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EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Popat**

Respondents: **Dr V Sehra & Dr P Gooty t/a The Drive Surgery**

Heard at: **East London Hearing Centre** **On: 2, 3 & 4 November 2016 and (in chambers) on 12-13 January 2017**

Before: **Employment Judge C Hyde** **Members: Mr D Adsett, Mr J Quinlan**

Representation

Claimant: Miss N Joffe (Counsel)
Respondents: Mr J Frederick (Consultant)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The unfair dismissal complaint under the Employment Rights Act 1996 is not well founded and is dismissed.
(2) The disability discrimination complaints under the Equality Act 2010 were not well founded and were dismissed.
(3) The Claimant is entitled to payment for one week of employment which was unpaid in respect of 4 to 10 July 2015.

REASONS

1 Reasons are provided in writing for the above judgment as the judgment was reserved. Reasons are also provided only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost. Further the reasons are only provided to the extent that it is proportionate to do so.

2 All findings of fact were reached on the balance of probabilities.

Preliminaries

3 The Claimant presented a complaint to the Employment Tribunal on 25 September 2015. In her grounds of claim she alleged that she had been unfairly dismissed under section 98(4) of the Employment Rights Act and that she had been the victim of disability discrimination under the Equality Act 2010. She alleged direct disability discrimination, discrimination for a reason arising out of her disability and that various reasonable adjustments should have been made but were not.

4 In their response and grounds of resistance the Respondents set out the basis on which they proposed to resist the claim.

5 A Preliminary Hearing (Closed) took place on 30 November 2015 at which directions were made for the preparation of the case including the fixing of the hearing date. In the event the hearing date was postponed. Further a list of issues was appended to that order. The appendices set out both the factual and legal issues. By the commencement of the hearing however matters had progressed somewhat and amendments were made to that list of issues. By a further document which was produced on 3 November 2016 at the Tribunal's direction the parties presented a revised list of issues which was agreed. This document was marked [C3].

6 Unfortunately the revised list of issues did not include the Respondents' case in relation to various matters. Further the Tribunal noted that the adjustments which were said to have been reasonable in paragraph 12 of the revised list of issues were not dealt with in the Claimant's witness statement. However they were part of the original list.

7 The Claimant then produced a further document which was marked [C4] on 4 November 2016 which the Tribunal entitled Further Revised List of Issues. This also purported to be an agreed document.

8 The parties agreed that the Tribunal would determine issues of liability first. It was confirmed with the parties that their understanding of liability only did not involve determination of *Polkey* or contributory fault. Those were elements to be dealt with as part of remedy if applicable in relation to the unfair dismissal complaint.

Evidence adduced/Documents produced

9 The parties produced a bundle each at the beginning of the hearing. It was thought initially that the bundles were identical but during the hearing it emerged that there were additional documents in the Claimant's bundle which were not in the Respondents' bundle. The Tribunal therefore had to refer to both bundles in the event. The Respondents bundle was marked [R1] and the Claimant's bundle was initially unmarked but by the end of the proceedings the Tribunal marked the Claimant's bundle of documents [C6]. The Respondents' bundle consisted of approximately 220 pages and the Claimant's bundle consisted of some 282 pages.

10 The Claimant had prepared a chronology which was produced at the beginning

of the hearing [C1] and at the end of the evidence the Claimant's submissions were contained in a written document marked [C5] which was supplemented orally.

11 The Tribunal heard evidence from the Claimant first given the claims and issues to be determined and the burden of proof in respect of them. The Claimant's evidence in chief was by way of a witness statement which was marked [C2]. On behalf of the Respondents Dr Sehra and Dr Gooty both gave evidence also. Their witness statements which stood as their evidence in chief were marked [R2] and [R3] respectively.

12 Closing submissions were made on behalf of the Respondents orally by Mr Frederick.

The issues

Unfair dismissal: sections 94 and 98(4) of the Employment Rights Act 1996 ("the 1996 Act")

13 It was accepted by the Respondents that the Claimant qualified for entitlement to bring a claim of unfair dismissal under section 94.

14 The Claimant further accepted that the Respondents had dismissed the Claimant with notice: section 95(1)(a) of the 1996 Act.

15 In those circumstances the following questions were to be determined: -

15.1 Was the Claimant dismissed for one of the admissible reasons? (Section 98(2) of the 1996 Act.) The Respondents contended that the Claimant's capability was the reason for the dismissal.

15.2 If yes, was the dismissal within the range of reasonable responses that a reasonable employer would have adopted?

15.3 Did the Respondents act reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant, having regard to the size and administrative resources of the Respondents? (Section 98(4) of the 1996 Act.)

Disability

15.4 The parties agreed that at the material time the Claimant was a disabled person within the meaning of the Equality Act 2010.

15.5 The Claimant suffered from a mental impairment – depression.

15.6 The substantial long-term adverse effect of the Claimant's disability was as described in the Claimant's disability impact statement at paragraph 7.

Discrimination arising from disability: section 15 of the 2010 Act

15.7 Did the Respondents treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability? The unfavourable treatment complained of was the Claimant's dismissal. The 'something arising' was her ill-health absence. (Section 15(1)(a) of the 2010 Act.)

15.8 If so, could the Respondents show that the treatment complained of was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon was set out in paragraph 25 of the grounds of resistance.

15.9 In the grounds of resistance the Respondents pleaded that in the event that the Claimant was found to have suffered from an impairment satisfying the definition of section 6 of the 2010 Act, the Claimant's continued absence was having an impact both operationally and financially on the Respondents, and therefore its treatment of the Claimant was justified as proportionate to achieve a legitimate aim, namely its requirement to have a practice manager to manage the day-to-day operations of the practice.

Failure to make reasonable adjustments

15.10 Was there a provision, criterion or practice ('PCP') which put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? Namely: -

(a) requiring the Claimant to consistently attend work and perform her contractual and discretionary duties at the surgery;

(b) applying the capability/sickness procedures;

(c) not following advice provided by the occupational health assessment;

(d) not resolving the dispute between the two partners.

