EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
CORALIE BURCHELL-WHITTLE	**AND**	**TRS LEGAL COSTS LTD (R1)** **TIM RUSSELL –SMITH (R2)** **ESME PHILLIPS (R3)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF **ON:** **5TH / 6TH / 7TH /8TH / 9TH JUNE 2017**
28TH / 29TH / 30TH NOVEMBER 2017
4TH / 5TH / 6TH DECEMBER 2017
21ST FEBRUARY 2018

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS:** **MR P BRADNEY**
MR J STAFFORD

APPEARANCES:-

FOR THE CLAIMANT:- **MS S STAUNTON**

FOR THE RESPONDENT:- **MR P WILSON**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claims of disability discrimination contrary to sections 15, 20, 26, 27 Equality Act 2010 against R1 are dismissed.

2. The claimant's claims of disability discrimination contrary to sections 15, 20, 26, 27 Equality Act 2010 against R2 are dismissed.

3. The claimant's claims of disability discrimination 15, 20, 26, 27 Equality Act 2010 against R3 are dismissed

4. The claimant's claim of constructive unfair dismissal against R1 is dismissed

5. The claimant's claim for unpaid holiday pay against R1 is well founded to the extent set out in the reasons below.

Reasons

1. This is the decision of the tribunal in the case of Ms Coralie Burchell-Whittle v TRS Legal Costs Ltd (TRSLC), Mr Tim Russell Smith (TRS) and Ms Esme Phillips (ES). The tribunal apologises to all parties for the delay in promulgating the judgment in this case.

2. The tribunal has heard evidence from the claimant herself, and on behalf of the respondent from Mr Russell Smith, Ms Phillips, Cathy Gilbert (the first respondents Office Manager and PA to the second respondent), Rachel Harding Hill (a self-employed costs lawyer engaged by the first respondent), Avril Watkins (external HR Consultant engaged to hear the claimant's grievance) and Charlotte Rowell (an external HR consultant engaged to hear the grievance appeal). In addition we have considered some 850 pages of documents.

3. The initial claim was lodged on 9th June 2016 bringing a primary claim of disability discrimination together with other monetary claims. On 11th August 2016 the claimant applied to amend by the service a revised rider to the ET1. A third amendment was permitted to include the claim of unfair dismissal. Any reference in this decision to the pleaded claims is a reference to the claims as set out in its final amended form (Bundle p92) or the response in its final amended form (Bundle p109).

4. The first respondent is a firm providing legal costs drafting services. The second respondent is the sole proprietor and director of the first respondent. The third respondent has been engaged as the Personnel and Business Advisor of the first respondent since 2012.The claimant joined the first respondent in 2011 as a cost draughtsman (For the avoidance of doubt we are using the word draughtsman as encompassing employees of both sexes simply for ease of comprehension). The claimant's income comprised a basic salary together with commission.

5. The claimant brings a number of disability discrimination claims; the alleged failure to make reasonable adjustments (s20 Equality Act 2010), harassment (s26 Equality Act 2010), discrimination arising from disability (section 15 Equality Act 2010), victimisation (s27 Equality Act 2010); constructive unfair dismissal; and holiday pay. On the face of the pleadings all of the allegations of disability discrimination are made against each of the respondents although some fall more naturally to be considered against one or more of the respondents on the basis of the allegations themselves. The factual allegations are summarised at paragraph 6.1 – 6.19 of the List of Issues. (For completeness there are disputes as to whether the claimant is in fact entitled to

rely on allegations 6.3 and 6.18 in relation to all of her claims, but given our findings it has not been necessary to resolve this.)

6. The parties have both invited us in their submissions to take a broad overview of their conduct. Unsurprisingly the approaches and overview urged upon us are radically different. In her written submissions the claimant invites us to conclude "*that there was an institutionally discriminatory attitude towards mental health conditions at the first respondent and that it permeated the way in which the respondents treated the claimant*". The claimant invites us to conclude that Mr Russell Smith and Ms Phillips, and by extension TRSLC, had a poor and unsympathetic attitude towards the claimant and her disability, and towards mental illness generally, which permeated and tainted its approach to dealing with the individual issues as they arose. The respondent by contrast invites us to the view that they were a small company for whom dealing with an employee with a mental health condition was a novel experience, and that at all times they sought to act supportively and constructively. Whatever our conclusions as to whether they achieved these ends, in reality and contrary to the claimant's belief, they were acting in what they understood and believed to be her best interests.

7. Moreover the respondents claim that the claimant's view of the case is itself tainted by a fallacy, which is exemplified by the way she puts her case as summarised above. In essence they submit that the claimant's approach is to assert that she was disabled and suffered from stress, and that unless the respondent was able to reduce or eliminate workplace stress it was necessarily guilty in one in one form or another of discrimination. The respondent identifies this as a "duty of care" approach rather than to approach it from the standpoint of the duties owed under the Equality Act.

8. As set out below in relation to a number of issues we do not accept the claimant's characterisation of the respondent's conduct, and do accept the respondents' evidence that they were attempting to act in the claimant's interests. As we have been invited by the parties to do so we are of the view that our specific conclusions in respect of disability and a number of the other issues reflect our more general view that all of the respondent's witnesses were honest and truthful and that there was no failure to act in what was perceived to be the claimant's best interests. This does not involve a rejection of the claimant's evidence as in this regard much of it relates to her impression and subjective interpretation of the respondent's conduct are and we are entirely satisfied that she genuinely holds the views summarised above.

9. However, irrespective of our holistic view of the case in the end the individual allegations stand or fall on their own merits. As will be apparent from the discussion of them below the tribunal has not found this easy to resolve as so much turns not on what precisely was said or done but accounts of the perception of tone and intention. However there are points at which we have been able to compare not simply the impression of an incident but its factual basis and where we have done so on each occasion we prefer the evidence of the respondents' witnesses.

