EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
	v
Ms N Lifac	**Zoyo Capital Ltd (1)**
	Thomas Brennan-Banks (2)
	Ms Wei Wang (3)
	Mr D Powell (4)

Heard at: London South Employment Tribunal via CVP

On: 16-20 November 2020

Before: **EJ Webster**
Ms Christofi
Ms Smith

Appearances

For the Claimant: **Mr T Moore (Counsel)**
For the Respondent: **Ms S Ismail (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unlawful deduction from wages is upheld for the period from 20 February 2019 – 23 July 2019.

2. The Claimant's claim for discrimination arising out of disability is upheld in relation to the requirement for her to go off sick between 22 February 2019 and 23 July 2019 is upheld against the First Respondent.

3. The Claimant's claim for discrimination arising out of disability is not upheld in relation to the conduct of the 14 March 2019 hearing.

4. The Claimant's claim for breach of the duty to make reasonable adjustments was withdrawn at the hearing and is dismissed accordingly.

5. The Claimant's claim for direct disability discrimination regarding her being placed on sick leave between 22 February and 23 July 2019 is upheld against the First Respondent.

6. The Claimant's claim for direct disability discrimination regarding the comment at the meeting on 14 March 2019 that the Claimant transitioned from contractor to employee in order to set up the 1st respondent and sue them for discrimination since summer 2018 is upheld against the First Respondent.

7. The remaining direct discrimination claims arising out of the meeting on 14 March 2019 are not upheld.

RESERVED WRITTEN REASONS

The hearing

8. The hearing was held by way of CVP with the agreement of all parties. The Tribunal Judge and members were all remote as well as the parties. At the outset of the hearing the Tribunal went through the draft List of Issues that had been agreed between the parties. During discussions with the parties a couple of points were clarified in that the claimant confirmed that the something arising out of her disability that she was relying upon was that the respondent believed she was experiencing a bipolar episode. Further, after the Tribunal had read the papers, the respondent confirmed that it was not questioning the claimant's disability. During submissions, the claimant's representative confirmed that he no longer sought to advance the failure to make reasonable adjustments claim. All these amendments are reflected in the List of Issues set out below.

9. It was agreed that we would not deal with remedy save in relation to the unauthorised deduction from wages claim where the figures were agreed by the parties though liability was disputed.

10. The Claimant has two separate tribunal claims against the respondent; the one that is decided here and a subsequent claim regarding her dismissal. Although unusual, the claims are being dealt with separately as agreed by a different

Judge prior to the hearing. It was in the interests of the overriding objective to proceed as the matters were largely separate and the parties were prepared for the 5 day hearing before this tribunal. To have adjourned at this late date would have put both parties to a huge amount of unnecessary cost and wasted time.

11. The Tribunal were therefore very clear with the parties that they would only make findings of fact relevant to the issues to be decided before us and not regarding the performance management process and dismissal which followed.

12. It was agreed that where witness statements or evidence addressed these issues, if they were not cross examined on or challenged, then this ought not to be taken as agreement by the other side that they were true; simply that they were irrelevant to the proceedings at hand. Likewise, this Tribunal would try, insofar as is possible, not to stray into factual conclusions about those processes.

13. The tribunal heard from the claimant and respondents 2, 3 and 4. All provided written witness statements. We also had a 1047 page bundle to which the respondent added further documents that were produced at a late stage with very little explanation. However due to their relevance the tribunal accepted them.

14. The evidence and submissions were completed on 19 November and the tribunal carried out its deliberations on 20 November. It was agreed that the tribunal would deal with liability only.

The Issues

Unlawful Deduction from Wages

15. What salary was properly payable to the Claimant by the First Respondent on each monthly payment date in respect of the period between 19 February and 23 July 2019, taking into account the Claimant's state of health (including her mental health) and any information provided to or otherwise available to the First Respondent?

16. To what extent was the amount actually paid to the Claimant on each monthly payment date in respect of that period less than the amount which was properly payable to the Claimant on that date?

Unfavourable Treatment because of Something Arising in Consequence of Disability – s 15 Equality Act 2010

17. Did the First Respondent's requirement that the Claimant go on sickness absence from work from 19 February 2019 until 23 July 2019 treat her

unfavourably because of something arising in consequence of her disability namely that the respondents believed that she was experiencing a bipolar episode.

18. If the answer to 16 is yes, in so requiring the Claimant to abstain from work from 19 February 2019, did the First Respondent have a legitimate aim and if so what was that legitimate aim?

19. Was the requirement to go on sickness absence from 19 February 2019 a proportionate means of achieving that legitimate aim?