Knowledge

15.11 Whether the Respondents had knowledge of:-

(a) the Claimant's disability; and

(b) the substantial disadvantage caused by the PCPs relied upon.

15.12 The Respondents accepted that they had knowledge of the Claimant's disability but did not accept that they had knowledge of the alleged substantial disadvantage caused by PCPs (b), (c) and (d).

15.13 If so, what adjustments were required and were they reasonable? The Claimant's case was that the Respondents had knowledge of her disability and the effect of the PCPs by the time they received Dr Sood's

report (p. 91 of the bundle). Namely: -

(a) recommendations from Elaine Hobson's letter (Occupational Health Adviser) dated 27 May 2015;

(b) waiting for the Claimant's contractual sick pay entitlement to run out before considering dismissal;

(c) a rehabilitation plan to include a phased return to work, re-allocation of some duties, lighter duties and home working;

(d) modifying the July 2015 capability hearing to a less critical environment allowing the Claimant to discuss her illness properly;

(e) paying for counselling;

(f) dealing with the underlying cause of the Claimant's depression – the dispute between Dr Sehra and Dr Gooty and the other issues the Claimant raised as causing her stress at work.

15.14 If the Respondents were required to make reasonable adjustments because of the alleged PCPs and the adjustments were not unreasonable, did the Respondents take steps to avoid the disadvantage caused by the Claimant's disability? (Section 20(3) of the 2010 Act.)

15.15 If not, did the Respondents fail to comply with their duty to make reasonable adjustments? (Section 21(1) of the 2010 Act.)

Relevant law

16 The relevant law was not in dispute. In her written submissions Ms Joffe made reference to various propositions of law and authorities which supported them. These are set out in the written submissions. It is therefore not proportionate to repeat them. In relation to the disability discrimination she also set out the primary relevant terms of section 15 (discrimination arising from disability) of the 2010 Act. Although she dealt with the issue of knowledge in the context of discrimination arising from disability she accepted that it was appropriate for that to be considered in the context of the failure to make reasonable adjustments claim.

17 Further, in addition to the cases set out in her document Ms Joffe referred to the further case of *Griffiths v DWP* [2015] Court of Appeal in relation to the failure to make reasonable adjustments submissions.

18 Ms Joffe handed up to the Tribunal a bundle of authorities as follows:-

- *BS v Dundee City Council* [2013] CSIH 91 EAT CS;
- a transcript of the judgment in *Romec Ltd v Rudham UKEAT/0069/07;*
- *Royal Bank of Scotland v McAdie* [2008] ICR 1087 (CA);

- *Cosgrove v Caesar & Howie* [2001] IRLR 653 (EAT SC);
- *Croft Vets Ltd & others v Butcher* UKEAT/0430/12;
- *London Underground Ltd v Vuoto* UKEAT/0123/09.

Findings of fact and conclusions

Outline and chronology

19 The Claimant commenced employment with the Respondents as a Practice Manager/Administrator working part-time on 19 June 1996. In 1999 she was appointed the practice's full-time Practice Manager.

20 From about 2012 the Claimant suffered from depression following the death of her husband and due to other family issues. She was hospitalised in September 2013 due to a physical ailment. Dr Sehra visited her in hospital.

21 On 28 September 2014, the Respondents wrote to the Claimant about her annual leave. On 16 October 2014, the Claimant began a period of sickness absence. The certificate issued by her general practitioner indicated that this was due to work related stress (p. 73). The sickness certificate was for a period of two weeks but in the event the Claimant did not return to work thereafter.

22 The Respondents wrote to the Claimant on 21 December 2014 asking for her to consent to a medical report and requesting a meeting with her (p. 77). The Claimant responded by letter dated 24 December 2014 indicating that she was unable to attend the meeting on the date proposed but attaching her written consent to the medical report (p 78).

23 By a letter dated 21 January 2015, the Respondents wrote to the Claimant's doctor Dr Sood requesting a medical report on her (p. 83). The Respondents then invited the Claimant to a meeting again on 15 February 2015. The purpose was said to be to discuss the Claimant's ongoing illness and the possibility of her return to work (p. 89).

24 On 26 February 2015, the Claimant's GP prepared her report on the Claimant (pp. 91-92). She outlined the history of her understanding of the Claimant's concerns about stress at work and the causes for it having first seen the Claimant on this issue on 16 October 2014. Dr Sood indicated that she considered that the Claimant's symptoms were unlikely to resolve until the stresses and concerns regarding her work issues had been addressed. She described her understanding that Mrs Popat had past ideas of self harm and had poor sleep and poor concentration which would clearly affect her day-to-day activities. She expressed the view that the Claimant therefore would be considered to have a disability (with her current stress levels) and this could have an impact on her ability to perform day-to-day activities. She described that the Claimant was currently taking medication for depression and had been getting some support from the IAPT Services.

25 In relation to reasonable adjustments she expressed the view that it certainly seemed that the work demands on the Claimant and the workload had triggered her stress. She stated:

> "*It may be something that you are able to discuss with her to try to facilitate her return to work. You might wish to get an occupational health assessment at this point to decide exactly how this could be done. If this was done I do not see why she could not return to work in the future.*
>
> *Unfortunately I cannot make any specific recommendations as this would need a full occupational health assessment and a plan would need to be negotiated for a return to work. As of now I do not think she is fit to return to work in the current situation, given that as far as she is concerned her work situation has not changed.*
>
> *If Mrs Popat is provided with support regarding her workload and work demands, there is no reason why she should be absent from work in the future.*"

26 Finally, Dr Sood indicated that she could not advise the Respondents on what work the Claimant was likely to be able to do but said that this was something that the surgery would have to discuss with the Claimant based on the occupational health assessment and their advice on her return to work.