10. As a general proposition we should say that our task has not been assisted by the fact that the claimant's pleaded claim takes the somewhat comprehensive approach

of setting out each of the factual matters of which she complains and alleging that they are either failures to make reasonable adjustments and/or acts of harassment and/or discrimination arising from disability in every case. In addition no distinction is made in respect of the respondents in relation to the discrimination claims and it appears that each allegation is made against each respondent although factually this necessarily cannot be true. Each factual allegation therefore has to be considered in respect of three several separate causes of action and three respondents. However in fairness to the claimant and Ms Staunton who represents her, in the closing submissions the claim was significantly restricted at least in relation to the failure to make reasonable adjustments.

Disability Discrimination

11. The relevant law in respect of disability discrimination which we will deal with first is set out below:-

15 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, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice 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 the disadvantage.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant 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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

Knowledge of Disability

12. The claimant has for many years suffered with a generalised anxiety disorder and depression which was diagnosed at the age of 17 or 18 in 2004. It is not in dispute in consequence of this condition she is a disabled person within the meaning of section 6 Equality Act 2010. Whilst there is no dispute before us as to the fact of disability there is a dispute about knowledge and, if the respondent knew or should have known that the claimant was disabled from what point.

13. The dispute is in fact relatively narrow. Both parties have, in their skeleton arguments set out the factual communication made by the claimant to the respondent about her conditions. The respondent contends that the picture disclosed is of the claimant being ill through a variety of conditions, many of which are not contended to be disabilities by the claimant herself. A part of this picture is the mental illness which is now accepted to be a disability. In general terms the respondent knew that the

claimant suffered from anxiety and depression but could not reasonably have been expected to disentangle this from the general picture of ill health and to have appreciated that the claimant was a disabled person. The claimant in essence submits that she provided the respondent with ample evidence of her mental condition to have allowed them to have concluded that she was disabled.

14. The correct legal approach to the question of knowledge is encapsulated at paragraph 36 of the Court of Appeal's decision in Gallop v Newport City Council [2013] EWCA Civ 1583 "*I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position*".

15. In our judgment the claimant's analysis is correct. It is notable that in her witness statement Ms Philips describes herself as having received extensive training in all personnel and HR techniques and at paragraph 13 refers to a meeting in June 2013 when the claimant informed her that she had been diagnosed with an anxiety disorder and had been advised to take time off work. Shortly after she again met the claimant who informed her that she was on new medication. In our judgment it is hard to believe that someone with extensive HR training would not have been alert to the possibility at least, that the claimant's condition constituted a disability, or at least that they may need more information, for example from the claimant's GP or by engaging an occupational health provider. It can be reasonably expected in our view that someone trained in HR would be aware of the existence of Occupational Health providers who could provide a medical report and to advise what if any adjustments were needed for the claimant. In our judgment on their own evidence by this point the respondent had sufficient information to have discovered with reasonable diligence that the claimant was disabled. However we should say at this point that in our judgment this is not evidence of callousness or a lack of concern on the part of Mr Russell Smith or Ms Phillips in particular. We accept the evidence of both of them that they were attempting to do what they could to assist the claimant with the difficulties she faced many of which as they understood it were rooted in her private life. They were, put simply trying to do their best, and meet difficulties as they arose. However in our judgment as a consequence of this approach they did not make sufficient or reasonable enquiries which would have alerted them to the fact of the

claimant's disability, and they must be taken in our view to have had constructive knowledge of it from June 2013 at the latest.

16. It follows that in our judgment for all of the events which concern us the claimant was disabled and the respondent had constructive knowledge of her disability.

Background

17. One of the issues between the parties which will be dealt with in greater detail later in respect of the individual claims is the question of training. It is not in dispute that the claimant initially received the respondent's standard training. The respondents' case is that whilst legal costs draughtsmanship is a detailed, precise and technical discipline it is not essentially difficult to understand and does not require extensive training. The standard training provide consists a few days training followed by access to and the assistance of colleagues to resolve any queries. Thus in 2011 this was the training the claimant received and is not alleged that at the time this either was, or was perceived to be inadequate by the claimant or any other of the draughtsmen employed by the respondent.

18. Between 2011 and 2015 there were few issues relating to the claimant. There is a dispute as to the reason why she was allowed to work from home but it is not in dispute that she did largely work from home between 2012 and 2015. She was engaged in two different types of work, drafting and management. She describes drafting work as generally involving going through solicitor's files and drafting a detailed bill of costs for solicitors to use to seek payment, the vast majority of the work involving dealing with legally aided funded claims. The management work she describes as a technically different and higher level of work dealing with historical cases, negotiating contracts with the legal aid agency, providing training to solicitors and other draughtsman, monitoring input and output of work, case management, preparing financial progress reports for the solicitor client and preparing appeal letters to send to the legal aid agency, and liaising with solicitors and partners of the client firms. It is not suggested by the claimant that at any point prior to the end of 2014 that she had any difficulty in performing any part of her duties nor that she needed any further training. It must also be borne in mind that when referring to training the claimant is referring to two different things. The first, as is set out in greater detail later, is the contention that she needed further training to carry out her existing role as a costs draughtsman. The second is that at various times she complains of the failure to provide further training which would have allowed her to advance her career. For our purposes only training in the first sense is relevant. This is dealt with in greater detail below.

19. From approximately 2012 the claimant had worked almost exclusively for one client T V Edwards (TVE) for most of the period from home. It was an arrangement which suited her and with which she felt comfortable. However, as the claimant sets out in her witness statement from January 2015 she began to suffer increased stress and illness because of work. The events which led to and caused this essentially start in the latter part of 2014 when TVE began to re-assess its relationship with TRSLC. It

was considering bringing all of its work in house, and by November 2014 it had decided to reduce expenditure by taking its management work in-house. On the claimant's estimate her this would have reduced her workload by approximately half. On 26th January 2015 the claimant attended TVE's offices in London to assist in training their new manager, in effect the person who was to take over her previous "file Management" role.

20. As a consequence of TVEs decision the claimant's work for it inevitably diminished, and her workload was varied to include drafting work for another large client DLS. The claimant complains that she had not worked DLS for approximately three years and found both the loss of the TVE work and the requirements of DLS increasing her stress. The claimant in her witness statement summarises the events as saying that her health deteriorated and she failed to get any training and support, and that in consequence when she was required in October 2015 to work every day from the office having previously worked from home she became even more ill, and by November 2015 was signed off work. By January 2016 she was suffering from severe depression and wished to return to homeworking which was not agreed. She began a phased return to work working two days a week from the beginning of February 2016 but her health deteriorated further.

