zd

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms P M Yeung		(1) Global Accounting Network Ltd (2) Adrian O'Connor

Heard at: London Central **On**: 3-6 and 9-11 January 2017

Before: Employment Judge Glennie
Mrs J Cameron
Mr I McLaughlin

Representation
For the Claimant: Ms S Chan of Counsel
For the Respondent: Ms A McColgan of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints under the Equality Act 2010 and of unlawful deduction from wages are all dismissed.

REASONS

1 Pursuant to Rule 62(2) of the Rules of Procedure and with the agreement of the parties, the Tribunal communicated its judgment following its deliberations and reserved its reasons to be given in writing later. These are the reserved reasons.

2 By her claim to the Tribunal the Claimant, Ms Yeung, made the following complaints:

2.1 Direct discrimination because of disability and/or sex.

2.2 Harassment related to disability and/or sex.

2.3 Discrimination because of something arising from disability.

2.4 Failure to make reasonable adjustments.

2.5 Unlawful deduction from wages by way of non-payment of holiday pay. This aspect was not pursued at the hearing because the amount outstanding had been paid and this complaint was therefore dismissed on withdrawal.

3 The Respondents both resist all of the complaints.

4 The Tribunal is unanimous in the reasons that follow.

5 Page numbers in these Reasons refer to the agreed bundle of documents which was organised with a file number followed by a page number in each case. So for example the number E1/100 would refer to page 100 in bundle E1.

6 There was an agreed list of issues and a copy of this is attached as an annex to these Reasons.

7 In that list of issues the factual allegations that the Claimant makes were set out by a reference to the paragraph numbers in the particulars of claim and the Tribunal has adopted these paragraph numbers to identify the issues in these Reasons. The same 14 factual matters were relied on as acts of discrimination on all three bases and of harassment related to both disability and sex.

8 In relation to the complaint of failure to make reasonable adjustments, no proposed adjustments were identified in the Claimant's particulars of claim. In her closing submissions Ms Chan relied on three adjustments as will be explained below.

9 Two matters identified in the list of issues did not need to be decided by the Tribunal. The first of these was the issue as to disability, as it was conceded by the Respondents that the Claimant was at the material time disabled by virtue of conditions of depression and Borderline Personality Disorder (BPD). There remained issues as the Respondents' knowledge of those conditions and of the Claimant's disability.

10 A potential issue was also identified in relation to the applicable time limits. In the event, however, Ms McColgan made no submissions on this point and it did not arise for decision as the Tribunal made findings on the merits of all of the allegations.

11 A preliminary procedural matter arose at the outset of the hearing. Ms Yeung sought to rely on an additional witness statement which referred to alleged drug taking by the First Respondent's employees and by the Second Respondent himself. The Respondents objected to this statement being admitted in evidence.

12 The Tribunal considered that the question of drug taking was not directly in issue in the proceedings but that it might be of some relevance to issues of credibility. Against this, the Tribunal was concerned at the prospect of allegations of this nature being made about individuals who were not present in the hearing to answer them, and being contained in a witness statement which potentially would be available to be read by members of the public attending the hearing. In the event the Tribunal dealt with the point by refusing to admit the statement on the grounds of its limited relevance and the nature of the material it contained, but indicating that it would allow cross-examination of Mr O'Connor on the point to the extent that this was necessary and proportionate.

The evidence and findings of fact

13 The Tribunal heard evidence from the following witnesses:

13.1 The Claimant, Ms Yeung.

13.2 Mr Adrian O'Connor, the Second Respondent and a founding partner and statutory director of the First Respondent.

13.3 Ms Rebecca Dear, Marketing Manager of the First Respondent.

13.4 Ms Lynda Soden, Office Manager of the First Respondent.

13.5 Mr Hugh Spurling, Head of Interim Services for the First Respondent.

13.6 Mr David Leslie, also a founding partner and statutory director of the First Respondent.

14 The First Respondent is a recruitment agency. It can be described as Mr O'Connor's company in the sense that it is a small concern with around 14 employees and he is the majority shareholder via a holding company, Global Staffing Network. Mr Leslie owns the remaining smaller interest. Mr O'Connor is effectively in charge of the day-to-day business of the First Respondent.

15 That business involves finding candidates for employment and placing them with employers in either permanent or fixed term roles. The two sides of the business are identified as permanent services, in other words, permanent employees; and interim services, indicating those with fixed term contracts. The First Respondent's employees were organised in two teams directed to those activities. Mr Leslie was the Head of Interim Services and as from August 2015 Ms Yeung was the Head of Permanent Services.

16 The factual issues with which the Tribunal has been concerned have largely involved conversations between Ms Yeung and Mr O'Connor which, except for the final one, were not witnessed by anyone else. We have had to decide whose evidence as a matter of probability we prefer about those events. In doing so we have been assisted by certain matters that are not in dispute or

are evident from contemporaneous documents or communications, the latter including in particular WhatsApp messages passing between Ms Yeung and Mr O'Connor.

17 Mr O'Connor and Ms Yeung had been work friends for about 10 years before the beginning of the latter's employment with the First Respondent. They had worked together in two companies before Mr O'Connor established the First Respondent in 2011, at all times in the recruitment business. When not working together they had remained in regular contact. Ms Yeung described Mr O'Connor as a confidant and the various communications to which the Tribunal was referred that passed between them confirmed this. For example, at page C/1, there was a text message of 11 August 2014 (and so about a year before Ms Yeung began work for the First Respondent) in which Ms Yeung said to Mr O'Connor:

> "Thank you for the chat. Got a lot of thinking to do. See you Saturday."

(On the same page and relevant to a different point the Tribunal noted that in a text message of 3 September 2014 Ms Yeung apologised for "acting like a nagging wife"). Another example, this time arising during the period when Ms Yeung was employed by the First Respondent, is at page C/45 and is a WhatsApp message in which Ms Yeung made reference to matters occurring in her personal life. She said she was currently sitting in A&E and had relieved her husband and daughter so that they could go home. It is evident that this concerned her mother because Mr O'Connor replied:

> "No worries, I know how frustrating it can be. Hope your mum is OK?"

To which Ms Yeung replied:

> "Thanks".

18 The Tribunal also made the following three general observations from the communications between Mr O'Connor and Ms Yeung which are relevant to the matters that we have to decide.

> 18.1 From time to time Ms Yeung expressed doubts about her own abilities and value as an employee. When she did so Mr O'Connor responded with kindness, reassurance and encouragement. One example of this is at page C/43 and again is a WhatsApp exchange. On 20 November 2015 Ms Yeung wrote:
>
> > "Had a fucking slow ST on the billing front but am working hard to claw it back and finish 2015 in style."
>
> Mr O'Connor replied:
>
> > "No problem at all. Thanks for the hard work over the last few weeks. Much appreciated. Don't work over the weekend. You deserve the break."

Then at pages C/49-C/50 there was an exchange concerning Ms Yeung taking an overdose and spending the weekend in hospital, to which further reference will be made later in these reasons. This was on 14 December 2015 and the exchange began with Ms Yeung stating that she had taken an overdose and had been released from hospital. She continued that she had been contemplating jumping off a bridge or jumping in front of an underground train and that she was admitting herself to hospital. Mr O'Connor's response was:

> "What? Where are you?"

followed by:

> "I'll come and wait with you."

Ms Yeung wrote:

> "I'm sorry its come to this and let you down again."

To which Mr O'Connor replied:

> "You have not let me down Marie. I'm just concerned that you look after yourself and get well. You've been doing a great job and need to not put so much pressure on yourself. Forget work. Get well. Let me know if you want a visit/support etc. Thinking of you."

18.2 Ms Yeung made frequent use of the word "fuck" or derivatives thereof in her messages to Mr O'Connor. In particular, she used the present participle, "fucking", to lend emphasis to the point she was making. We have already cited one example of this on page C/43. Other examples, which we will not quote here, are at pages C/39, C/55 and C/59. On other occasions Ms Yeung used other forms of the word, for example describing herself as "fucked up" or having fucked up. The Tribunal noted that Mr O'Connor did not use this word often in their communications. When he did, this was in a somewhat different way. On page C/39 he described someone who was in a predicament as "totally fucked"; and at page C42 in an exchange where Ms Yeung had used the word "fuck" as an exclamation he did the same and in response to news about a successful piece of business wrote:

> "Fuck, that's fantastic news."