27 By a letter dated 24 March 2015, the Respondents informed the Claimant that they were arranging a grievance hearing as a result of the report from Dr Sood (pp. 94-95). In the letter they summarised under five bullet points the issues and concerns that they had drawn from Dr Sood's report. These were:-

27.1 Stress at work.

27.2 Work related stress.

27.3 Felt overworked and under appreciated.

27.4 Felt harassed by the team at the workplace.

27.5 Not receiving support from workplace.

28 A meeting then took place on 14 April 2015 between the Claimant and her UNISON representative Jay Williams, and the two doctors. A note-taker was also present arranged by the Respondents. The notes of the meeting were in the bundle (pp. 105-107).

29 On 19 May 2015 Dr Gooty undertook a home visit to the Claimant. Mrs Popat signed a consent form consenting to the release of her late husband's medical records. This related to an issue which Dr Gooty was concerned about in relation to the writing of prescriptions within the surgery.

30 On 20 May 2015, the Claimant wrote to Dr Gooty withdrawing her consent for

her late husband's medical records to be used (pp. 117 & 118).

31 The Claimant underwent an occupational health assessment on 27 May 2015 and a report was prepared on the same day (p. 123). Ms Hobson's report was sent to Dr Sehra who had referred the Claimant to the occupational health company Health Assured. Ms Hobson recorded the Claimant's perception that the triggers for her depression had been mainly work issues. She suggested that the issues of concern were effectively assessed and addressed because these perceptions appeared to be driving the Claimant's illness and continued absence and had the potential to act as barriers to return to work in their own right if they remained unresolved. She noted that Mrs Popat perceived that the meeting which had taken place in April 2015 had not provided any resolution. She also noted that Mrs Popat reported that the longer her work situation continued, the more detrimental was the effect on her well being.

32 Ms Hobson responded to the specific questions posed to her by the Respondents and offered recommendations. She stated her opinion that the Claimant was currently unfit for work and that she had been unable to identify a return to work date and that while the Claimant's perceived issues continued her absence was likely to continue. She stated that it would be a management decision as to how long her absence could be accommodated.

33 In answer to the question when the Claimant would be able to return to work/ return to normal hours/duties, she indicated that she was unable to identify a return to work date. In answer to the question whether there was an underlying medical condition affecting the Claimant's ability to work she stated that at the present time it was Mrs Popat's symptoms of depression which were affecting her ability to work.

34 The next question was how this condition affected the employee at present? Ms Hobson referred the Respondents to the main body of the report. In answer to the question whether the Claimant was having appropriate treatment and whether it would aid her recovery and if so when, she stated that Mrs Popat was receiving the appropriate treatment but that unfortunately she did not perceive that her health had improved despite treatment. The next question was whether the Claimant was likely to provide reliable service in the future? Ms Hobson noted that research had shown that the best way of predicting an individual's future likelihood of attendance was to review the past record. If management had ongoing concerns about this employee's attendance then she suggested that the employer's sickness absence policy was followed.

35 Finally, Ms Hobson was asked whether, in her opinion, it was likely that an Employment Tribunal would consider the condition to be a disability under the terms of the Equality Act? Her answer was in the affirmative.

36 Ms Hobson then invited the Respondents to consider the following steps to help facilitate a return to work:-

36.1 To support the Claimant's return to work. It may be necessary for a further meeting to discuss the issues further and hopefully resolve them.

36.2 She recommended that a stress risk assessment was undertaken as was

mandatory under the Health and Safety Executive, Management Standards for Stress at Work. She believed that this would identify adjustments that could be made to support the employee at work.

37 Having provided some additional information about the potential risk assessment she concluded her report by indicating that the information was advisory only and that the possibility of implementing any suggestions was purely a decision for the employer. She indicated that any rehabilitation programme or adjustments must be agreed by the employer taking into account the needs of the organisation and any constraints within the work environment.

38 She reported that she had not arranged a further review at that stage but that Mrs Popat could be re-referred if there were any further concerns.

39 A sickness meeting took place on 1 July 2015, attended by the same parties who had attended the meeting on 14 April, including the note-taker. The minutes were signed by all (pp 133-135). Copies were also provided to the Claimant and her trade union representative.

40 Among other matters the minutes recorded that the Claimant's indication to the Respondents was that although her condition varied, there was no significant change and she was still suffering from stress and severe depression. She indicated also that her doctor had not given her a date on which it was likely that her symptoms would improve and that she would come back when she felt better. Her UNISON representative and the Claimant indicated that her return to work would probably be on 1 September 2015. At this point the Claimant was covered by a fitness to work certificate which indicated that she would be unable to work between 29 May 2015 and 31 August 2015.

41 The discussion covered various aspects of the Claimant's condition and the circumstances of the practice. For example, the point was made that the surgery had been running without a practice manager for some eight and a half months by the date of the meeting and that this was having an impact on the ability of the surgery to deliver its service, on the other members of staff and on various aspects of the work of the surgery. The Respondents had only been able to secure part-time cover for a fraction of the hours that the Claimant had been doing.

42 It was also noted at one point that Dr Gooty asked the Claimant what impact she thought it would have on her when she came back and how she thought she would cope. The Claimant and her UNISON representative indicated that they did not know until the Claimant came back to work.

43 The Claimant accepted in the Tribunal that she was not comfortable with IT. This was one of the issues raised during the meeting by Dr Gooty in terms of the impact on the practice while the Claimant was working full-time. There was apparently discussion about support which could be put in place for the Claimant to assist her in this regard. However, towards the end of the meeting Dr Gooty asked the Claimant what adjustment they needed to make to help her come back and the Claimant replied: "I do not know until I come back".

44 The notes record that Mr Williams asked if there was any suitable work available for the Claimant and that the Respondents replied that they only had three senior positions, namely that of the two doctors and one practice manager so there was no suitable alternative to offer.

45 Further, the notes recorded that the Claimant was asked what she thought might cause problems when she returned to work. She initially said that she would not know until she returned but when probed further she said that not having meetings with the doctors could be one thing as the doctors both did not agree on the same thing. It was agreed in evidence that the note recorded accurately that the doctors had explained that they were always available and that if the Claimant was concerned about clinical issues she could contact Dr Gooty and for administrative issues she could go to Dr Sehra and that both doctors also agreed to have joint meetings.