21. On 10th March during a meeting the claimant handed a grievance to Mr Russell Smith She was then permitted to work from home until a further meeting on 22nd March at which it was agreed that she would work from home until her grievance was concluded. In fact on 31st March 2016 a decision was taken that she would not be provided with work whilst at home pending the outcome of the grievance. On 12th April 2016 the claimant lodged an updated grievance including some additional matters. On 25th April the claimant attended a grievance meeting with Ms Watkins who had been appointed to determine it, and on 9th May the grievance outcome was sent to the claimant. This included a number of recommendations. In summary those were that the claimant return for a four week initial period based in the office to receive intensive training; the training would be guided by the claimant identifying the subject areas for training; progress would be reviewed after four weeks; and that the claimant would be reimbursed for the lost commission after 31st March 2018.

22. On 13th May 2016 the claimant appealed the grievance outcome, with the consequence that none of the recommendations were put in place pending the appeal. As part of her appeal letter she stated " *I now feel my position with TRSLCL is untenable and do not agree with Avril Watkins' conclusion that I should return to working in the office to receive training..*" and she goes on to suggest that there has been "*a breakdown of trust and confidence in TRSLCL*.." and that "*The best course of action is to agree an exit package*." On 2nd June the appeal meeting took place and on 8th June the outcome was sent to the claimant. The appeal was not upheld and the outcome letter reflected the passages set out above suggesting that a termination agreement needs to be put in place. In fact this did not happen and the claimant remained employed by the first respondent until her resignation on 4th November 2016.

23. On 9th June 2016 the claimant instituted the first proceedings in the tribunal claiming disability discrimination. At this point she was still employed by the first respondent. On 26th October 2016 she received a substantial volume of material by way of disclosure in the litigation. As a result of reading some of the comments contained in the disclosure she resigned on 4th November 2016.

24. We will now deal with the individual claims starting first with those of disability discrimination. We have dealt with them in the order in which they are set out in the claimants written submissions.

Return to Working In the Office (Failure To make reasonable adjustments / harassment / discrimination arising from disability)

25. In relation to the alleged failure to make reasonable adjustments the claimant's claim has been significantly reduced in her closing submissions. There is only one PCP relied on which (as set out in paragraph 27of the submissions) is the requirement to work from the office; and it follows that the only adjustment now contended for is the removal of that requirement.

26. The claimant also contends that this requirement was an act of harassment; and discrimination arising from disability. In our judgment this claim can only in reality be a claim for the failure to make reasonable adjustments. In relation to harassment even if the requirement to work from the office has the proscribed effect set out in section 26 it is impossible to see how that requirement was imposed for a reason relating to disability. It is not essentially in dispute (and if it were we would in any event have accepted the respondents evidence as to this) that the reason for requiring the claimant to work in the office was in order to provide the training she had requested, and because it was believed by the respondents to be necessary to supervise the claimants work more closely because of errors she was making. In respect of the latter it is not the claimant's case that her disability caused her to make those errors and so necessarily neither reason relates to the disability. For the avoidance of doubt even if that had been the claimant's case, and at some points in her evidence she appeared to be suggesting it, we have not been taken to any medical evidence which would support any such proposition or entitle us on the evidence to find that any such link had been established.

27. It is the claimant's case that that training could have been provided whilst she worked from home, but even if that is correct we accept that the respondent's motivation was for the reasons described above and not for a reason related to disability. Whilst the claimant may disagree with the assertion that she needed to be in the office to receive training it has not been suggested, and if it had been we would have rejected it, that the respondents were not genuinely of that view. In our judgment it would not be reasonable within the meaning of s26(4) to hold that the requirement had the prescribed effect given that its purpose was to assist her.

28. Similarly it is difficult to see how, even if the requirement is unfavourable treatment within the meaning of section 15 that it was because of something arising from

disability. As with the harassment claims neither of the reasons for imposing the requirement were because of something arising from disability even on the claimant's case (and again if the claim had been put on this basis made we accept the respondents' evidence in respect of this). It follows that in our judgement if this was discriminatory it can only be in the failure to make reasonable adjustments.

29. Although not directly in issue the background to this relevant. The claimant contends that she began to work from home, at least partly in 2012, and that at the time this was a reasonable adjustment to accommodate her disability. Specifically the claimant's evidence is that in December 2012 she disclosed to Ms Phillips that she was having panic attacks and that the arrangement was put in place because of this. The respondent disputes this. Its case is that the arrangement was put in place in part to assist the claimant because of the need to care for her child and because of tensions in the office between Faye Nicholls and Cath Gilbert, and the claimant.

30. As is set out in the documentary evidence the initial agreement to the claimant working one day a week from home commenced in September 2012. It is not clear whether that increased and if so when, but by March 2013 Mr Russell Smith agreed with a proposal that the claimant worked Monday and Tuesday in the office and Wednesday to Friday at home. There is no specific reason given but the email correspondence immediately prior to this relates to concerns about the claimant's daughter's health. Whilst it is not definitive this appears more consistent with the respondent's account of the process of the claimant working from home than the claimant's.

31. The requirement to work in the office was imposed first in October 2015, and secondly in February 2016. The claimant contends that it placed her at a substantial disadvantage in comparison with persons who are not disabled in so far as she suffered panic attacks on the way to the office in 2012 and was stressed by the prospect of working from the office in October 2015. The adjustment contended for is to remove the requirement to work from the office.

32. There is a fundamental difference between the parties as to this, in that the respondent contends that the purpose of the requirement for her to attend the office was precisely because the claimant was contending that she needed further training and support which simply could not be provided other than by her working in close proximity to her colleagues. Moreover they had made an adjustment for her in that they had rented an extra room in which she could work alone. Accordingly they contend that the requirement to work in the office did not in fact place her at a substantial disadvantage.