The Tribunal noted that while the Claimant often used this word as an adjective to give emphasis to what she was saying, Mr O'Connor did not do this, and furthermore that on the two occasions we have noted where he used the word, he did not do so in an aggressive or hostile manner.

18.3 Ms Yeung on occasions described herself as nagging Mr O'Connor. We have already given one example of this above (page C/1). Another is

in a WhatsApp message (page C/59) where on 3 March 2016 Ms Yeung wrote:

> "Am drunk and in nagging mood. ….. Admit it you need a woman like me in your life to keep U in check" [followed by three laughing faces].

There was also (page G1/16) an email of 14 May 2015, and so pre-dating Ms Yeung's employment by the First Respondent, where Ms Yeung said to Mr O'Connor among other things:

> "Sorry to nag."

19 Having made these general observations the Tribunal turned to the particular issues to be determined. It is accepted by the Respondents that Ms Yeung is disabled by virtue of the conditions of depression and BPD. Knowledge, however, remains in issue and the matters in dispute relate not only to the conditions themselves but also to what the Claimant described in her evidence as her coping mechanisms and crisis plan relating to those conditions.

20 In relation to the condition of depression, Mr O'Connor knew that the Claimant had had what was described as a breakdown in 2008. On 15 May 2015 (page G1/16) Ms Yeung, when working for another organisation, sent an email to Mr O'Connor saying that she was feeling unwell and wrote:

> "Now for some moral support in your opinion do you think [P] values me and recognise everything I do and have done for him. Do you think he realises I am pushing myself so hard I am at breaking point?"

Shortly after this there was an email exchange between Ms Yeung and Mr O'Connor in connection with the proposal that she should go and work for the First Respondent. Ms Yeung sent Mr O'Connor details of the remuneration package at her current employers which included the following points:

> "Private doctor fees (repeat prescription).
>
> Working from home option.
>
> No questions asked if I need to take time off to recuperate."

21 In respect of the last of these, when cross-examined Mr O'Connor said he did not know what it might be that Ms Yeung would need to recuperate from. Ms Yeung's case was that this all related to her condition of depression. The Tribunal found that the point was made clearer in another email exchange on 4 August 2015, and so immediately after the commencement of Ms Yeung's employment (page G/26A). This concerned a work related visit to Valencia and began with an email from the Claimant to Ms Dear asking about the sleeping arrangements and saying that, as she suffered from insomnia, she requested a room to herself. Ms Yeung then followed this with an email to Mr O'Connor in which she said:

> "Before you start on me I'm not being a princess but I need to have my own room for the Spanish trip. The anti-depressants affect my sleep and sharing a room with other people makes it worse. I've shared a room once since being on anti-depressants and didn't sleep at all."

Mr O'Connor replied, as the Tribunal finds, in a light-hearted and affectionate manner:

> "Hey princess, I've already booked you a double room, single occupancy. You and me are the only ones not sharing."

22 The Tribunal found this exchange of significance in two respects. One was that it again showed Mr O'Connor responding to the Claimant with a degree of consideration and affection. The other is that Ms Yeung mentioned anti-depressants twice in her email, which Mr O'Connor had evidently read. He replied without making any comment on that matter and the exchange does not read as if Ms Yeung was making reference to anti-depressants or depression for the first time. In any event, an individual would be taking anti-depressants because they were suffering from depression, and the Tribunal found that Mr O'Connor must have known that Ms Yeung was suffering from that condition, at least from the start of her employment with the First Respondent.

23 We have already mentioned the events in December 2015 when Ms Yeung took an overdose and was admitted to hospital and on her release threatened suicide again. In addition to the messages already quoted, on 14 December Ms Yeung informed Mr O'Connor (page C/50):

> "I'm still……waiting for formal admission. It's been agreed it's best I stay here for a bit to deal with my illness and/or am away from everything and everyone."

And a little later:

> "I've been on a downward spiral for a long time. [Ms Yeung's husband] thought removing me from [P] and [another organisation] coupled with working you will keep me under control would bring balance again. The issues are far greater than that……..Me moving out of my comfort zone on the work front probably it to a head sooner due to the pressure I have put on myself. I intend to use this time wisely to find myself and get better even if there's difficult decision and choices to be made along the journey. Hopefully I'll still have a friend and boss at the end of the journey. Doesn't have to be both, doesn't even have to either if I'm too much of a headache or pain for you."

The Tribunal noted in passing that again Mr O'Connor's response was to reassure Ms Yeung, as he wrote:

> "Marie, you'll always have a friend. Your job is open and whether its long-term depends on its effect on you. The most important thing is that you

> get well and look after yourself as I've said on Friday. Let me know if there is anything you need or if we can help. Don't think about work for now."

and in the next message he wrote:

> "Just calling in to see how you are. Look after yourself. Give me a call if you feel like it."

24 It was evident, and effectively conceded by Mr O'Connor, that following the events of December 2015, he knew that Ms Yeung was suffering from a serious mental health condition. His evidence was that he did not think of this in terms of a disability within any legal definition such as that in the Equality Act, and it appeared that his awareness of what might amount to a disability and what the significance of that might be, was at best hazy. He said, however, that in practical terms he and the company would attempt to help and support an employee such as Ms Yeung who was suffering from a condition of this nature. As the Tribunal has already stated, we have found that Mr O'Connor knew that the Claimant suffered from depression.

25 Ms McColgan tacitly conceded in her submissions (paragraph 22) that the Respondents had actual or constructive knowledge of the Claimant's disability by reason of depression as from December 2015. The Tribunal agrees with that, given the nature of the events and Mr O'Connor's evidence, referred to above. Given the Tribunal's findings of fact about events between August and December 2015 (set out below), it is not strictly necessary to decide on the Respondents' state of knowledge about the Claimant's disability during that period. However, should it be necessary, the Tribunal has concluded that, given the longstanding and close friendship between the Claimant and Mr O'Connor, the latter as a matter of probability had much the same level of knowledge of her condition when she commenced employment as he did in December 2015. On this basis, the Tribunal found that the Respondents had knowledge of the Claimant's disability arising from depression at all times during her employment.

26 Apart from the condition of depression, it is common ground that the condition of BPD also gives rise to disability in Ms Yeung's case. On 27 February 2016 (page C/57) Ms Yeung wrote:

> "BTW [by the way] I've self-diagnosed and believe I have BPD. Life is a journey of self discovery …."

To which Mr O'Connor replied:

> "Nah your just a pain in the are [sic] sometimes."

Later, on 9 March 2016 (page C/60), in the course of exchanges about various matters, Ms Yeung sent Mr O'Connor a link to a website about BPD and made reference to therapy that she was starting in April saying that:

> "This focuses on coping, self-image and apparently helps me find peace with my problem. It's a treatment popular with trauma, rape and abuse victims."

27 There was no evidence that Mr O'Connor recognised the initials BPD or what they stood for, or knew what borderline personality disorder was. Equally he made no enquiry of Ms Yeung about it, such as asking her what this meant and what the effects might be. So far as the stated self-diagnosis is concerned, Ms Yeung's evidence was that she subsequently discovered that she had been medically diagnosed with BPD, and that at this earlier point she had independently come to her own self-diagnosis through her own researches.

28 It was common ground between the parties that for the purposes of the duty to make reasonable adjustments, this would not arise where the employer did not know, and could not reasonably be expected to know, that the worker had a disability and was likely to be placed at a disadvantage by the PCP concerned (paragraph 20(1)(b) of Schedule 8 to the Equality Act).

29 The Tribunal concluded that Mr O'Connor, and therefore the First Respondent, did not have actual knowledge of the Claimant's condition of BPD during the period of her employment. The Tribunal accepted that Mr O'Connor did not know what the reference to this meant.

30 So far as constructive knowledge is concerned, the Tribunal found that the matters we have referred to above were not sufficient to enable it to say that Mr O'Connor and therefore the First Respondent ought to have known of the Claimant's condition. Her stated self-diagnosis in the course of a WhatsApp exchange would not, we found, be sufficient to put a reasonable employer on enquiry as to what the condition might be and as to whether it might amount to a disability. Even assuming (as we consider we should) that a reasonable employer would be aware of the outline at least of the Equality Act duties and of the potential duty to make reasonable adjustments in connection with any disability, passing references to a self-diagnosis and to a website are in the Tribunal's view not to be equated with information about a medical diagnosis or about specific symptoms.