46 The minutes further recorded that the Claimant's trade union representative acknowledged that the Claimant's long-term absence was causing "huge problems in the daily running of the surgery" and reassured the doctors that they were supporting the Claimant and working with her to bring her back to work and if possible before 1 September 2015. He also referred to the fact that the Respondents had explained to the Claimant that if she did not come back to work then the employer had the legal right to dismiss her.

47 The meeting concluded with Dr Gooty and Dr Sehra explaining that due to the Claimant's indefinite long absence and possible disability and no real improvement in her condition for the last eight and a half months it was becoming difficult for the practice to be run as it was causing risk to the patients' care and staff morale. The doctors therefore had to consider a permanent replacement.

48 As with the previous meeting in April 2015, the minutes were signed by all and a copy sent to the Claimant and her trade union representative.

49 The doctors then took the decision to terminate the Claimant's employment and wrote to inform her of this on 3 July 2015 (pp. 136-137). They referred to the relevant matters which had been discussed as outlined in these reasons above and then informed the Claimant that in all the circumstances and taking into account that they needed to find a permanent replacement for the Claimant, they had regretfully been left with no alternative other than to terminate her employment on the grounds of ill-health. Although the termination would take place with immediate effect they would give the Claimant 12 weeks' pay in lieu of notice. This was the correct notice pay.

50 The Claimant was also informed that she had the right to appeal against the decision and was invited to write to Dr Sehra (principal GP) within five working days giving the full reasons and grounds of the appeal.

51 The letter included a personal note expressing sadness that the employment had terminated in this fashion. The Claimant was also thanked for her contribution and service and the doctors expressed their good wishes for the future.

52 Although the letter was signed by both doctors it was expressed in both the first person singular and plural.

53 By a letter dated 16 July 2015, the Claimant responded to the termination letter. She indicated that she had only received the letter on 10 July. She challenged the Respondents' entitlement to have dismissed her and stated that she believed that the Respondents wanted to dismiss her because she had refused consent to Dr Gooty to request her late husband's medical files and because she did not want to get in the middle of the dispute between the doctors. She started the letter by explaining that she had given long consideration to whether to appeal but that she had decided not to as she had no faith that any appeal would be dealt with fairly and objectively given that there was no-one more senior than the doctors to address any appeal to.

54 By a letter dated 24 July 2015, Dr Sehra responded to the Claimant acknowledging her letter of 16 July 2015 and addressing the issue of the appeal. She indicated that in order to fully consider the points raised by the Claimant and to review the decision to terminate her employment on grounds of ill-health, she proposed appointing an independent person to arrange this in the form of an appeal hearing. She confirmed that the Claimant would be entitled if she wished to be accompanied by a fellow employee at any such appeal hearing. She asked the Claimant to inform her by 31 July 2015 if she wished to proceed with this or had any other queries regarding Dr Sehra's letter of 24 July.

55 By a letter dated 28 July 2015, solicitors acting on behalf of the Claimant wrote to Dr Sehra (p. 141). In a short letter they indicated that they were writing to clarify the Claimant's position in respect of any appeal against the decision to dismiss her. They stated:

> "*Our client may not have made her position clear, but for the avoidance of doubt, and since she states that she has lost all trust and confidence in respect of her (now ex) employer, she will not be appealing against the decision to dismiss her.*
>
> *Nevertheless, our client would be interested to know the identity of the proposed independent person that was to have heard any appeal.*"

56 Dr Sehra responded on 7 August 2015 to the solicitor's letter. She acknowledged that Mrs Popat's position was clear and that Mrs Popat did not wish to appeal against the decision to dismiss. She went on to answer the question as to the identity of the independent person by stating that the independent "*and impartial consultant I had in place for an appeal is part of the HR Face to Face Team at Peninsula Business Services*". There was no further response from the Claimant on the issue of the appeal.

57 On 30 August 2015, the Early Conciliation Certificate was issued, ACAS having been notified of the Claimant's desire to initiate early conciliation on 30 July 2015 (p. 1).

58 A further GP's report from Dr Sood was provided dated 10 February 2016. This confirmed that the Claimant continued to suffer from anxiety and depression. Among other things the doctor stated that it was difficult to state exactly how long the symptoms were going to last given the fact that the Claimant had already had

counselling and medication, and had been away from work that her symptoms continued. She hoped that the Claimant would continue with the counselling techniques and the medication for at least another six months to one year before the GP could consider taking her off the medication if her mental state had improved. This report was at page 142a.

59 There was an issue as to whether the Respondents had indeed sent out the minutes of the meetings after both the April and July meetings. However, there was no evidence before the Tribunal that the Claimant and/or her representative had written to or chased up the Respondents after the meeting seeking copies of the notes. This tended to suggest that they had indeed been sent as both the Claimant and her representative were aware that there was a note-taker present during each of the meetings.

60 There were two over arching issues that the Tribunal needed to determine. The first was whether the Respondents acted reasonably in dealing with the Claimant's sickness absence. Determination on this is relevant to the unfair dismissal complaint and to the disability discrimination complaints. That determination will also be necessary for consideration of the failure to make reasonable adjustments complaints.

61 The second substantive point that we had to decide was whether the Respondents had acted reasonably in deciding to dismiss the Claimant in July 2015. Determination of this point included consideration of the Claimant's section 15 claim under the 2010 Act, namely disability arising from discrimination. In addition the Tribunal will need to decide on the state of the Respondents' knowledge about the effects of the Claimant's disability on her.