33. Secondly even if it did, the adjustment asserted is not reasonable as it was incompatible with her request for training. The background to the training issue is that it is the respondents' case, which we accept, that by the autumn of 2015 they had begun to discover what they believed to be significant errors in the work being done by the claimant. The claimant broadly accepts the fact that she had been making mistakes, in the main on the DLS work although she asserts they were relatively minor and their effect has been exaggerated. What she does not and has not

asserted is that the errors were a consequence of her disability, which is entirely logical given that she was disabled for the whole of the period of her employment and went for several years working without error to the satisfaction of TVE. However the respondent concluded that he work need monitoring and she concluded that she needed training; both of which at least raised the question of whether she need to return to working in the office.

34. It is useful at this stage to deal with the issue of training. The claimant's position is objectively very difficult to follow. She had been trained in 2011 and worked very successfully for some four years without apparently considering that she needed any further training. We accept the respondent's evidence that whilst the work requires an attention to detail and precision it does not require extensive training. It is difficult objectively to understand the need for training and in our judgment it would have been difficult to criticise the respondent if it had refused to provide further basic training to a very experienced member of staff who objectively could not need it. However the claimant clearly subjectively took the view that she did require training, and they did agree to provide further training, and in order to do so acquired a small office from which the claimant could work on her own if she wished rather than be in a large office with the rest of the team. In our judgment whilst the claimant may not appreciate it this is a prime example of the respondent attempting to assist the claimant as best they could. Rather than challenge the claimant they set about providing the training she had requested.

35. They assert that working from the office was the only way of meeting her perceived training and support needs essentially because it requires the interaction with colleagues to address problems when they arise. Fundamentally whilst working from home is possible it is only open to employees who are fully trained and are able to complete work independently. In essence the claimant's two requests, to receive further training and to work from home were mutually incompatible. Moreover they point to the fact that in the subsequent written grievance the claimant stated "I*n September October I agreed to work in the office for two days a week in order that support and training could be provided*." The respondent's contend that an action to which the claimant herself accepts that she agreed to must objectively be reasonable.

36. The second point at which the claimant was required to work in the office was from 2 February 2016 which the respondent accepts there is the effect of the formal letter from Mr Russell Smith dated 1 February. However once again the respondent points to the fact that it is clear that the purpose of a return to work in the office for is a period of three months was in order to facilitate her request for support and retraining at which point the arrangement would be reviewed and again the respondent relies the claimant's own notes of the meeting which she records that had been suggested that she work on a Tuesday and Thursday in the office to begin with as part of a phased return to work and she records that she had planned to work two days a week in the office for the short term and to be given thorough training and that outcome said to be agreed. If the respondent is correct in its analysis of the claimant's real complaint is not being required either in September or October 2015 or February 2016 to work in the office but that she does not believe that training or

support of the type she expected that was provided. If this is correct, which we believe it to be, it follows that in reality this complaint is actually one of a complaint of the failure to provide training rather than to work from the office.

37. In our judgement the respondent's submissions in respect of these claims are correct and we accordingly dismiss these claims.

The requirement to do work tasks during sick leave (Harassment/ Discrimination arising from disability)

38. The factual background to this allegation is that the claimant was absent sick from 30 October 2015 until 2 February 2016. The actual requirements of her were relatively minimal. She was asked to save some work onto the cloud which was necessary as, until she had done so, no one other than the claimant could continue to work on those tasks, or have access to them at all. In fact she was not actually required to work herself merely to perform a task which allowed others to carry on that work. This occurred on 16 November 2015 and 7 December 2015.

39. On the face of it this claim would appear to fall most naturally within an allegation of a failure to make reasonable adjustments but that claim is no longer pursued on the basis that the claimant no longer relies on the requirement as a PCP, which is an essential element of any such claim.

40. As a claim of harassment the first question is whether the conduct was unwanted. In an email dated 30 October 2015 at the claimant specifically asked to be notified of any urgent issues, which implies at the very least that she would be checking her emails and would act on any urgent issues. Moreover at no stage did the claimant make any a request not to be contacted whilst off sick nor to be released from the requirement to perform any work related task at all such as uploading work to the cloud. In the circumstances we are not persuaded that the conduct was unwanted and this claim therefore falls at the first hurdle.

41. It is equally difficult to see how this claim can fit within the parameters of section 15. If the conduct complained of was agreed to by the claimant how can it be said to be unfavourable? Even in the absence of agreement a request to upload work to the cloud so as to allow others to access it could not in our judgment be regarded as unfavourable. This claim too therefore falls at the first hurdle.

Failing to deal with grievances in a timely way (Harassment /Discrimination arising from disability/ victimisation)

42. The factual background is that on 10 March 2016 the claimant submitted a grievance. On 30 March Mr Russell Smith advised the claimant that as the respondent did not have the resources in-house that they would be arranging for an independent consultant to deal with it. On 4th April Ms Watkins was contacted and asked whether

she could assist. On 12 April and amended grievance letter was sent by the claimant. The claimant was invited to a grievance meeting which took place on 25 April. On 26 April the claimant sent Ms Watkins further documents she wished her to consider. On 4 May as Gilbert was interviewed and on 9 May the outcome letter was sent. The grievance policy itself states that each step in the grievance procedure should be carried out without unreasonable delay.

43. The respondent invites the tribunal to conclude that looked at overall, and in fact at each stage, the grievance was concluded with a reasonable timeframe and not with unreasonable delay. If this is correct the allegation is not well founded factually. Moreover even if it was not and the failure to complete it more swiftly is capable of amounting to unwanted conduct, that the delay was not related to her disability. There is no evidence that the respondent deliberately delayed the grievance process in order to cause her greater stress. The delay was a function of the respondent not having the internal capacity to deal with the grievance more promptly. Similarly it is again difficult to regard this as falling with s15. Even if an unreasonable delay can be regarded as "unfavourable" it is very hard to see that it is in consequence of something arising from disability.