31 The third element of the issues as to knowledge concerns the Claimant's coping mechanisms and crisis plan. In cross-examination Ms Yeung confirmed that the crisis plan and coping mechanisms were not contained in documents of any description. In paragraph 7 of the particulars of claim Ms Yeung pleaded that Mr O'Connor "is and was at all material times fully aware of the nature and extent of the Claimant's health condition, coping mechanisms and crisis plan." This assertion in rather formal legal language was not reflected in Ms Yeung's evidence, in the sense that she did not suggest that she had told Mr O'Connor about her coping mechanisms or crisis plan as such. Instead, she relied on a more general assertion that Mr O'Connor was aware of her condition, the effects that it had on her, and how she attempted to deal with these. As we have described above, to a certain extent that is common ground and is evident from the messages that were exchanged between Mr O'Connor and Ms Yeung. However, there was no evidence that Ms Yeung ever used the expression

"coping mechanisms" to Mr O'Connor, or that she gave any such formal title to the means with which she sought to deal with her condition.

32 The only evidence about mention of a crisis plan came in Ms Yeung's answers in cross-examination. This arose in connection with the events of the final day of her employment. These will be described in greater detail later in these reasons, but the material point for the present issue is that in paragraph 71 of her witness statement Ms Yeung said that Mr O'Connor snatched the company mobile phone from her, and that he knew that he having done so, she would not be able to summon help. There was no reference in the witness statement to a "crisis plan" being mentioned. When cross-examined about these events Ms Yeung referred several times to having said that Mr 'Connor had taken her "life line"; and then when rehearsing these events again at the end of her evidence she included the words "crisis plan" as well as the reference to "my life line".

33 In the light of the way in which this evidence came out, the Tribunal found it unlikely that Ms Yeung had in fact referred to her crisis plan at this particular point. However, even if she did, we found that this would not have been sufficient to give Mr O'Connor (and therefore the First Respondent), actual or constructive knowledge of the crisis plan in any way that was relevant to the issues in the case. This was for two reasons; one is that on this evidence Ms Yeung did no more than utter the words "crisis plan" in the course of what was an emotional exchange. The other is that this was practically the last event that occurred in the course of her employment and could not therefore be the foundation of any form of knowledge that could have been relevant to alleged acts of discrimination or potential adjustments during the course of that employment.

34 Having dealt with the question of knowledge, the Tribunal now turns to its findings of fact in relation to the matters that are relied on by the Claimant as acts of direct discrimination, discrimination arising from disability, and harassment. As we have indicated, we will deal with these essentially chronologically and by reference to the paragraph numbers identified in the list of issues as arising from the particulars of claim.

35 Ms Yeung's employment with the First Respondent began on 3 August 2015. One of the first events was the visit to Valencia to which reference has already been made. The incidents that occurred in the course of this visit were not ultimately of great significance to the matters that the Tribunal had to decide. They included an incident in a night club involving one of the First Respondent's employees and some other people, and the taking of cocaine by some of those on the trip, including Ms Yeung and Mr O'Connor. As we will describe, Ms Yeung's use of cocaine was something that featured later in the history of her employment. She asserted in her evidence that she had not used drugs since her teenage years and had effectively been reintroduced to them on the visit to Valenica. Whether that was so or not did not seem to the Tribunal to be material to the issues before us.

36 Mr O'Connor's evidence about this aspect was that he regretted using cocaine on this work related trip, saying that this was "not his finest hour", and that on his return he established a rule that drug taking at work related events would not be tolerated. As we have indicated in relation to the application to admit a further witness statement from the Claimant relating to drug use by, among others, Mr O'Connor, the Tribunal did not see these allegations against him as being of direct relevance to the issues before us nor ultimately did we consider that his admitted use of cocaine on this occasion made any difference to our assessment of his credibility. He had not sought to deny the incident at any point, and given that the Claimant's evidence was that she herself and other employees of the First Respondent used cocaine, it seemed to the Tribunal to be of no real significance that Mr O'Connor had done so also.

37 Another matter that was canvassed fairly extensively in the oral evidence, but which was not, we found, central to any of the issues in the case, was the question whether the Claimant had ever been provided with a written contract of employment. Put simply, the dispute was that the Claimant maintained that she had never been provided with a contract of employment and the Respondents asserted that she had.

38 The Tribunal found both parties' evidence on this subject difficult to understand. There was no copy of a contract of employment purporting to be the Claimant's in the bundle of documents, nor was there any draft of such a contract with terms referring to her employment. The Respondents' case was that a contract had been given to the Claimant, that she had signed and returned this, and that it had been kept as a hard copy which had then been lost in the course of an office move. This explanation gave rise to the obvious point that in that event one would have expected an electronic copy of the Claimant's contract to have been available, as the same would have been necessary in order to produce a hard copy for her to sign. Ms Dear's explanation for the lack of an electronic copy or draft was that the process adopted was to take a standard template, fill in the details that were relevant to the particular employee, and then print a hard copy without retaining the original electronic document that had been created from the template. She further said that her recollection was that in Ms Young's particular case it had been Ms Yeung who had printed a copy and then signed and returned it, and that the copy had become lost in the way described.

39 The Tribunal found this evidence somewhat unsatisfactory, involving as it did two separate unfortunate sets of circumstances, namely the original inability of the Respondents to print a copy and later the loss of the hard copy in the office move. It was difficult to see why the Respondents would not have saved an electronic copy of the contract of employment when this could be done easily and would not involve taking the template out of use for future occasions.

40 Ms Yeung's evidence that she had never received a contract of employment was, however, open to the criticism that in an email of 23 February 2016 at page G2/617 she stated that she had signed and returned her contract of employment. The Tribunal found her explanation that she meant the offer letter referring to her employment with the First Respondent unconvincing. The Claimant is an experienced recruitment specialist and, we considered, would

know the difference between an offer letter setting out the basic terms that are being proposed and a contract of employment setting out the full terms.

41 Ultimately it was not necessary for the Tribunal to make a decision on this point. Not only was the question of the contract not directly in issue, but also we found that it shed little light on the matters that were in dispute. To the extent that it might be said that the contract, if it existed, probably had attached to it a job description of the sort that appears attached to Mr Leslie's contract, we found that this did little to explain what Ms Yeung's responsibilities were and what degree of clarity about them existed. This is because the job description was lengthy and in generic terms and included little detail as to what the manager concerned was expected to do. It was so wide that (as one might expect in a small organisation of this nature) it might be summarised as saying that the manager was expected to deal with all matters that were necessary in furtherance of the First Respondent's business.

42 The Claimant's case was that Mr O'Connor promised to provide what she described as a more structured role with less administrative responsibility and with support from him and his team, and then she related this to the management of her health. Mr O'Connor's evidence was that he accepted that he and Ms Yeung met regularly and discussed goals and her request for specific targets for the team that she was managing. He said that they met on most Monday mornings subject to the demands of the business. His case was that he was expecting Ms Yeung to make changes to processes and structures in order to promote the permanent team and he denied that any of these matters were discussed with reference to Ms Yeung's health.

43 The Claimant agreed that she had not in any document linked her requests for targets or a structure to her health, saying that Mr O'Connor was well aware of her mental health. As the Tribunal has found, the latter statement is broadly correct, but it does not mean that Mr O'Connor made, or should have made, a link between that and a need for a structured working environment. We found as a matter of probability that the Claimant did not express, and Mr O'Connor did not understand there to be, such a link.

44 The first matter of complaint was in paragraph 11 of the particulars of claim in the following terms: on an occasion during the week commencing 21 September 2015 Ms Yeung raised various concerns with Mr O'Connor including the need for her direct reports to have details of their potential quarterly bonus. The pleading continued as follows:

> "In response to this request the Second Respondent observed that the Claimant's direct reports should 'know their own numbers' in response to which the Claimant suggested that a master copy should be made available to her direct reports to enable them to cross-reference their own numbers. The Claimant's suggestion was dismissed out of hand, following which the Second Respondent told the Claimant that it was 'her fucking job' and that she should stop nagging."