Unfair Dismissal

62 The burden of establishing the reason for dismissal lies on the Respondents under the 1996 Act.

63 The Respondents relied on capability as the reason for dismissal. The alternative suggestions from the Claimant as to the real reasons for dismissal were that Dr Gooty was upset with the Claimant for withdrawing her consent in relation to the GMC allegations in late May 2015. That did not appear to the Tribunal to be a credible reason as Dr Gooty did not want to complain against Dr Sehra. We accepted her evidence as confirmed by the contemporaneous correspondence that she had simply made an enquiry of her medical defence union in about January 2015 about some practices within the GP practice and that she was then advised by her union to contact the GMC. The purpose of contacting the GMC however remained on her part a matter of seeking advice. She did not wish to pursue a complaint and indeed she also withdrew her consent to a complaint being brought against Dr Sehra. When assessing therefore whether this could have been the reason for the dismissal the Tribunal also took into account the indisputable factual background that the Claimant had been away from work for some eight to nine months by the date of dismissal and that the Respondents operated a small practice and that there was no real dispute to the picture painted by the doctors about the disruption caused to the practice by the Claimant's absence. We also took into account her pivotal role as practice manager and the fact that cover was only able to be obtained for a few hours per week.

64 From all the evidence, especially the contemporaneous documents, the Tribunal considered that it was likely that the true and genuine reason for dismissal was the Claimant's lack of capability.

65 Further, not only was the Claimant still off sick for a continuous period of approximately nine months at the time of the dismissal but her GP report was unable to give a return to work date or timeframe. The same was true in relation to the occupational health report prepared in May 2015.

66 The Claimant disputed the Respondents' position in relation to this and suggested that she had indicated that she could return to work in September 2015. Whilst it is correct as the notes recorded in the text cited earlier in these reasons that there was a reference to a potential return date of 1 September 2015, the Tribunal considered that the Respondents were entitled to take into account that this would have been at the end of a continuous period of certified sickness most recently for a three month period from the end of May to the end of August. Further, the information that was given to them at the meeting in April and July 2015 did not suggest that the Claimant was improving overall. This was supported by the medical evidence available to the Respondents. In the circumstances therefore the Respondents were entitled also to rely on the medical evidence. This evidence gave them little reassurance that the Claimant was likely to be fit to return to work in the foreseeable future. It was put at its highest as "probably". Indeed during the course of discussion in the meeting about a likely return to work date, the Claimant's representative objected to what he perceived as the Respondents trying to force the Claimant to return to work. This reinforced the Respondents' view and indeed that of the Tribunal that it was clear that it was not very likely that she would be able to return to work in a reasonable time frame.

67 Further, although there was a reference to the 1 September return date at the July 2015 meeting, the Respondents were also entitled to take into account that, as the Tribunal found, the Claimant had on earlier occasions referred to an intention to return to work fairly soon but this had not materialised. The Tribunal accepted this evidence from the Respondents, which was disputed, as credible, having regard both to the oral evidence about this from the Respondents and to the notes in the agreed minutes of the meeting in April 2015.

68 In all the circumstances therefore the Tribunal considered that the Respondents acted reasonably in relying on the information before them from the medical and expert occupational health report about the likely timeframe for a return to work. The Respondents were reasonable in concluding that the Claimant would not be in a position to return to work within a reasonable timeframe from July 2015.

69 As already stated above the Tribunal took into account that the Respondents operated a small practice and that there was no alternative post for the Claimant. This was not seriously challenged and indeed this had been confirmed in the meeting with the Claimant.

70 Further, there were no adjustments which could be implemented which were likely to facilitate her return to work.

71 In the July 2015 meeting the Respondents were told that the Claimant was on occasions not leaving the house or feeling able to engage with people. It was therefore likely (this is discussed below) that there were no adjustments which the Respondents could have made to get the Claimant back to work.

72 A further point was made by the Claimant as to the process followed and the allegation that the environment of the meeting in early July 2015 was overly critical. Despite making this generalised complaint the Claimant confirmed that she was able to put all her concerns and issues across during the meeting and it was not disputed that she was represented by a trade union representative who had indeed represented her interests in the earlier meeting in April 2015.

73 The Tribunal concluded therefore that there was no merit in the suggestion that the meeting in July 2015 was an overly critical environment which hampered the Claimant.

74 The Tribunal concluded therefore that the Respondents genuinely dismissed the Claimant because of reasons relating to her capability and that they reached this conclusion after a fair process having obtained occupational health advice and having consulted with the Claimant and given her the opportunity to consult with them on a sufficient number of occasions and that they had waited for a reasonable period of time in the circumstances but that the demands of their practice and the reasonable conclusion as to the uncertainty and unlikelihood of the Claimant being fit to return to work within a reasonable timeframe justified a decision to dismiss. The Tribunal considered in all those circumstances that the decision to dismiss fell within the range of reasonable responses of an employer. The decision to dismiss at that point cannot be said to have been unreasonable.

Failure to make reasonable adjustments

75 The Respondents did not challenge that the PCP identified by the Claimant at 9(a) – requiring the Claimant to consistently attend work and perform her contractual and discretionary duties at the surgery could amount to such.

76 As to the alleged PCP of applying the capability/sickness procedures the Respondents put the Claimant to prove as to how this alleged PCP caused disadvantage. The Tribunal accepted the Respondents' submission that the capability process of itself was not a negative. The purpose of it was to help staff who were indisposed to return to work. Indeed not all capability processes lead to dismissal. The Tribunal accepted the Respondents' contention that there was no evidence that if the Claimant was disadvantaged this was substantial compared to a non-disabled person. All employees, whether disabled or not disabled, could be susceptible to dismissal as an outcome. Prior to going off sick in October 2014 having had the condition of depression for at least a couple of years by then the Claimant's sickness record was nonetheless quite good. It followed therefore that she was not simply by reason of having that condition more susceptible to dismissal.

77 The next PCP relied on was at 9(c) – not following advice provided by the occupational health assessment. There was no evidence that this was a PCP which was applied generally. We only heard evidence about what had occurred in the

Claimant's case. The Claimant's complaint was effectively about inaction by the Respondents. Her case was that by not following the occupational health recommendation the Respondents reduced the Claimant's chances of returning to work sooner. However, there was no evidence before the Tribunal that the effect on the Claimant was more disadvantageous or substantially so than if the Claimant had not been disabled.

