled comparator (where appropriate), and

(4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be 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.

A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

125. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. To decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

126. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

127. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

128. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

129. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

130. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

131. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion, or practice, namely the requirement to attend work at a certain level to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

132. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply

with the requirements relating to absenteeism and would be disadvantaged by it.

133. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time, does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

134. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and must be determined objectively.

135. In the case of <u>Kenny v Hampshire Constabulary [1999] IRLR 76,</u> a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised to accommodate those who cannot fit into existing arrangements.

136. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." <u>Smith v Churchills Stairlifts plc</u> [2006] IRLR 41.

137. The Tribunal's breach no contract jurisdiction is in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. It must be a claim that "arises or is outstanding on the termination of the employee's employment", article 3.

138. Section 88 Employment Rights Act 1996, provides:

> "(1)If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

> (a)the employee is ready and willing to work but no work is provided for him by his employer,
>
> (b)the employee is incapable of work because of sickness or injury,
>
> (c)the employee is absent from work wholly or partly because of pregnancy or childbirth or on adoption leave, shared parental leave, parental bereavement leave, parental leave or paternity leave, or
>
> (d)the employee is absent from work in accordance with the terms of his employment relating to holidays,

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

(2)Any payments made to the employee by his employer in respect of the relevant part of the period of notice (whether by way of sick pay, statutory sick pay, maternity pay, statutory maternity pay, paternity pay, statutory paternity pay, adoption pay, statutory adoption pay, shared parental pay, statutory shared parental pay, parental bereavement pay, statutory parental bereavement pay, holiday pay or otherwise) go towards meeting the employer's liability under this section.

(3)Where notice was given by the employee, the employer's liability under this section does not arise unless and until the employee leaves the service of the employer in pursuance of the notice."

Conclusions

Unfair dismissal

139. In relation to the unfair dismissal claim it is acknowledged by Mr Akilo that he failed to follow the correct procedure and admitted that there was a procedural failing but had a proper procedure been followed the claimant would have been dismissed on 30 August 2019.

140. We, respectfully, take a different view. There was in this case a series of failures on the part of Mr Akilo. We found that he did not send the notice of termination letter. That document was received much later by the claimant after she had been dismissed and after she had challenged her dismissal. We further found that the dismissal letter was not received by the claimant until 12 September 2019. She submitted what was her grounds of appeal on 17 September but there was no appeal hearing. These failures, we conclude, were more than procedural, but substantive. Where there are

serious procedural failures, it renders the dismissal substantively unfair. Her dismissal was substantively unfair.

141. We, however, take into account that although the claimant was ready to return to work on 16 September 2019 after her most recent fit note, at that time the Housing department, was operating at a loss. It did not have a supervising solicitor and was unable to engage in Legal Aid work. We were told by Mr Akilo that during the period from September 2018 to August 2019, a private client housing law work came to £5,000 gross. We have already found that most of the housing law work engaged by the claimant was legally aided.

142. We further conclude that there was no position for the claimant to occupy as an Assistant Solicitor engaged in housing law work. Her case had not been that she was prepared to engage in immigration work, that is not part in her pleadings.

143. She would have been engaged, for a period, in consultation with Mr Akilo following her return to work. That might have lasted two weeks and in all probability she would have been sent home as there was no effective role as a salaried staff member for her to do in the Housing department. She would have been invited to come up with alternatives to avoid being made redundant. In the particular circumstances of this case there was no realistic possibility of retaining her employment and she would have been given one month's notice after the expiration of two weeks' consultation. This meant that she would have been given notice of termination of her employment at the end of the consultation period, namely on 30 September 2019. One month's notice given to the claimant on 1 October would have expired on 31 October. Accordingly, we have come to the conclusion that the claimant's employment would have terminated on 31 October 2019. This claim is well-founded.

Direct disability discrimination

144. It is not disputed that the claimant was dismissed by the respondent. The reason for the dismissal was invoking clause 13.5 of her contract of employment, in that, she had been absent for a continuous period of 26 weeks. Comparators would be those who either did not have her disability or were not disabled but had been absent for a continuous period of 26 weeks. We find that they too would have been dismissed by invoking clause 13.5 of their contracts. In that regard the claimant was not treated less favourably. Accordingly, her direct disability discrimination claim is not well-founded and is dismissed.

Discrimination arising in consequence of disability

145. The claimant was absent due to sickness in 2019 from 14 February 2019. The reason why she was absent was because of her disability, namely her cancer. She was dismissed because of the length of her absence on grounds of capability. This was the "something arising inconsequence of

disability". The respondent acknowledged that it dismissed her because of her sickness absence

146. Its case is that her dismissal is a proportionate means of achieving a legitimate aim. It is contended that the legitimate aim of any employer is to terminate an employee's employment where there is a total lack of turnover and profitability. That seems to be an argument in respect of proportionate means of achieving the legitimate aim. As in the <u>Heskett</u> case, the legitimate aim is reducing or saving of staff costs as the respondent has to function as a viable and profitable business. Was the decision to dismiss the claimant a proportionate means of achieving a legitimate aim?