45 The allegation made in paragraph 15 about a meeting on 23 November 2015 was similar in that it was again said that the question of bonuses had been raised by Ms Yeung and that Mr O'Connor failed to provide any proper assistance or constructive comments, instead saying: "Everyone is just fucking stupid" and that they should "use a calculator" and the Claimant was "nagging him" and should "stop fucking chasing him."

46 When Mr O'Connor was cross-examined about this aspect, no clear distinction was drawn between the meeting in September and that in November. Given the similarity of the allegations, this was not very significant. Mr O'Connor agreed that something had been said about whether the team should know their own numbers i.e. know their own sales and potential commission, and that something was said about using a calculator. He denied swearing but said that his best recollection of what he had said was "Jesus, how come they still don't get it? It's billings times the bloody percentage! You have to be stupid not to get it." He denied using the F word. So far as the question of the word "nagging" is concerned, Mr O'Connor did not refer to this specifically in his witness statement, and this particular point was not put to him in cross-examination.

47 In defence of his denial of swearing Mr O'Connor suggested that the word "bloody" did not count as such. Whether it does or not is not really material to the Tribunal's decision. The real issue about swearing is whether Mr O'Connor used the F word in the way that the Claimant describes in these discussions. Mr O'Connor denied habitually swearing, although he did not maintain that he never used this word, and in this he was supported by the other witnesses called on behalf of the Respondent. We have already referred to the contents of the WhatsApp messages passing between Ms Yeung and Mr O'Connor. These support Mr O'Connor's assertion that he did not habitually swear by using the F word, although he did use it occasionally. They also show that the Claimant undoubtedly used that word and, as we have said, the version "fucking" to lend emphasis to what she was writing. We find that Mr O'Connor did not habitually swear, certainly not in the aggressive fashion suggested by the Claimant in these exchanges, and on balance we find in favour of his denial of using the F word in this way in their discussions about the bonus scheme.

48 As to the other elements of these conversations that were not agreed by Mr O'Connor, the Tribunal found that saying that the team members should know their job was little different from saying that they should know their own numbers, and that Mr O'Connor probably did say something to that effect. Although he agreed he used the word "stupid", the Tribunal considered that there was some difference between saying that everyone in the team was stupid and saying: "You'd have to be stupid not to get it", the former being more directly insulting to the team members. We considered it unlikely that Mr O'Connor would have been directly insulting to the team in this way and on this point we had in mind the observation that in his WhatsApp communications with Ms Yeung he was not in the habit of making insulting references to people directly. We found as a matter of probability that he did say, as he accepted, that you'd have to be stupid not to get it, in connection with bonus scheme.

49 As we have pointed out, in the written communications between the parties it was Ms Yeung who described herself as nagging Mr O'Connor. He did not use that expression of her. We therefore find it likely that Mr O'Connor did not tell Ms Yeung to stop nagging him, but that conversely this might reflect her own view of how he might have perceived the way in which she was behaving.

50 Although not strictly a finding of fact, it is convenient to mention here the conclusions that the Tribunal has reached about the word "nagging" if, contrary to our finding, it was in fact used by Mr O'Connor. Although Ms Chan urged us to have in mind a stereotypical "nagging wife" in support of the contention that any use of the word "nagging" was related to the Claimant's sex, we found it to be gender neutral. The Tribunal considered that men or women could be accused of nagging without this seeming incongruous in the case of a man, and that whatever the origins of the expression, its present-day use is gender neutral.

51 In dealing with paragraph 15 of the particulars of claim together with paragraph 11, we have departed from the chronological sequence. Returning to this, paragraph 13 refers to a meeting on 2 November 2015. The pleaded case is that Ms Yeung sought to raise a formal grievance about lack of support and raised concerns about Mr O'Connor's general attitude, namely his aggressive and abusive behaviour; the fact that the "most valued person" awards appeared to be rigged; and that changes had been made to her team without her first being consulted. She pleaded that Mr O'Connor's response was that she should "suck it up" and "do her fucking job" and that "this is my company and I can do what I want with it." The Claimant then began to cry and in response Mr O'Connor told her to pull herself together and stop being such a drama queen.

52 In her witness statement Ms Yeung described herself as "extremely cross" that changes had been made to the team without her authority, such as changes to the seating arrangements. She said that from time to time Mr O'Connor give instructions directly to the team without prior discussion or her approval. She described Mr O'Connor as "incandescent in his response" and that he screamed at her the offensive words set out above.

53 The Tribunal considered it probable that, faced with Ms Yeung in a state that she herself described as extremely cross, Mr O'Connor also became angry. We found it unlikely, however, that he screamed. This was not pleaded. Moreover, the evidence was that his office was far from sound proof, and if he spoke loudly all the other people in the Respondents' company office would be able to hear what was going on. As to the specific words alleged, Mr O'Connor denied using the F word or using the expression "suck it up". For reasons that we have previously given we accept that he did not use the F word. So far as the other expression is concerned, it is not clear to the Tribunal what this is supposed to mean, but it is evidently said to have some offensive connotation. We find for the same reasons that Mr O'Connor did not use it. We find that he had probably did say something to the effect of "you do your job" and "it's my company" as these would be probable responses to the Claimant's complaints about the selection for the most valued person award and the argument about Mr O'Connor going over her head.

54 Mr O'Connor accepted that the Claimant cried from time to time in meetings, and we find that she did so on this occasion. He denied that he would have said something like "pull yourself together" in such circumstances or that he would have called the Claimant a drama queen when she was crying, although he accepted that it was an expression he did use on other occasions jokingly, and asserted that it was one that the Claimant also applied to him. On this point the Tribunal considered that saying the things attributed to him by Ms Yeung would have been inconsistent with Mr O'Connor's responses when she was distressed and sent him WhatsApp messages. As we have said, he consistently replied in a reassuring and kind manner. We concluded that it was unlikely that he would react harshly or unkindly when face to face with the Claimant and when she was visibly distressed.

55 Paragraph 14 refers to events of 17 November 2015. The pleadings said that Ms Yeung met Mr O'Connor and raised concerns about lack of support in response to which he told her "stop being such a fucking needy person" and "stop fishing for more reassurance."

56 The pleaded case was inaccurate in the sense that it was common ground that on 17 November Mr O'Connor was unwell and any discussion would have had to have taken place by telephone. The expression "stop fishing for more reassurance" did not appear in the Claimant's witness statement and seemed to the Tribunal to be a rather stilted expression that was unlikely to have been used. The observation that the Claimant should stop being such a needy person with or without swearing would have been inconsistent with Mr O'Connor's whole approach to her as demonstrated in the communications to which we have previously referred. We found therefore as a matter of probability that these things were not said.

57 On the evening of Friday 11 December 2015 Ms Yeung took an overdose of drugs and was taken to hospital. On Sunday the 13th she sent by WhatsApp a picture showing her arm with a drip and hospital notation attached to which Mr O'Connor replied: "WTF what happened?" Ms Yeung replied that it was a long story and she would need to leave work early the next day for an out-patient appointment. On the morning of Monday 14 December Ms Yeung sent a WhatsApp message to Mr O'Connor referring to the overdose and suicidal thoughts, to which we have already referred. We have also set out above the responses that Mr O'Connor sent to these messages.

58 Following this incident Ms Yeung was off work over the Christmas period and returned on 4 January. There was a meeting on that date between her and Mr O'Connor which was the subject of the complaint set out in paragraph 17 where the incorrect date of 5 January is given. The pleaded case was that Ms Yeung expressed concern regarding her continued employment and began to cry. In response Mr O'Connor questioned her loyalty and commitment and told her to "fucking leave then". She commented that she was just emotional. He said that he would be prepared to offer her some support and that she could work from home on at least one day per week.

59 Mr O'Connor's evidence was that there were really two parts to the meeting. In the first he expressed concern about Ms Yeung's health and asked how he and the Respondent company might assist with that. She said that she was better and had got over the incident and was anxious to get back to work. He then referred to work matters including some deficiencies that had arisen in the performance of her team in her absence, and at that point she became distressed. He denied disputing or questioning Ms Yeung's loyalty or commitment, or suggesting, with or without the F word, that she should leave.