44. In our judgement the respondent is correct in both analyses and these claims too must be dismissed.

<u>Continuing scrutiny of the claimant's work (Harassment / Discrimination arising from disability)</u>

45. The next allegation of harassment it is the continuing scrutiny of the claimant's work. The way this is put in the claimant's skeleton argument is that the claimant was making mistakes with her work due to her disability and that the respondent asserted that the work had to be submitted without supervision, but then took pernickety points in respect of her work. Once again there is a factual dispute as to whether this was unwanted conduct, or whether it was related to the claimant's disability.

46. The respondent submits that this allegation fundamentally makes little sense. The respondent's business is costs draughtsmanship and it was the claimant's job to perform it. To allege that the respondent is not entitled to scrutinise her work, nor to take "pernickety" points is unsustainable. The evidence of Mr Russell Smith is that in essence the task of a costs draughtsman is to carry out detailed work on behalf of the client. Whilst there may be errors which are more significant than others there is in reality no such thing as a minor error, because any error reflects badly on the costs draughtsman and the firm particularly when the firm prides itself on providing a professional and indeed superior service. The reason for continuing to scrutinise the claimant's work and for picking her up on errors was that errors were not acceptable to the respondent in the work it sent to its clients. That was not for a reason relating to the claimant's disability nor is the claimant held to more any more exacting standards than any other costs draughtsman.

47. Even if scrutiny of her work was "unwanted" conduct in the sense that the claimant did not like it cannot reasonably have had the proscribed effect given that the claimant must, or at least should have appreciated that it was entitled to check that the work was being carried out to an acceptable standard. Similarly in respect of the s15 claim, even if scrutiny of her work is unfavourable treatment because of something arising from disability (which is not accepted) it must be justified. Ensuring that work sent to clients is performed to an acceptable standard is self-evidently a legitimate aim, and equally scrutinising that work for that purpose is a proportionate means of achieving that aim.

48. In our judgement the respondent is correct and these claims must also be dismissed.

Telling the claimant she should not return to work until 100% fit (Harassment / discrimination arising from disability)

49. The next allegation is that the claimant was told at a meeting of 28 January 2016 that she should not return to work until she was 100% fit. There is a dispute as to the precise circumstances and by whom the issue of 100% fitness was raised that this comment was made. The claimant's case is that it was made by Mr Russell Smith in the context of him telling the claimant that they could not afford for her condition to have a negative impact on the company. The respondent's is that it was in fact made by the claimant explaining that she would never be wholly free from the condition. The respondent points out that the claimant's account is not supported by her own notes of the meeting in her subsequent e-mail which includes the following, "There will never be a "good" time for me to return to work and the health issues I experience will be ongoing and will affect me on an ongoing basis." This is much closer to the respondent's account than the claimant's in evidence. In the light of the contemporaneous evidence we are not satisfied on the balance of probabilities that the claimant has established the factual basis of this allegation.

Being dismissive of C mental health (Harassment/ Discrimination arising from disability)

50. The next allegation is being dismissive of the claimant's mental health issues at a meeting on 10 March. This meeting is a paradigm example of the parties being at cross purposes. The claimant believed that the sole purpose of the meeting was to discuss the stress she was suffering and how to ameliorate it. There is no dispute that at the meeting Mr Russell Smith also discussed criticisms of her work. This is encapsulated in a text the claimant subsequently sent saying (in part) *"..I still can't believe that I was telling them about my ill health and Tim carried on moaning about my work and putting me down*." The claimant's case is that the conduct of the meeting and comments made by Mr Russell Smith and Ms Phillips caused her to have a panic attack. This is not accepted by the respondent but there is no dispute that the meeting concluded with the claimant very upset, nor that Ms Phillips advised her to go home, and to work from home the following week.

51. The claimant's case appears to encompass a number of different elements. The first is that it was inappropriate to criticise the claimant's work at a meeting that she understood was intended to discuss her stress assessment. Secondly the claimant complains of the tone and intonation of Mr Russell Smith and the "terse" way in which he spoke to her. Thirdly she alleges that they made comments she regards as dismissive of her mental illness "anxiety is not a mental health illness"," they did not have a record of her having a mental health issue" and they "had not seen her having a panic attack".

52. Once again there is a dispute as to whether these comments were made, but also a dispute as to the tone of the meeting. Mr Russell Smith and Ms Phillips maintain that it was not inappropriate to discuss concerns about the claimant's work, and that they were concerned about as is exemplified by Ms Philips reaction to the claimant becoming upset. In essence they contend that this is a paradigm example of the "duty of care" approach identified by the respondent, and that the claimant has conflated the fact of her subjective upset with a breach of the duties owed under the Equality Act. The conduct of the meeting caused the claimant to become upset and the essence of her complaint appears to be encapsulated in the extract of the text set out above. The conduct was clearly "unwanted" in that it caused the claimant to become upset. However the reason for the conduct was the concern about her work and for the reason set out above that is not a reason related to her disability. (We reiterate that although the claimant's case in general was that her disability did not cause her to make mistakes she at some points in her evidence appeared to suggest that it had; but there is no medical evidence before us which would support any such causal link).

53. In our judgement the respondent's analysis is correct and in the absence of the conduct being related to the disability the claim for harassment must fail. Similarly even if regarded as unfavourable treatment for the purposes of s15 we cannot see that it was because of something arising from disability and it follows that that claim must also be dismissed.

<u>"Stress head" (Harassment/Discrimination arising from disability)</u>

54. The next allegation it is an allegation that in September 2015 the second respondent referred to another member of staff as a "stress head". There is a dispute of fact as to whether this comment was made. Mr Russell Smith has no recollection of it and denies that this is the type of comment he would make. There is no independent evidence supporting either account. In the light of the concerns we have over the accuracy of the claimant's account in respect of other allegations we are not satisfied that she has proved on the balance of probability that this comment was made as alleged.

"Aspergers" comment (Harassment/ discrimination arising from Disability)

55. The next allegation of work is of Ms Phillips asking claimant "Is that your Asperger's playing up?" and laughing on 4 January 2016. Once again there is a dispute of evidence about this. Ms Phillips denies having made the comment. The respondent points out that that stage the claimant had not had a diagnosis of Asperger's and so that it is extremely unlikely she would have made any such comment. The claimant insists it was made. On balance we prefer the evidence of Ms Phillips and are not satisfied that on the balance of probabilities that the clamant has established the factual basis of this allegation. In any event the respondent submits, correctly in our judgement, this even if said and even if fulfilling the other aspects of s26 and/or s15 it is not "for a reason relating to" the claimant's disability nor is it something arising from the claimant's disability as (as is set out above) Asperger's is not a claimed to be a disability.