78 The first adjustment argued for was the implementation of the recommendations from Elaine Hobson's letter of 27 May 2015. The recommendation was to deal with the interpersonal issues which the Claimant said was a dispute between the doctors and the GMC. The Tribunal has already set out its findings in relation to how the issue of the GMC potentially investigating Dr Sehra came about and that it was not a matter of Dr Gooty pursuing a complaint. Further, the Claimant never raised with the doctors that she had an issue with them in relation to the GMC investigations. The Respondents were therefore never aware of any substantial disadvantage on the Claimant. They could therefore in the circumstances not be expected to address an issue that they were not aware of. The Tribunal was thus satisfied that they did not have knowledge of that issue and that they did not have the relevant knowledge to give rise to a duty to make reasonable adjustments.

79 The issues raised by the Claimant in April 2015 with the Respondents at the meeting were described as "organisational or communication issues". Further although the Claimant subsequently put forward a different case, during the meeting the notes record that she considered that the matter had been resolved by way of the plan to have regular meetings with the doctors and to have open door access to the doctors. At the end of the meeting she accepted that the matter had been resolved in relation to communications with the doctors and the doctors were reasonably entitled to believe that the matters that had been raised by her had been resolved.

80 The Tribunal took into account that in her subsequent meeting with the occupational health in May 2015 she expressed a different view. However the Tribunal considered that there was considerable force in the Respondents' submission that the Respondents had taken reasonable steps to seek to resolve the Claimant's issues by way of discussing them at the meeting. Indeed the way in which the issues re-emerged in the occupational health report in May 2015 tended to suggest that they were not capable of reasonable resolution. They had been the subject of discussion face-to-face with the Claimant assisted by her trade union representative and they appeared to have been resolved in April. The fact that the Claimant considered that they had not been resolved a month later did not displace the finding that the Respondents had taken reasonable steps to resolve them and that the Respondents were entitled to take that view at the time.

81 The Tribunal also took into account that the Claimant was offered a grievance meeting to discuss the matters further and that she declined this opportunity. The Respondents cannot compel an employee to pursue a grievance and they did all that they could reasonably be expected to do in offering one. They also acted reasonably in respecting the Claimant's decision to decline that opportunity.

82 At the meeting in July 2015, the Claimant had had an opportunity to see the occupational health reports prepared in May 2015 as had her representative. Neither

raised the need to discuss the matters further. Against the background set out above and the Claimant's earlier failure to take up the opportunity for a grievance, the Respondents reasonably concluded that the matter had been taken as far as it could.

83 The other matter which the Claimant raised arising from Ms Hobson's letter of 27 May 2015 was the suggestion of a stress risk assessment. The Tribunal agreed with the Respondents' submission that the purpose of the stress risk assessment was to assess such risks as at the point when the employee had returned to work. Such an assessment prior to that event, especially a long time ahead of such event, was likely to be meaningless and a waste of time and effort. The Respondents and indeed the Claimant, could not know what the exact state of her health and therefore restrictions and risk factors would be if this were assessed before the Claimant's likely fitness to return to work.

84 The Tribunal also took into account that the Respondents had addressed in discussion with the Claimant such issues as what were the potential triggers of her stress in April 2015. Even if the Tribunal therefore were wrong about the appropriate time at which such a stress risk assessment was to be done, the Respondents had, albeit unwittingly, tried to deal with this issue in the April 2015 meeting. It was noteworthy that the Claimant's response in April 2015 was that she could not do anything until she was back at work.

85 In all the circumstances therefore the duty to make reasonable adjustments did not arise in relation to conducting a stress risk assessment and would not have arisen until the Claimant's return to work.

86 The next suggested adjustment (para 12b) of the list of issues [C4] was that the Respondents should have waited for the contractual sick pay period to run out. Once again in this respect there was no evidence of the Claimant having financial difficulties which were any different from those which any employee, whether disabled or not, would have had in such an event. The likely date on which the sick pay entitlement would have expired would have been 15 October 2015. The Respondents were not made aware of a request to postpone the termination of the Claimant's employment to this date. It was likely in all the circumstances that the position would have remained the same, namely that the Claimant had been off work for approximately nine months, there was no date on the horizon for a return to work which was realistic or supported by any medical evidence. It would have been unreasonable for the Respondents to have to wait any longer.

87 It was suggested that a reasonable adjustment was to have had a rehabilitation plan to include a phased return to work, reallocation of some duties, lighter duties and home working (Para 12c of list of issues). The Claimant was not well enough to return to work at all as at the date of the decision to terminate the employment. As with the stress risk assessment, the Tribunal considered that any discussion about a phased return to work or rehabilitation plan was premature. At no point did the Claimant say that she could return to work on a phased return to work plan. Nor was this suggested by the medical or occupational health expert. The Respondents in any event did not refuse any such adjustments.

88 The next element of this proposed adjustment was the reallocation of some of

the Claimant's duties. There had been no definition or clarification of what was meant by "lighter duties". The general point about modification of the Claimant's workload once again only kicked in once the Claimant was fit to return to work or that was in prospect within a reasonably short timeframe.

89 In any event, as the Tribunal has set out above in the text quoted from the notes of the meetings in April and July 2015, the Respondents had attempted to assess the Claimant's workload and identify areas that might have caused her stress and had given her a job description to look at during the meeting in April 2015 and asked her to revert to the Respondents about possible adjustments. The Claimant had disputed that the job description had been given to her but the Tribunal accepted as credible the Respondents' account about this, corroborated by the notes of the meeting. Even if it were wrong however, the Tribunal considered that the Claimant was very familiar with her job description as she had been in post for some 20 years and would have been in a position to have made suggestions to the Respondents when they asked her to consider this without a physical document. No such suggestions were forthcoming from her or her representative.

90 Further, the Claimant never asked during her employment for some of her duties to be reallocated. Indeed during the course of the hearing the Claimant criticised the Respondents for identifying certain areas of her work which had caused her difficulty/ stress as an attempt to criticise the Claimant's job performance.