60 In resolving these matters of dispute the Tribunal drew some assistance from an email exchange of the same day, 4 January 2016 (page G1, 205). Ms Yeung wrote this:

> "I'm sorry if I pi@@ed [meaning "pissed"] you off this morning or gave you the impression I am not committed. On reflection I was probably still feeling a bit over-whelmed and delicate ….. Don't forget I have been bubble-wrapped since 14 December. However, am really pleased to be back. Now keen to push forward and make things a success. Just need to get back into a routine, getting results and my full confidence back. NB my self doubts of questioning whether I'm right for the business and my boss is not a sign of being uncommitted or not being up for the challenge. ……"

Mr O'Connor replied:

> "No apology necessary. I probably shouldn't have sprung it on all you. We'll get there."

61 The Tribunal considered that this email exchange showed that the Claimant had feelings of lack of confidence in her ability to do the job and was concerned that expressing this might have been interpreted as a lack of commitment on her part. We found it unlikely that Mr O'Connor would have said that she lacked loyalty or commitment as he had never challenged her in those respects in the past. We found that he did not make those comments. Again, it seemed to us, that it may have been that the Ms Yeung was taking her own concerns about how Mr O'Connor might have perceived her and attributing to him words (that he had not used) that indicated such feelings.

62 The Tribunal was satisfied that Mr O'Connor did not say "fucking leave then" or make any reference to the Claimant leaving her employment. To have done so would have been wholly inconsistent with the approach that he had demonstrated to Ms Yeung in the past and to which we have previously referred in relation to the WhatsApp messages. It would also have been wholly inconsistent with the response to this particular incident that he showed elsewhere in the email at page G1/205 and WhatsApp messages at page C/53. It would also have been an unlikely response from him in the light of the friendship between him and Ms Yeung.

63 Finally on this aspect, Mr O'Connor said in his evidence that with hindsight it probably would have been better not to have gone on to the business matters

in the course of this meeting, and that he should have left those until later. The Tribunal accepted that this was the meaning of his observation in the email of 4 January that he probably should not have sprung it all on Ms Yeung, and that if there was an error of judgment involved, it was that, and did not show him in an unfavourable light as regards his view of Ms Yeung.

64 Paragraph 19 was a general allegation that on numerous occasions between February and April 2016 Mr O'Connor berated Ms Yeung, referring to her as a drama queen, telling her to stop fishing for reassurance and to "stop being so fucking melodramatic", as a result of which she was frequently reduced to tears. On this point and for the reasons that we have previously given we do not consider that Mr O'Connor would have used the F word. We have accepted that Mr O'Connor would not use the expression "drama queen" when Ms Yeung was upset and in relation to a previous allegation we have found it unlikely that he would have told her to stop fishing for reassurance or something similar. For the same reasons we find as a matter of probability that he did not use these expressions in the way complained of on these occasions. So far as any question of referring to the Claimant being melodramatic is concerned, that would have been an inappropriate thing to say in the light of the events of 11-14 December, and given everything that we have said about the nature of the relationship between the parties, we find that Mr O'Connor did not say this.

65 The Tribunal also noted that this general allegation was not reflected in the Claimant's witness statement, and there was no specific evidence of occasions on which Mr O'Connor was said to have rebuffed Ms Yeung's discussions in this way. We also considered that to have done so would have been inconsistent with his demonstrable concern and reassurance for Ms Yeung shown in the WhatsApp messages and would not have been in Mr O'Connor's own business interests, since the business depended on performance of the individuals within it, including of course the Claimant.

66 Paragraph 20 concerned 12 May 2016 when, it was common ground, there was an exchange between Mr O'Connor and the Claimant concerning an overdue invoice directed to the organisation Carillion. There was no real dispute about the facts of what happened. The figure shown on the invoice included a discount for prompt payment. The invoice had in fact been outstanding since the previous November. Mr O'Connor took this matter up with the Claimant and asked or told her (it seemed to the Tribunal to make little difference in practice how the matter should be regarded) to telephone the client's finance director and seek immediate payment of the invoice. The Claimant did not feel comfortable doing this and said so. Mr O'Connor nonetheless told her that she should make the call and that he would remain present while she did so.

67 There were differences of interpretation of this incident between the parties. Ms Yeung pleaded that Mr O'Connor had forced her to make the call and that he refused to allow her to leave the office until she had done so under his supervision. Mr O'Connor's evidence was that the purpose of his presence was to assist the Claimant with the call. He said that one area of work with which Ms Yeung had difficulty was that of situations where the client was

being unhelpful or where it was necessary to tell them something that they did not wish to know. He felt that Ms Yeung needed assistance and encouragement to tackle situations of that nature.

68 The Tribunal found that whatever the precise details of this event, it was in fact unremarkable. There is nothing unusual about the situation of a business chasing an invoice, nor is it unusual for the employee who is expected to do the chasing to find this uncomfortable especially when, as was the case here, they had done the original business with the client and therefore had some relationship with them. Ms Yeung might have felt obliged to make the call as Mr O'Connor, who ultimately was her boss, was asking or telling her to do so, but the Tribunal considered that it was exaggeration to describe the situation as one where she was not allowed to leave the office without making it.

69 Paragraph 21 concerned a candidate calling session 16 May 2016. This was a regular event on Monday evenings where the team remained in the office later than usual and called job candidates. Ms Yeung's pleaded case was that she told Mr O'Connor that she did not believe that she would be able to participate on this particular occasion because of her workload and staff shortages and that in response Mr O'Connor behaved aggressively saying: "What's the fucking point?" "I fucking don't care" and "if you don't fucking take part how the fuck do you expect others to?" The pleading continues that Ms Yeung referred to the urgency of the matters that she was working on and that Mr O'Connor said that she had a work phone for a reason, and why could she not do it on the way home. Ms Yeung said that she would likely be working until midnight to which Mr O'Connor replied: "There's always fucking something".

70 Mr O'Connor's evidence was that he did not swear and did not say that he did not care. He said that, minus the swearing, words to the effect of, "if you don't take part how do you expect others to", sounded like the sort of thing that he might say. He denied that he would have said "there is always something", and that in the circumstances he would have said that there was a need to address the matter if Ms Yeung was working on her phone until midnight.

71 For the reasons that we have already given in relation to other matters the Tribunal found that Mr O'Connor did not swear on this occasion. We also found that he probably did not say that he did not care about the situation because to say so would not make sense. One would expect him to have had some opinion one way or the other about the proposition that the Claimant could not take part because of the weight of other work that she had to do. We found that he did say something to the effect of: "If you don't do it how do you expect others to", as one would expect this sort of comment in the circumstances given that Ms Yeung was the team leader. So far as the other comments are concerned, the Tribunal found as a matter of probability that Mr O'Connor did say "there's always something" as well as something to the effect that if the Claimant was working until midnight then she needed to address it. Again, the Tribunal found these exchanges to be unremarkable in the context of the business activity to which they related.

72 Paragraph 22 of the particulars of claim refers to a meeting on 18 May 2016 in which the Claimant expressed concern about Mr O'Connor giving instructions directly to her reports and instructing Mr Leslie to do the same thing, in response to which Mr O'Connor accused the Claimant of being too passive. This was not referred to in the Claimant's evidence, nor was it put to Mr O'Connor. The Tribunal therefore concluded that there was no evidence to support this particular allegation, which in any event seemed to be of little significance.

73 Paragraph 23 concerned 24 May 2016. The pleaded case was that Mr O'Connor had already agreed that Ms Yeung would be able to work from home at least one day per week in order to facilitate both the relocation of her home to Birmingham and a proposed course of cognitive enhancement therapy. The particulars of claim continued that Mr O'Connor told Ms Yeung that he had changed his mind and would not after all permit her to work from home as he needed her to be in the office for more than 3½ days per week. It was said that Ms Yeung expressed distress at this, in response to which he asked how she could "feel it would be acceptable to be away for so long" and said that he was "disappointed she did not suggest it herself to revoke the working from home."

74 In paragraph 61 of her witness statement Ms Yeung stated that she started working from home "shortly afterwards" (apparently meaning after January 2016 as in paragraph 62 she went on to speak about matters happening over the course of the next few months, which would take her to about the end of her employment in May). In relation to 24 May the Claimant said in paragraph 66 of her witness statement that Mr O'Connor stated that he was not allowing her to work from home from 24 May in order to attend therapy and that it was then that he said that he could not understand how she could feel it would acceptable to be away for so long. If anything, this paragraph seemed to refer to a request to work from home on occasions beyond the one day per week that had previously been agreed, and was presumably the subject of the reference in paragraph 61 to working from home.