Keep Reading the Self Help Books comment (Harassment/ Discrimination arising from disability)

56. The next allegation of harassment/ discrimination arising from disability is that Rachel Harding Hill told the claimant to "keep reading those self-help books" at a point between 16th February and the 23rd February 2016. On this occasion there is no dispute that the comment was made. In her submissions the claimant accepts that there may have been no intention to cause any distress but it is said that the comment was made in an open office and was heard by other colleagues. Accordingly it is said to be unwanted conduct which had the effect of creating the statutorily prohibited environment even if that was not its intention.

57. Ms Harding Hill's evidence is that she was on friendly terms with the claimant and had discussed the claimant's mental health issues with her on a number of occasions. During these conversation Ms Harding Hill had mentioned a number of methods she herself had found useful including natural treatments and also online forums and literature. These conversations were clearly intended to be helpful to the claimant and there is no complaint about them. Indeed as set out above the claimant's case is not that the comment was intended to upset or distress the claimant, but did so because of the possibility it might be overheard. However this is not how the claimant puts the claim in her witness statement. The allegation as set out at paragraph 58 is that Ms Harding Hill had not discussed the claimant's health with her previously but made the comment after a meeting with Mr Russell Smith. She sates "This leads me to believe that Tim had discussed my issues with this staff member." In this account it appears to be a complaint against Mr Russell Smith for disclosing confidential information, and Ms Harding Hill for to referring to it in the office. However, Ms Harding Hill's evidence is correct she was already entirely aware of the claimant's issues having discussed them with her on a number of occasions. If this is correct the assumption that anything had been disclosed by Mr Russell Smith is obviously unfounded.

58. In our judgment a comment made by Ms Harding Hill in the context set out above cannot reasonably be considered unwanted conduct. Even if it could be we are entirely satisfied that it would not be reasonable within the meaning of s26(4) to regard the conduct as having the proscribed effect and the harassment claim must be dismissed.

59. We find it extremely difficult to see how this allegation can be anything other than one of harassment but for completeness sake and as the claimant asserts that it is alternatively discrimination arising from disability, in our judgement we are unable to identify any unfavourable treatment, nor that even if there is unfavourable treatment that it is because of something arising from disability; and this claim must also be dismissed.

TRS ignoring the claimant on 7th March 2016 (Harassment/ Discrimination arising from disability)

60. The final allegation of harassment and/or discrimination arising from disability is of the second respondent greeting every member of staff by name on 7 March 2016. The factual basis of this allegation is in part accepted by Mr Russell Smith. In a meeting that morning he did greet every member of staff by name except the claimant. His explanation is not that he was ignoring the claimant but that unlike the other members of staff in the meeting who he had not already met that day, he had already seen the claimant had greeted her that morning. The claimant disputes this and contends that effectively he was deliberately ignoring her.

61. There is no independent evidence in support of either version of events and as, for the reasons set out above, we in general prefer the evidence of Mr Russell Smith we have concluded that on the balance of probabilities we are not satisfied that the factual basis of this allegation has been established.

Removal of work/ delay in dealing with grievance (Victimisation)

62. The final claim is victimisation. The background is that it is accepted that comments made in a meeting on 28th January 2016 and subsequently repeated in an email of the same day are protected acts falling within s27(2) (c) or (d); and that the claimant's grievance submitted on 10th March 2016 was also a protected act. In the grievance the claimant specifically requested that the "reasonable adjustment" of working from home be re-instated. The question therefore is whether there is any act after either date which is causally linked to any disclosure.

63. There are in our judgment two allegations which followed the grievance which were in one sense causally linked to it, those are the decision not provide work to the claimant whilst she was at home awaiting the outcome of the grievance and the alleged delay in the hearing of the grievance. We have addressed the issue of delay earlier but for completeness sake we will also deal with it in this context. In our

judgment both are causally linked to the grievance in the sense that "but for" the grievance there would have been no delay in the grievance process as it would not have existed, and the decision not to provide work whilst the claimant was working from home would not have been made as it arose in consequence of the grievance. As is set out below however the "but for test" is not the legal test we have to apply.

64. Dealing firstly with the delay we are entirely satisfied that the grievance was not delayed because the grievance itself had been lodged. In our judgment there is no evidence that the fact of the grievance being lodged caused the respondent deliberately to delay it. The decisions as to timing were not dictated by the fact of the grievance being lodged and therefore there is no causal link in the sense that we are obliged to consider.

65. More difficult issues arise in respect of the decision not to offer work. It is clearly a detriment in that it affects her earnings which are based in part on commission. By an email dated 22nd March 2016 from Ms Phillips it had been confirmed that the claimant would be permitted to work from home whilst her grievance was being investigated. It was pointed out that she would not be able to receive training whilst working from home. On 31st March 2016 the claimant wrote referencing the decision that had been made not to provide her with any further work as Mr Russell Smith had expressed the view that neither the training approach nor the arm's length approach was working. On 1st April Mr Russell Smith replied effectively confirmed the claimant's account of their earlier conversation assaying "..*we do not feel it is possible to offer you training whilst you are at home as you have requested and in view of our client's requirements it is not possible to submit work that is not to the highest standard*…".

66. On the face of it there is therefore a causal link between the grievance and the decision to withhold work. In consequence of submitting the grievance the claimant was permitted to work from home, but as she was working from home she was provided with no work. This is clearly a detriment to which the claimant was subjected, the question is whether it was because of the grievance. Clearly in one sense it was "but for" the grievance the claimant would not have been working from home and the work would not have been withheld. However that is not the test which we must apply. Rather we have to ask "the reason why" question and establish whether the protected act was a significant (in the sense of being more than minor or trivial) cause of the detriment.