91 The next element of the proposed adjustment under paragraph 12c of [C4] was to have offered home working to the Claimant. It was not in dispute that this was not raised by the Claimant during her employment. In addition there were significant issues to be considered such as patient confidentiality; the technical obstacles to the Claimant working from the computer system from home as it appeared that this was not a system which could be installed at her home. She could thus only access emails but could not open the attachments to such emails. It was agreed that the Claimant could work on wages or the staff rota but this was work which on the evidence, only took up one day a month. It was also not sufficient to fill one day's work.

92 In all the circumstances therefore it was reasonable for the Respondents not to suggest home working as an adjustment to the Claimant's depression.

93 The next proposed adjustment was in paragraph 12(d) – modifying the July 2015 capability hearing to a less critical environment allowing the Claimant to discuss her illness properly.

94 The Tribunal has already made findings above in the context of the unfair dismissal complaint as to the way in which the meeting was conducted and the acceptance by the Claimant that she was able to put across her points. There was further no medical evidence before the Tribunal that problems with communication were a symptom of the Claimant's condition. The Respondents could not have known therefore that the manner or structure of the meeting in July 2015 would have been problematic for the Claimant and as set out above the Claimant confirmed that she was able to make all her points in any event.

95 The further point made in paragraph 12e of the Further Revised List of Issues

was that the Respondents should have paid for counselling for the Claimant. It was clear on the evidence that the Claimant had been seeing a counsellor in any event (pp. 92 and 124). She confirmed to the Respondents that she had completed her counselling course as of July 2015. There was no medical evidence before the Respondents which suggested that further counselling would have helped the Claimant. The Claimant then took up group counselling sessions. She never suggested to the Respondents that they should pay for this. It was not reasonable to require such an adjustment. In relation to private counselling Dr Sehra made it clear that this was a matter for self referral therefore it was not reasonable to duplicate the counselling.

96 Further, in the Claimant's written submissions, reference was made at para 41c [C5] to a further modification being reduced hours. This matter had not been canvassed with the Respondents' witnesses in cross-examination and had not featured as one of the possible adjustments in the list of issues. In any event the general point in relation to modification of working hours and the rehabilitation plan applies to this suggestion also.

97 The disability impact statement prepared by the Claimant following the Tribunal's direction in the hearing in November 2015 was served in late December 2015 on the Respondents. Although the Tribunal only received the disability impact statement when we were in chambers, having asked the parties to send us a copy, the relevant information had been set out in the Claimant's substantive witness statement for the hearing, therefore we had that material before us during the hearing.

98 Paragraph 7 of the statement which described the substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities listed the following: -

98.1 That the Claimant suffered from interrupted sleep and did not get much more than four hours sleep per day. This meant that she was constantly tired which in turn affected her ability to do simple household chores. She felt as if she had significantly less energy and was extremely tired all the time.

98.2 Her son had had to keep an eye on the Claimant on a daily basis as on some days she had been reluctant to wash or dress herself. He visited her in the morning before he went to work and in the evening when he finished work to ensure that she was alright. If he did not come, she became frightened as she lived on her own.

98.3 Where once the Claimant was socially very active, she had become a bit of a social recluse. She hid herself away from her friends and family. She had not visited local places of interest where she used to regularly attend.

98.4 She began to have suicidal thoughts, as she thought it was worthless for her to live.

98.5 She had been forgetting things and very often she felt lost if she was out.

98.6 The Claimant had been forgetting things and very often she felt lost if she was out. She had left the gas cooker on on many occasions as she had often forgotten to switch it off.

98.7 She was frightened to get on or use public transport.

98.8 Everyday simple tasks such as shopping, reading, writing, having a conversation, watching TV, getting washed and dressed, cooking and eating, housework, walking, travelling including using public transport, and taking part in social activities were all affected.

99 Another relevant matter of the factual background was that the Claimant was a very long serving member of staff in a senior position within the surgery. She had worked in the practice longer than either of the doctors.

100 The Claimant contended in her witness statement that the Respondents' actions in relation to querying her annual leave in September 2014 directly led to her going off sick. The Tribunal assessed the evidence which was produced in relation to this which was both documentary and oral. It was clear from the contemporaneous records that there was a background of confusion about which leave the Claimant had taken and which leave had been authorised by either of the doctors. The Tribunal took into account that it was the Claimant's responsibility as practice manager to keep such paperwork in order albeit we accepted her contention that her own leave had to signed for by her managers.

101 We then considered that the email that was sent to her ostensibly by both doctors in September 2014 was appropriately worded and was clearly intended to clarify the position in relation to prospective leave. Further, the doctors invited her to discuss the matter further with Dr Sehra. This was incidentally also consistent with the Respondents' position which they subsequently clarified for the Claimant as described above, that clinical matters should go to Dr Gooty and administrative matters should go to Dr Sehra. This was in the meeting in April 2015 when she had raised as one of her concerns confusion about which doctor she should speak to on a given issue. Further, the terminology of the September 2014 email appeared to the Tribunal to be perfectly reasonable in terms of seeking to clarify and formalise the position in relation to leave, especially given that the Claimant was the practice manager. There was therefore nothing unreasonable about their actions and there was nothing which on the Tribunal's findings could have caused ill health on the Claimant's part.

102 A further point made by the Claimant as an indication of the unreasonableness of the decision to dismiss was that she was entitled under her contract to a further period of paid sick leave. Whilst it is correct that her contract probably allowed her sick pay until October 2015 there is no requirement that an employer must allow the contractual sick leave to be exhausted before the employer can establish a reasonable dismissal.

103 In any event, as the Claimant was dismissed with pay in lieu of notice. That further 12 week period would have taken the Claimant past the expiry of the contractual sick pay period.