75 The Claimant's case on this point was therefore somewhat muddled. Ultimately there was no evidence of any specific request or actual refusal to allow her to work from home on a particular date, which was perhaps not surprising given that this conversation took place on 24 May and the Claimant's last day of employment was 27 May. Mr O'Connor's evidence about the conversation was that he said that 1½ days per week working from home could be a problem but that the conversation got no further than that. This seemed to the Tribunal to be broadly consistent with the Claimant's account, including as it did a reference to being in the office for more than 3½ days per week, which would reflect being away for 1½ days. However, the Tribunal found that the conversation went no further than that.

76 There was a further incident on 25 May 2016 which became the subject of paragraph 24. Here Ms Yeung's pleaded case was that she met Mr O'Connor on that date to discuss proposed terms of business for a new client and that she said that this matter was urgent. She continued that Mr O'Connor agreed to review the terms within a couple of hours, and that in spite of her sending him an

email requesting an update at around midday (about two hours later), he did not respond until approximately 6 o'clock. It was apparent from the Claimant's oral evidence that she found the terms of Mr O'Connor's response as well as the delay unacceptable or difficult. This was because she had wished to have a yes or no answer to the question whether the terms were acceptable (preferably a yes as that would enable her to do business with the new client). The reply that she got was that the client's terms could not be accepted and that she should continue talking to them with a view to reaching a satisfactory solution.

77 The complaint continued that there was then a telephone conversation during which Mr O'Connor told Ms Yeung that she should not expect him to do things in two hours as he was a busy man and that she "should have pushed back and not be so accommodating to the clients." Paragraph 24 continued that Ms Yeung reminded Mr O'Connor that he had taken seven hours to respond to her email to which she responded by saying that "he didn't fucking care if it was two hours or seven hours the Claimant should have done her job properly."

78 In paragraph 67 of her witness statement Ms Yeung observed that matters had got to the point where she thought that Mr O'Connor was being difficult and creating issues on purpose. She referred to this particular incident and said that when she spoke on the telephone he said that he was a busy man and that she should not be so accommodating to her clients; but there was no reference to him swearing or to the two or seven hours comment.

79 Put in the terms contained in Ms Yeung's witness statement, the Tribunal considered that there was nothing remarkable about these exchanges. It was not particularly surprising that, having engaged with the client, Ms Yeung would above all wish to enter into a contract with them. Equally it was not surprising that Mr O'Connor as the effective owner of the business would have a slightly different interest, and that although he would want to obtain the business he would not want to do so on terms that he found unacceptable. The Claimant wanted a yes or no answer to her question (preferably a yes) and would have been frustrated when she got the answer that she should keep talking to the client. As we have observed in relation to an earlier incident, it seems to have been the case that Ms Yeung did not find it particularly easy to go back to clients with requests that they might find inconvenient or difficult.

80 In all of the circumstances Mr O'Connor's comment that he was a busy man was unremarkable given that no doubt he was busy, and Ms Yeung was complaining that he had not got back to her quickly enough in relation to this matter. A comment that she should not be so accommodating to the clients was consistent with his opinion about Ms Yeung's general approach and with the understandable need to acquire business, but not on such terms as to render it not worthwhile undertaking. In summary, the Tribunal concluded that this amounted to no more than a fairly normal exchange in connection with business of this nature.

81 The 27th of May 2016 was the final day of Ms Yeung's employment. Her evidence was that she had decided that she had no option but to leave. On 26 May she prepared the text of her resignation letter and printed off a copy of this

using one of her team member's (Maria) computer, as she had left her laptop at home. She did not have the opportunity to give the letter to Mr O'Connor during that day. On 27 May she had a meeting arranged with a third party consultant, a Mr Rose, and she felt that it would be unfair to go ahead with this as she was intending to leave the Respondent's employment. She therefore informed Mr Rose of the situation and cancelled the meeting.

82 As a result of these matters both Maria and Mr Rose were made aware of Ms Yeung's impending resignation before Mr O'Connor.

83 A meeting then took place between Mr O'Connor, Mr Leslie and Ms Yeung. This was the subject of paragraph 26 of the particulars which related that Ms Yeung verbally resigned, in response to which Mr O'Connor became aggressive and called her "calculative" and said that she had tried to corner him and stitch him up. He further said that she would be leaving but only following a disciplinary meeting (this was a reference to her having informed others of her resignation before Mr O'Connor and Mr Leslie). The pleading continued that Mr O'Connor accused the Claimant of being "disloyal, disgraceful and despicable" and that she was "a manipulative calculative bitch".

84 Paragraph 27 continued that Ms Yeung became distressed and asked about the allegation of stitching Mr O'Connor up, in response to which he said that she wanted to force him to accept her resignation as she knew that he would try and convince her to stay, but that in the circumstances "she could fucking leave but only after the disciplinary meeting". The pleading continued that Mr O'Connor further commented that Ms Yeung had burnt all her bridges and that he was not surprised she had no one to turn to.

85 Mr O'Connor again denied swearing. He said that he did not call the Claimant disloyal, disgraceful or despicable but that he did say that her actions were disloyal and disgraceful. In these points he was supported by Mr Leslie. Mr O'Connor's account was that he warned the Claimant against burning her bridges and that she would find that she had no one to turn to. Mr Leslie supported Ms Yeung's slightly different account of these matters, saying that Mr O'Connor said that she had burnt her bridges and that he was not surprised that she had no one to turn to. The Tribunal found it likely that Ms Yeung and Ms Leslie were right about this. Mr O'Connor would have been angry in the circumstances. It would have been surprising if he had not been, and given that he was a person or even the person that Ms Yeung turned to when in difficulty, he might well have said that she had burnt her bridges and that he was not surprised in the light of her conduct (towards him, as he saw it) that she had no one to turn to.

86 Mr O'Connor accepted that he at least implied that Ms Yeung had forced him into a corner and that he said something to the effect that she could leave but only after a disciplinary meeting. Mr O'Connor denied saying that Ms Yeung was a calculative bitch (the word "manipulative" did not appear in Ms Yeung's evidence), further stating that he would not have said "calculative" because it was not a word, and that he did not use the epithet "bitch" about the Claimant at all.

87 The Tribunal accepted Mr O'Connor's evidence about these matters. As we have said earlier, we found that he was not given to what might be described as name calling and that even though he was angry (understandably in the Tribunal's judgment given his efforts to be supportive to Ms Yeung) it still would have been inconsistent with their friendship for him to have called her a bitch.

88 The final element in the complaint about 27 May was in paragraph 28 of the particulars and was that Ms Yeung sought to leave the meeting to have a cigarette and make a telephone call as part of her crisis plan. Mr O'Connor followed her out of the office while she was attempting to call her husband and demanded that she return the company's mobile phone, eventually snatching it from her hands. The allegation continued that when Ms Yeung's husband attempted to call her he was cut off by Mr O'Connor. Ms Yeung asked for her husband's telephone number to be retrieved from the mobile and Mr O'Connor did so, but then (the pleading continued) sent it to an incorrect email address.

89 As already described, in her oral evidence Ms Yeung was not certain whether it was right that Mr O'Connor had taken the mobile phone from her hands or whether she had handed it over to him. It was common ground that in one way or another he took it back and that thereafter Ms Yeung left the office and purchased a mobile phone with a view to making use of that. She also purchased from several different shops a quantity of pills, which she swallowed. She then returned to the office and told Mr O'Connor that she had taken an overdose and that his suggestion that she could work from Birmingham more often had come too late. Ms Yeung then went to a hospital accident and emergency department, she said at the instigation of her husband, and happily survived these events unharmed.

The applicable law and conclusions

90 Having made the findings of fact set out above, the Tribunal considered its conclusions by reference to the list of issues and the applicable law.

91 The Tribunal has already expressed its findings as to the Respondents' knowledge of the Claimant's disability. We have found that the Respondents did not know, and could not reasonably be expected to know, that the Claimant had a disability arising from BPD, but did know at all times during her employment that she had a disability arising from depression.