147. According to the respondent, no reasonable alternative was available. It no longer had a qualified supervisor in housing law practice from the end of April 2019, and that the legal aid contract, as a consequence, became void. There was insufficient private housing law work available to justify the claimant's continued employment.

148. We have come to the conclusion that the proportionate means of achieving the legitimate aim as identified by the respondent, requires it to be reasonably appropriate and necessary. To dismiss without exploring possible alternatives, such as, engaging in a period of consultation with the claimant to discuss alternatives to dismissing her would have been proportionate. This was a case of a dismissal summarily rather than the respondent considering other means. Summary dismissal was not a proportionate means of achieving a legitimate aim. Accordingly, this claim is well-founded. However, having considered the evidence and having regard to our findings of fact, after a further period of consultation it was unlikely that the claimant would have been able to continue in any other role.

<u>Indirect disability discrimination</u>

149. Applying the same legitimate aim of saving staff costs, was the claimant's dismissal appropriate and necessary? Those who suffer from a serious medical condition, such as cancer, are more likely than those who do not, to be absent from work due to sickness. Therefore, would be disparately impacted by the aim of saving costs. We have come to the same conclusion in relation to the proportionality argument and find this claim to be well-founded.

<u>Failure to make reasonable adjustments</u>

150. The claimant referring to clause 13.5 as the provision, criterion, or practice, then went on to submit that the substantial disadvantage was "It did not allow her time to receive medical treatment to recuperate and rehabilitate following her chemotherapy". It is unclear to us what this means. According to the claimant, she was only aware that she had been dismissed on 12 September 2019. By then she was close to returning to work as she had

stated that she was due to return to work on 16 September 2019. We were not satisfied that this demonstrated a substantial disadvantage.

151. She then stated that another substantial disadvantage was that she was dismissed. We accept that she was dismissed as a disabled person when Mr Akilo applied the provision in her contract.

152. In relation to reasonable steps the respondent should have taken to ameliorate or to avoid such disadvantage, the claimant referred to not dismissing her. We have concluded that given the circumstances, the claimant would have been dismissed by the respondent albeit at a later date.

153. In relation to the other proposed reasonable step of permitting her to return on a phased return to work basis, there was no work in the Housing department to afford the respondent to pay her her full-time salary. In relation to private housing work, there was not enough even to pay her even on a part-time basis as during the period from September 2018 to August 2019, private housing client work came to £5,000 gross.

154. A further reasonable step the claimant contended, was to give her additional time before considering her capability. It is unclear what this means. She stated in her email of 12 September 2019 that she would like to work on a phased return to work basis from 9am to 1pm for a period of four weeks after which she would resume her full-time duties. However, she could not do publicly funded housing work. When we take into account what she did as a self-employed consultant, from the evidence it would appear that very little fee earning work was generated during the short period of time she worked on that basis.

155. We were not satisfied that there was a realistic prospect of the claimant returning to work on a phased return basis working 9am to 1pm for a period of four weeks as there was little or no work for her to do apart from engaging in billing work during the time before she went on sick leave.

156. The claimant next proposed that, as a reasonable step, the respondent should not have applied clause 13.5 of her contract. She notified Mr Akilo that she was going to return to work on 16 September 2019. She was a disabled person and allowance should have been made for her disability and length of absence. He knew of the prognosis for her return to work, but his decision was to terminate her employment which the claimant became aware of on 12 September 2019. She was able to work but his position was that she was unable to do so. We have come to the conclusion that it was a reasonable step to disapply clause 13.5 of her contract as she was ready, willing, and able to return to work from 16 September 2019.

157. This was not a case of capability, but according to the respondent a case of redundancy. The claimant would have been dismissed following a consultation procedure, as we have concluded, by 31 October 2019. This claim is well-founded, though compensation is likely to be limited.

Breach of contract

158. The claimant's case is that she had not been paid her notice pay. She had been paid one week's pay upon termination of her employment in the sum of £395.85. The provisions of s.88 and 89, Employment Rights Act 1996, entitled the claimant to receive four weeks' statutory notice pay. This amounts to £1,538.46 gross which the respondent is prepared to offer the claimant to settle this claim the sum of £1,142.61 gross which is after deducting £395.85 from £1,538.46 gross. Mr Miah asked that he be given time to take instructions from the client in respect of this offer.

159. The claimant is entitled to the sum of £1,142.61 gross.

160. This case is listed for a Remedy Hearing on Monday 11 April 2022, for one day, via cloud video platform, unless settled beforehand.

Employment Judge Bedeau

Date: 8 March 2022

Sent to the parties on: 8 March 2022

For the Tribunal Office