67. The claimant refers us to the fact that in his oral evidence Mr Russell Smith stated explicitly " *I think we stopped giving her work after her grievance*", although this does not appear to answer the reason why question. The respondent submits that it was not the "reason why". The reason that work was removed from the claimant was that she was at her own request being permitted to work from home. After that decision had been made the decision to remove work was made simply because she was working from home. If Mr Russell Smith's evidence is accepted the fact that the request was contained in a grievance letter which contained assertions which were protected acts within the meaning of s27 does not make the decision an act of

victimisation because of those protected acts. To put it another way the outcome would have been exactly the same if the request had not been made in the same letter as the protected acts but separately. If this is correct the necessary causal connection is not established. We accept this analysis. It follows that there is no causal connection between the decision to withhold work and pay and the protected acts and accordingly the victimisation claim must fail.

Constructive Dismissal

68. As set out above the claimant had apparently reached the conclusion in May/June 2016 that she could no longer remain employed by the respondent and had expressly made this point in her grievance appeal letter. However she did not resign and issued the first proceedings on 9th June 2016. Things appear to have fallen into some form of limbo with the claimant not accepting the outcome of the first grievance and maintaining her position that she would not return work, but simultaneously not resigning; whilst the respondent appears to have done nothing to bring matters to a head or to have made any decision as to the claimant's employment despite the fact that she was in effect refusing to work as her grievance had not been upheld. That state of affairs continued until early November 2016 when the claimant resigned.

69. Disentangling those events to attempt to draw conclusions as to whether the respondent was in fundamental breach of contract and/or whether the claimant had affirmed the contract is not an easy task. However as is set out in more detail below the claimant is relying on the last straw doctrine to justify her dismissal and the respondent submits that she is not able to do so. If the respondent is correct her claim must fail and so it is sensible to deal with those submissions first.

70. The actual trigger for the claimant's resignation was the disclosure of documents in the existing tribunal litigation in October 2016. Those documents included the responses to the claimant's grievance which had been provided to Ms Watkins but not previously seen by the claimant. Some of the comments of Mr Russell Smith in particular offended her deeply. These include "*alleged panic attacks*", "*a wall of accusation and innuendo* ", "*an exercise to excuse her substandard work and extract compensation.*." amongst others. In her witness statement (para 94) the claimant states that on reading these documents "*It was also and more hurtfully apparent to me that the Respondents attitudes towards me made it clear to me that I could never feel able to return to TRS Legal Costs Ltd*" , and (para 98) "*what I read destroyed my trust and confidence in the respondents such that I knew that I would never be able to return to TRS Legal Services*.", and (para 100) "*By Friday 4th November 2016, however, my upset and feelings that I could not trust them or go back hadn't changed and I knew I had no choice but to resign*." *In the pleadings (para 22) she states "Such allegations and remarks were likely to and did, seriously damage or destroy the claimant's trust and confidence and did so irretrievably. This was the final straw*".

71. The leading authority on the application of the "last straw" doctrine is Omilaju v Waltham Forest LBC [2005] ICR 481. At para 14.5 of the Judgment Lord Dyson

states "*A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents (he goes on to set out with approval a passage from Harvey*), and at paragraph 16 states ""*Although the final straw may be relatively insignificant it must not be utterly trivial…"*

72. On the face of it the remarks set out above are more than utterly trivial and would on the basis of Omilaju entitle her to rely on them as the last straw. If this is correct the tribunal would have to judge whether they were individually or cumulatively, whether in themselves or taken with other conduct, part of a breach of the implied term of mutual trust and confidence.

73. However the context in which the claimant received those documents was disclosure in the course of litigation and two questions have arisen as matters of law for the tribunal. As a point of general principle documents which are disclosed in the course of litigation that can only be used for the purpose of that litigation. In this case those documents were, on the face of it, used for a separate purpose, that is as the basis for her claim of constructive unfair dismissal. That raises two questions; firstly is it open to a party to rely on documents disclosed in one piece of litigation to found another cause of action (albeit one that had been allowed by amendment to form part of the same litigation). The second question is, even if the answer to that question is yes, whether the act of disclosing that document can amount to a last straw given that it is a requirement of litigation that the document be disclosed.

74. The respondent submits the principle as set in CPR 31.22 (1) applies to this case. Whilst there is no specific equivalent in the Employment Tribunal's own rules, the principles set out in CPR 31.22 (1) do apply in the Employment Tribunal (See McBride v Body Shop International PLC 2007 EWHC 1658 and Riddick v Thames Board Mills Ltd [1977] 2 All ER 677). The rule provides (so far as it is relevant for our purposes :-

(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

75. It follows, submits the respondent, that the documents could not be used to found the basis of a separate claim for constructive dismissal. Whilst it is always open to an employee to resign if she wishes, to found a second claim expressly on the basis of documents disclosed in existing litigation breaches this principle. Sub-section 31.22 (1) (a) does not apply as at the point the new claim was permitted by amendment the hearing in the initial litigation had not taken place; equally the court had not given permission, and nor had the respondent agreed, and it follows equally that sub-

sections (b) and (c) do not apply. It follows submits the respondent that the claimant is simply not permitted by law to rely on the documents disclosed in the litigation to form the basis of a further claim for constructive dismissal.

76. Further the respondent submits that even if the prohibition set out above does not apply, that the disclosure of a document which a party is obliged to disclose by reason of its disclosure obligations cannot be in or of itself or as part of a cumulative sequence of events be the basis of an allegation that there has been a fundamental breach of contract. As is set out above the reason for the claimant's resignation was that reading the disclosed material destroyed the claimant's trust in the respondent to such a degree that she felt compelled to resign.

77. The definition of the implied term of mutual trust and confidence is well known and it is not necessary to do more than set out the following extract from the IDS Handbook Contracts of Employment to identify it:- *"The relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties. In* Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84, EAT*, the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. By 1981 the EAT found that the term was 'clearly established' and affirmed the formulation set out in the* Courtaulds *case –* Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT*. Mr Justice Browne-Wilkinson put it this way: 'To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.'*

78. The respondent submits that in the context of this case the critical question is not whether it conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence but whether it had "reasonable and proper cause". Put simply it must have reasonable and proper cause if it acts in a way that is required by law. It follows that it must be, to use the language of Omilaju "utterly trivial" in the sense that it is not capable of constituting any part of a breach of the implied term as the respondent necessarily had reasonable cause for acting as it did in disclosing the material.