92 In considering the complaints under the Equality Act, the Tribunal had in mind the provisions about the burden of proof, which are set out in section 136 in the following terms:

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

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

93 In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246**, both decided under the earlier anti-discrimination legislation, the Court of Appeal identified a two-stage approach. In the first instance the Tribunal would find the primary facts and ask itself whether, in the absence of an explanation from the Respondent, it could properly find that discrimination had occurred. The Court of Appeal in **Madarassy** emphasised that the finding should be one that could properly be made, stating that a mere difference in treatment and in status would not be sufficient: there would have to be something else for a finding of discrimination to be properly made. If the facts were of this nature, the burden would be on the Respondent to prove that discrimination had not occurred.

94 In **Hewage v Grampian Health Board [2012] UKSC 37** Lord Hope (with whom the other members of the Supreme Court agreed) stated that it was important not to make too much of the burden of proof provisions, and that these "….have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another." Where applicable, the Tribunal has kept this in mind as well as the **Madarassy** approach.

95 Although the agreed list of issues set out the complaints beginning with direct discrimination, the Tribunal considered that the better starting point was the complaint of harassment.

96 Section 26 of the Equality Act defines harassment as follows:

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a protected characteristic, and –
(b) The conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) The perception of B;
(b) The other circumstances of the case;
(c) Whether it is reasonable for the conduct to have that effect.

97 The Tribunal will use the shorthand expression "a harassing environment" to indicate the terms of section 26(1)(b)(ii).

98 The Tribunal considered paragraphs 11 and 15 of the Particulars of Claim together, for reasons already given. We have found that Mr O'Connor said something to the effect that the team should know their own numbers, and that you would have to be stupid not to get it (the bonus scheme). He did not use the F-word and did not suggest that the Claimant was nagging.

99 These words were not about the Claimant herself but about her team. Given this, and the background of the frank and robust messages passing between the Claimant and Mr O'Connor (and particularly from her to him), the Tribunal concluded that saying these things neither violated the Claimant's dignity nor created (either by intention or effect) a harassing environment for her. There was also nothing in the evidence that could properly form the basis for a finding that Mr O'Connor's conduct in this regard was related to the Claimant's sex or disability. The natural inference was that he said these things because he meant them, and that the Claimant's sex and disability were irrelevant to his view about the team's apparent inability to understand the scheme, or the terms in which he expressed that view.

100 With regard to paragraph 13, the Tribunal has found that Mr O'Connor did say words to the effect of "you do your job" and "it's my company" and that he was angry (as was the Claimant). We found that he did not use offensive language or say the other things alleged. Given the context of a conversation in which both parties were angry, and the nature of the relationship in which the Claimant and Mr O'Connor spoke frankly to each other, the Tribunal found that Mr O'Connor's words did not have the purpose or effect of violating the Claimant's dignity or of creating a harassing environment for her.

101 Furthermore, there was nothing in the evidence that could form a proper basis for finding that Mr O'Connor saying these things was related to the Claimant's sex or disability. The Tribunal found that he was saying what he felt, and that the Claimant's sex and disability were irrelevant to this.

102 The Tribunal has found against the Claimant on the facts alleged in respect of paragraphs 14, 17 and 19.

103 With regard to paragraph 20, the Tribunal has found that the exchange concerning the Carillion invoice was unremarkable in a business context. On the facts as we have found them Mr O'Connor's conduct did not have the purpose or effect of violating the Claimant's dignity or creating a harassing environment for her. Nor were the facts such as to form a proper basis for finding that Mr O'Connor's conduct was related to the Claimant's sex or disability. He acted as he did because he wanted the Claimant to chase up payment of the invoice, and her sex and disability were of no relevance to this.

104 In relation to paragraph 21, the Tribunal has found that Mr O'Connor did say something to the effect of "if you don't do it how do you expect others to" and "there's always something", but did not swear. As with the matters under paragraph 20, we found that what he said on this occasion was unremarkable in context, and did not have the purpose or effect of violating the Claimant's dignity or creating a harassing environment for her. Furthermore, the facts were not such as to form a proper basis for finding that Mr O'Connor saying what he did was related to the Claimant's sex or disability, which were of no relevance to what was said.

105 With regard to paragraph 22, the Tribunal has found against the Claimant on the facts.

106 In relation to paragraph 23, the Tribunal has found that there was no specific request or actual refusal to allow the Claimant to work at home on a particular date, and that Mr O'Connor commented adversely on the idea that the Claimant might work from home for 1.5 days per week, or only be in the office for 3.5 days per week.

107 The Tribunal found that there was no reason to believe that Mr O'Connor took or expressed this view with the purpose of violating the Claimant's dignity or creating a harassing environment for her, especially given their longstanding friendship. So far as the effect of this is concerned, the Tribunal accepted that the Claimant felt disappointed, even distressed, by Mr O'Connor's reluctance to contemplate 1.5 days per week of working from home. We do not find that the Claimant actually perceived this as violating her dignity or creating a harassing environment for her. The subject matter and tone of the conversation were not such as to give rise to such a perception, and we do not consider that the Claimant perceived it in that way. For the same reason, if the Claimant did in fact perceive Mr O'Connor's words as violating her dignity or as creating a harassing environment, we do not consider that it was reasonable for them to do so.

108 The Tribunal accepted that Mr O'Connor's words on this occasion were related to the Claimant's disability, as her request was in part related to the proposed course of CBT. There was no proper basis for finding that they were related to her sex, which was not relevant to the issue under discussion. Nonetheless, for the reasons given above, this did not amount to harassment.

109 The Tribunal found that the exchanges that formed the subject matter of the complaint in paragraph 24 were unremarkable in a business context and for the same reasons as those given in relation to paragraphs 20 and 21, did not amount to harassment.

110 With regard to paragraphs 26 and 27, the Tribunal has found that Mr O'Connor said that the Claimant's actions were disloyal and despicable, that she had burnt her bridges and had no one to turn to. He at least implied that she had forced him into a corner and said words to the effect that she could leave, but only after a disciplinary hearing.

111 The Tribunal concluded that these were hard words, but did not amount to harassment. We found that Mr O'Connor's purpose in saying what he did was not to violate the Claimant's dignity or to create a harassing environment for her. He was expressing his anger at the Claimant's decision to resign and at her having alerted others to her intention before she told him. The Tribunal has already commented that Mr O'Connor's anger was understandable in the circumstances. Although the Tribunal accepts that the Claimant found what Mr O'Connor said upsetting, we do not find that she perceived this as having the effect of violating her dignity or creating a harassing environment for her. Although the situation was distressing, she would have understood that he was angry about it because of their friendship and their business relationship. Alternatively, the Tribunal found that, for the same reasons, it was not reasonable for Mr O'Connor's words to have that effect on the Claimant.

112 Furthermore, there was no basis on which the Tribunal could properly find that Mr O'Connor's conduct on this occasion was related to the Claimant's sex or disability. On the findings we have made, he did not refer to either of these. The Claimant's sex was not relevant to what Mr O'Connor said or why he was angry. There was at most a very tenuous connection with the Claimant's disability, in that it might be said that his anger was linked to his support for the Claimant, and that the occasions when he had provided support for her had included some when her need for it was connected to her depression. The Tribunal did not, however, consider that this was sufficient to satisfy the requirement that the conduct concerned be "related to" the protected characteristic: the connection was too remote.

113 In relation to paragraph 28, it was common ground that in one way or another Mr O'Connor retrieved the company's mobile phone from the Claimant before she left the office. The Tribunal considered that his actions in this regard might at least have had the effect of creating an intimidating or hostile environment for the Claimant, depending on precisely what occurred (as to which the Tribunal has not made specific findings). It is not necessary for the Tribunal to make those specific findings as we have concluded that, on any view of the facts, there is no basis for finding that Mr O'Connor's actions were related to the Claimant's disability or sex. We are satisfied on his evidence that he required the return of the phone because it belonged to the company and the Claimant was leaving with it. There is nothing in the evidence to suggest that his attitude to this or the way in which he reacted was related to either protected characteristic.