104 Also in relation to the general points made by the Claimant about being overloaded with work, the Tribunal reminded itself that the Claimant was the practice manager and her job entailed the power to delegate tasks to other members of staff, and ultimately to allocate administrative responsibilities. Although the Claimant had included in her list of factual issues at paragraph 9 that when she delegated work to other staff this would frequently be countermanded by Dr Sehra and Dr Gooty, she gave no examples of this in her witness statement. When she was questioned about this further in oral evidence she was not able to substantiate this allegation. Indeed some oral evidence from the doctors painted a picture of the doctors trying to contact the Claimant when she was not at work in order to get essential information from her about matters such as access to the IT records so they could continue the work of the practice. This tended to suggest that there had not been any substantial degree of delegation of work from the Claimant. Indeed it was agreed that she dealt with matters relating to wages at all stages - she had not delegated that to anyone else even when she was on holiday.

105 The Claimant complained that she was warned prior to her July 2015 dismissal that if her attendance did not improve she would be dismissed. The Respondents did issue such warnings but they were consistent with appropriate warnings for a reasonable employer to give so that an employee could know that this was in contemplation. Indeed the Claimant's trade union representative made similar reference to this during the meeting in July 2015.

106 There was also an issue as to when the Claimant received the minutes of the April 2015 meeting. On the documents before us it appeared that the Claimant and her representative were sent the minutes of the April and July meetings together shortly after the July 2015 meeting. This also appears from Dr Gooty's witness statement.

107 The contemporaneous documentary evidence which tends to confirm the oral evidence of the doctors that the Claimant had previously indicated that there was a strong likelihood that she would be able to return to work by a particular date but had then not been able to return due to her health was in the record of the minutes of the meeting of 14 April 2015 (p. 107). It was clear that the Claimant was noted as saying that she would let the Respondents know after her "echo" which was due by the end of April when she would be returning to work.

108 At that point the Claimant had been certified as not fit to work for one month from 2 April 2015. As already noted above, when the Claimant attended the medical capability meeting on 1 July 2015 she was then in the middle of a sickness certificate which covered a three month i.e. a longer period than had been the case in April. Dr Gooty described other occasions as well when the Claimant had indicated an intention to return to work but had not been able to do this. There were no documents relating to this but the Tribunal considered that that evidence was consistent with the evidence about the discussion in their April 2015 meeting.

109 After the April 2015 meeting when the Claimant had thought she would be able to return to work at the end of April she then sent in a further medical report covering the month of May dated 1 May 2015 (p. 108).

110 The Claimant also raised in the factual issues the question of whether it was

reasonable for her not to appeal the decision to dismiss. The Tribunal did not consider that this was a matter which was relevant to liability. The Tribunal has found that the Respondents offered an appeal and that is relevant to and indicative of a fair dismissal. However to the extent that the Claimant wished to argue that this was not in effect a proper appeal the Tribunal took into account that the Claimant made it absolutely clear both in her own correspondence and in a letter that she instructed a solicitor to write that she would in any event not want to take up the appeal. The fact that the Respondents therefore offered an ostensibly independent person to conduct the appeal remained a reasonable act on their part and was not an indication that they had failed to offer to the Claimant an appeal. The significance of the Claimant's actions and whether it was reasonable for her not to appeal would have been relevant to remedy if the Tribunal had found that this was an unfair dismissal.

111 As set out at the beginning of these reasons the Tribunal stated that the reasons would be set out only to the extent that we considered it was proportionate to do so. Thus, for example, the Tribunal has not set out an answer to each and every one of the factual issues identified in the list of issues but having reviewed them at the end of our considerations we were satisfied that they had been sufficiently addressed above in the reasons. This was the reason why, for example, the Tribunal did not set out any background facts about the alleged dispute between Dr Sehra and Dr Gooty and did not provide detail about some of the other issues the Claimant raised as causing her stress at work (Issue 12f). We were satisfied that they were dealt with adequately during the meeting on 4 April and by the offer of a formal grievance process which was not taken up by the Claimant.

112 Reliance was placed by the Claimant on the case of *London Underground v Vuoto* referred to above in support of the proposition that it was not premature for the Respondents to have considered reasonable adjustments with the Claimant before she was fit to return to work. The Tribunal accepted as binding the Employment Appeal Tribunal's decision in the *Vuoto* case at paragraph 125 that there was no general proposition of law that an employer's duty to make reasonable adjustments did not arise until an employee indicated when they would be able to return to work.

113 The Tribunal considered that on the facts of the present case it was indeed premature because it was difficult to predict as we set out above what the conditions would be like when the Claimant returned to work in terms of her own condition. But in any event as the Tribunal has also set out above, the Respondents did undertake that discussion or attempted to with the Claimant at the meeting in April 2015.

114 At the second meeting in July 2015, the Tribunal noted that the Claimant's trade union representative interjected to emphasise to the doctors that the Claimant was not well and that they could not "force her to come back to work as she is having disability". There was therefore no reasonable basis for reaching the conclusion that the Claimant would have been in a better position to have a discussion about any adjustments in the July 2015 meeting. Indeed than she had been in the April 2015 meeting when even at that point she anticipated returning to work at the end of April.

Section 15 of the 2010 Act – the dismissal

115 The complaint under section 15 of the 2010 Act was in relation to the dismissal.

Having regard to our findings in relation to the unfair dismissal and the failure to make reasonable adjustments claims above we were satisfied that the termination of the Claimant's employment was indeed related to her absence but we considered that the Respondents' action of terminating the employment in July 2015 was justified.

Effective date of termination – notice pay

116 The Tribunal was satisfied that the dismissal letter was not received by the Claimant until 10 July 2015 based on her response to the termination letter in which she refers to the fact that she only received it on 10 July despite the fact that it was dated 3 July 2015. In those circumstances therefore the Claimant would have remained as a matter of law employed until notification of the termination. She was therefore entitled to a further seven days' pay. The letter of termination dated 3 July stated that the Claimant's employment was being terminated with immediate effect and the Respondents confirmed to the Tribunal during the hearing that the Claimant had been paid until 3 July 2015.

117 In those circumstances therefore there is an outstanding amount due to the Claimant equivalent to one week's pay.

Employment Judge Hyde

14 March 2017