79. The claimant submits in respect of CPR rule 31.22 that the claimant is not using the disclosed documents for a "collateral purpose"; that the resignation and amendment arose from disclosure in the course of the same proceedings and that in effect once the amendment is allowed, that the documents are being used for a purpose in the same proceedings in which they have been disclosed.

80. In our judgment the respondent is correct in both submissions. The fact that the constructive dismissal claim now forms part of the proceedings in which the documents were disclosed is something of a red herring. The constructive dismissal claim is a wholly new and different cause of action from the disability discrimination claim in which the documents were disclosed. They were then used specifically as

the last straw to justify resignation and found a wholly new cause of action. It follows in our judgment that the claimant has not used the documents "only for the purposes of the proceedings in which (they were) disclosed", and their use must therefore breach the prohibition contained in the rule. As none of the exceptions apply the use of those documents in the constructive dismissal claim is prohibited; and if their use is prohibited there is as a matter of law no last straw upon which the claimant can rely. It follows automatically that the constructive dismissal claim must be dismissed.

81. Even if we are wrong about that the respondents' second submission appears to us equally well founded. In addition to the passages from Omilaju set out above at paragraph 21 Lord Dyson held " *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect*.", and at paragraph 22 "*Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely , but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test …. Is objective*."

82. In our judgment where an employer is bound by law to act in a particular way in the course of litigation brought by the employee (here meeting its disclosure obligations) that action must to use the language of Omilaju be "entirely innocuous" as it has no choice. Objectively it can do nothing else and must therefore objectively have reasonable cause to act as it did. In our judgment the act of an employer doing something it is required by law to do is simply not capable of amounting to a last straw and we would therefore have equally dismissed the claimant's claim for constructive dismissal on this ground as well.

Holiday Pay

83. The claimant's claim for holiday pay falls into two parts. Firstly the claimant contends that her holiday pay for the holiday years 2014 and 2015 was only based on her basic pay and did not include commission. It is not in dispute that this is correct, nor that the claimant is in principle correct that the holiday pay was incorrectly calculated by the failure to include commission in the calculation, save as is set out below that it is not accepted that this is correctly calculated by reference to the calendar year, nor that the right to commission accrues in respect of the full regulation 13 and 13A annual leave provision. The claim set out on this basis is claimed from 30th January 2014 and until 31st December 2015 and amounts to £9810.01. The second part relates to 2016 and is based on the allegation that she had pro rata 23.5 days untaken leave at the point of her resignation and is entitled to that holiday for that period calculated to include both basic pay and commission.

84. In respect of the first the respondent submits that parts of the claims are out of time. They fall foul of the principle set out by Langstaff P in the well known case of Bear Scotland (and others) v Fulton (and others) [2015] IRLR 15 in that there are gaps of more than three months between the amounts claimed and that the earlier claims are therefore out of time. The respondent submits that the claimant is only entitled to

have her holiday calculated with commission included in respect of the regulation 13 leave. Secondly the regulation 13 leave is deemed to be taken first. Thirdly the holiday year began on 18th July not 1st January (for the reasons set out below in my judgment the respondent is clearly correct in this assertion). In consequence of these three propositions (all of which are in our judgment correct) as there is a gap of more than three months between the last regulation 13 leave in the leave year 2014/15 and the first in the leave year 2015/16 (30th April 2015 to 24th September 2015) the earlier claims are out of time. In the holiday year 2015/16 the claimant had taken 10 days holiday. It is accepted that the claimant is owed the unpaid commission element of her holiday pay in respect of those 10 days. There is however no statutory or contractual right to carry over untaken leave any untaken leave is therefore lost. The respondent therefore accepts that the claimant is owed the balance of her holiday pay in respect of unpaid commission for ten days.

85. In relation to the second part of her claim the claimant seeks the accrued but untaken leave at the point of her resignation. The first question is how much untaken leave she had. The claimant alleges that the correct figure is 23.5 days which is explicitly based on the proposition that the holiday year matched the calendar year and began on the1st January. However clause 7 of the claimant's contract of employment specifically provides that the holiday year commences on 18th July 2011. It follows in our judgement that the respondent is correct that she had untaken accrued pro rata leave of 7.29 days at that point. She was paid 8.5 days holiday pay calculated at her basic rate following her resignation. The respondent contends that this extinguishes her claim as from 31st March 2018 she was not working and therefore not entitled to commission. If this is correct her final holiday pay was correctly calculated and there is no outstanding holiday pay other than that set out above.

86. The claimant simply submits that the amounts are payable by reference to the Schedule of unpaid holiday by reason of the admitted fact that commission has not been included in the calculation.

87. In our judgment the respondent is correct as to the first element and the claimant is accordingly entitled to 10 days holiday pay calculated to include commission pay and to receive any shortfall.

88. In respect of the second element the position is more difficult. The claimant had a contractual right to receive both basic pay and commission. After 31st March 2016 the respondent gave her no work and paid her basic pay but not the commission she would otherwise have received. On the face of it the claimant would appear to have an arguable claim to unlawful deduction from wages in respect of the commission payment. However no such claim has been advanced or argued before us and we have no way of knowing whether if it had been and we had heard full argument we would have upheld such a claim. It does not appear to us safe or fair to simply assume that such a claim would have been successful, and in the absence of determining it, it appears to us although without enthusiasm, that we are bound to hold that the respondent is correct to assert that the claimant's final holiday pay was correctly calculated.

Direction

89. The claimant's claim in respect of unpaid commission for 10 days holiday pay has been upheld. If the parties are unable to agree the appropriate figure within 28 days they should notify the tribunal and the case will be listed for a remedy hearing.

Judgment entered into Register
And copies sent to the parties on

.....6 November 2018.....

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for Secretary of the Tribunals

_____

EMPLOYMENT JUDGE Cadney
Dated: 1st November 18