114 The Tribunal has therefore found against the Claimant on the individual allegations of harassment. Having done so, we paused to consider the complaint in the round, and asked ourselves whether, viewing the overall picture rather than each component part of it, we might come to any different conclusion. We found that we reached the same conclusion on the whole picture as we did on the individual parts considered alone. The complaint of harassment was therefore unsuccessful.

115 The Tribunal then considered the same allegations with reference to the complaint of direct discrimination because of disability and/or sex. Section 13(1) of the Equality Act provides that:

"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".

116 Where we have previously found that the complaint of harassment was not made out on the facts, the same findings are applicable to the complaint of direct discrimination. Where we have found that the acts complained of were not related to the protected characteristics, we find that for the same reasons, they were not done because of the protected characteristics.

117 The above means that all of the allegations of direct discrimination are unsuccessful for the reasons given in relation to harassment, except for paragraph 23. We have found with regard to that paragraph that Mr O'Connor's

refusal of the Claimant's request for time away from the office was related to her disability. There is, however, no basis on which we could properly find that his refusal was because of her disability. Such a finding would involve the Tribunal being able to infer from the primary facts that if the Claimant's request had been based on some factor other than her disability (such as ill-health arising from a condition that did not give rise to disability, or caring responsibilities), Mr O'Connor would have treated it more favourably. There was nothing in the evidence to suggest that this would have been the case. On the facts that the Tribunal has found, Mr O'Connor refused the request because he did not consider it workable for the Claimant to be away from the office for 1.5 days per week, and there is no basis for finding that his refusal was because she was disabled.

118 As with the complaint of harassment, the Tribunal asked itself whether consideration of the overall picture led to any different conclusion on the complaint of direct discrimination, and found that it did not. The complaint of direct discrimination also fails.

119 Section 15 of the Equality Act makes the following provision about discrimination arising from disability:

> *(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…..*

120 The "something arising in consequence of" the Claimant's disability was defined in the list of issues as the Claimant seeking frequent reassurance and/or frequent clarification of her role and responsibilities. Ms McColgan accepted that the Claimant had sought reassurance from Mr O'Connor on a regular basis both before and during her employment with the Respondent company.

121 The same acts are relied on in respect of this complaint as in respect of the complaints of harassment and direct discrimination, save that Ms Chan did not rely on an allegation concerning a colleague's expenses claim (which in any event was not pleaded in the Particulars of Claim). Where we have found against the Claimant on the facts earlier, those findings are applicable here also.

122 Beyond this, it seemed to the Tribunal that Ms Chan's submissions on discrimination arising from disability tended to blur the applicable legal test. In paragraph 40 of her written submissions Ms Chan said that, when the Claimant sought reasonable adjustments in terms of support or empathy, Mr O'Connor was sometimes supportive and sometimes not, making no allowance for her mental health conditions. This seemed to the Tribunal to be moving away from the relevant test and into the reasonable adjustments complaint. In paragraph 41 Ms Chan suggested that Mr O'Connor had made comments that were callous and unsympathetic and that this constituted unfavourable treatment "for" something arising from her disability, which is not the same as treatment "because of" something.

123 Essentially, the Tribunal has rejected the contention that Mr O'Connor treated the Claimant in a way that was callous and unsympathetic, and therefore unfavourable. Furthermore, however his behaviour might be characterised, there was no basis for finding that he acted in any unfavourable way because of any need on the Claimant's part for reassurance or a structured environment. At most, anything that he did was a response to the Claimant's stated needs. There was no reason to find that, if any response by him could be described as unfavourable (which, on the Tribunal's findings, was not the case), it was unfavourable because of the Claimant's needs.

124 Finally on this point, the Tribunal agreed with Ms McColgan's submission that there was insufficient evidence before the Tribunal to allow it to find that any need for reassurance or a structured working environment arose from either of the conditions giving rise to the Claimant's disability. The Claimant maintained that this was so, but there was no medical evidence on the point. The Tribunal considered that some such evidence would be required to support the proposition that a need for a structured working environment arose from either condition; and that, although one might think that depression could give rise to a need for reassurance, that in itself might represent a stereotypical view of the condition and might not be correct in a particular case.

125 As before, the Tribunal looked at the overall picture in relation to this complaint, but found that it reached no different conclusion.

126 The complaint of discrimination arising from disability was therefore also unsuccessful.

127 The Tribunal then considered the complaint of failure to make reasonable adjustments. Section 20(3) of the Equality Act provides for a requirement:

"….where a provision, criterion or practice [PCP] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid that disadvantage."

128 The PCPs relied on in the particulars of claim were:

128.1 Failure to properly clarify the Claimant's roles and responsibilities in the workplace.

128.2 Failure to provide the Claimant with clear and measurable objectives and/or goals in the workplace.

128.3 Failure to provide the Claimant with clearly defined boundaries in the workplace.

128.4 Requiring the Claimant to attend the First Respondent's offices every day.

129 Ms McColgan submitted that the first three of these could not realistically amount to PCPs as they would amount to practices of not providing employees with clear roles, objectives or boundaries. Ms Chan did not address the issue of the PCPs, but went straight to the adjustments for which she contended.

130 The Tribunal is aware of the need for the term PCP to be construed widely. For example, the EHRC Employment Code refers to formal or informal policies, rules, practices, etc, and one-off decisions. Equally, it was common ground between the parties that a practice could be inadvertent. Nonetheless, the Tribunal considered that the evidence in the present case did not support any contention that the Respondents had practices (still less policies or rules) or had made a decision that roles and responsibilities, goals and objectives and "boundaries" (the nature of which was not explained) should not be clear. The existence of practices etc of this nature is something different from a complaint that roles etc were not in fact clear.

131 Apart from that point, however, the Tribunal agreed with Ms McColgan's submission that there was insufficient evidence for the Tribunal to conclude that any such PCPs placed the Claimant at a substantial disadvantage compared with persons who were not disabled. The point is essentially the same as that made above in relation to discrimination arising from disability. The Claimant's assertion that it was her mental health conditions that gave rise to her stated need for a clearly defined role, objectives, boundaries, etc was not in the Tribunal's judgment sufficient to establish that disadvantage.

132 The first adjustment relied on by Ms Chan related to these matters (being a failure to put in place clear processes) and the complaint in that regard faield for the reasons given above.

133 The second proposed adjustment was put as the failure to allow the Claimant to work from home between August and December 2015. Ms McColgan accepted that a requirement to work in the office was capable of amounting to a PCP. It is right that, when discussing with Mr O'Connor the terms of her existing package before joining the First Respondent, the Claimant mentioned working from home. It is also the case that the Claimant was working from home one day per week from January 2016 (as set out above in relation to the issue of working from home for 1.5 days per week). There was no evidence that the Claimant had asked to work from home before that date, nor was it put to Mr O'Connor that she did.

134 The Tribunal therefore found that the Claimant had not asked to work from home during the period in question, August to December 2015. Mentioning that working from home was an option at her previous employers would not put the Respondents on notice that this was something that was necessary or desirable for health reasons.

135 Again, the Tribunal found that there was insufficient evidence to enable it to decide that a PCP of working in the office put the Claimant at a substantial disadvantage as compared with people who were not disabled. This was not

something that could safely be found on the basis of the Claimant's own assertion of the point.

136 Furthermore, the Tribunal found that, in the absence of any request to be permitted to work from home, the adjustment of allowing this was not one that it would be reasonable for the Respondents to have to take. The Tribunal noted that the issue is not whether it would be reasonable to make the adjustment, but whether it would be reasonable *to have to* make it, i.e. to be under a duty to make it. We found that this would not be the case where, as here, even if working in the office was placing the Claimant at a disadvantage, this was not obvious, and where the Claimant had not requested that the adjustment be made.

137 The third adjustment contended for referred to the need for Mr O'Connor to be supportive and empathetic in his dealings with the Claimant. The Tribunal concluded that the short answer to this point is that we have found that Mr O'Connor was supportive and empathetic, at least to the extent that it would be reasonable for him to have to be. (It would not be reasonable for him to be under a duty to be supportive and empathetic no matter what the circumstances or what the Claimant did). If he was under a duty to make such an adjustment, the Tribunal is satisfied that he made it.

138 The complaint of failure to make reasonable adjustments was also therefore unsuccessful.

139 In the result, therefore, all of the complaints in this matter fail.

Employment Judge Glennie
20 April 2017