20. Did the First Respondent's conduct at the without prejudice meeting on 14 March 2019 treat the Claimant unfavourably because of something arising in consequence of a disability namely that the respondents believed that she was experiencing a bipolar episode? The behaviour relied upon is:

(i) Refusing the send the claimant for a medical assessment to ascertain if she was fit to work;

(ii) Stating that the Claimant transitioned from contractor to employee in order to set up the 1st respondent and sue them for discrimination since summer 2018.

(iii) Pressuring the claimant to accept a derisory settlement offer by saying that they had uncovered more serious evidence since her 15 February performance review letter

(iv) When discussion did not lead to a successful agreement on settlement terms, by placing the Claimant again on mandatory sick leave, despite the fact she was fit to and well to work, and had supporting evidence from doctors to indicate this.

21. If the answer to 19 is yes, did the First Respondent have a legitimate aim and if so what was that legitimate aim?

22. Was the First Respondent's conduct at the without prejudice meeting 14 March 2019 a proportionate means of achieving that legitimate aim.

Direct Disability Discrimination

23. Did the First Respondent, because of a disability, treat the Claimant less favourably than the First Respondent would treat others who are non-disabled or have a different disability and whose circumstances are not materially different to the Claimants when:

a. placing the Claimant on Statutory Sick Pay from 19 February to 23 July 2019; and
b. By the conduct of the without prejudice meeting 14 March 2019. The behaviour relied upon at the meeting is:

(i) Refusing to the send the claimant for a medical assessment to ascertain if she was fit to work;

(ii) Stating that the Claimant transitioned from contractor to employee in order to set up the 1st respondent and sue them for discrimination since summer 2018.

(iii) Pressuring the claimant to accept a derisory settlement offer by saying that they had uncovered more serious evidence since her 15 February performance review letter

(iv) When discussion did not lead to a successful agreement on settlement terms, by placing the Claimant again on mandatory sick leave, despite the fact she was fit to and well to work, and had supporting evidence from doctors to indicate this.

Personal Liability

24. Has either the Second, Third or Fourth Respondent carried out any discriminatory acts against the Claimant under paragraphs 16-22 above that would be treated as having been done by the First Respondent by any of them acting in the course of his or her employment?

25.If the answer to 23 is yes, are either of the Second, Third or Fourth Respondents liable under section 110 of the Equality Act 2010?

The Law

26. s13 Employment Rights Act 1996 — Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision” , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

27. S 15 Equality Act 2010 - 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.

24. **S 13 Equality Act 2010 Direct discrimination**

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

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

Factual findings

Overall observations

28. This was a difficult claim for everyone involved and emotions ran high. We as a tribunal have found it difficult to treat the evidence of any of the witnesses with certainty because, unfortunately, they all appeared to be unreliable witnesses for different reasons.

29. The respondent witnesses have all taken the situation personally from the outset and have projected onto the claimant a machiavellian plan that is simply not supported by the evidence we saw. In our view their approach is born out of a combination of being a young company with little management experience and a lot at stake and an absolute refusal at almost every stage that we have seen, to accept that they may have made mistakes, or that on occasion, others, including the claimant, may be right. This refusal has turned what could have been a fairly simple situation into a messy one. During cross examination both Mr Powell and Mr Brennan Banks frequently failed to answer simple questions and gave lengthy apparently authoritative answers about areas for which they clearly had no expertise. Despite this they felt that they were right without question. Examples of this include issues relating to the definition and importance of the claimant's employment status (which they clearly misunderstood and continue to misunderstand) as well as their approach to medical evidence. They also suggested at various points that they had not reviewed the evidence in the bundle properly until this hearing was underway. We do appreciate that they are very busy, however their decision to change their evidence and only disclose very important evidence at a very late stage was unhelpful and did not assist their credibility before us.

30. However we also note that the claimant has certainly contributed to this messy situation. She frequently wouldn't answer questions, would say what she wanted to say as opposed to respond to the question she had been asked, and during her evidence before us frequently referred to matters that were irrelevant to the question and had no bearing on the proceedings other than to confuse the answer, or attempt to wrongly malign the respondents. We believe it is more likely than not from the transcripts we have seen that she behaved this way

during the pertinent meetings and discussions and conclude and that this in no small way contributed to the defensive attitude of the respondents throughout their subsequent dealings with the claimant.

Background

31. The respondent is a small start-up investment fund. The three individual respondents were directors. There is a fourth director but he played no part in these proceedings or the events we are deciding. As part of the process in setting up such a fund, the claimants needed to get FCA approval. To that end, they employed the claimant who works as a regulatory consultant.

32. The claimant was diagnosed with bipolar disorder in 2007. The formal diagnosis of the 'type' of Bipolar disorder has evolved and the exact diagnosis that was confirmed in 2019 is Bipolar Type II with an underlying hyperthemic personality. In addition she has bipolar mood disorder. She has continued to have that diagnosis until the hearing before us and we believe that it is a lifelong diagnosis according to the medical evidence we saw. The claimant receives treatment for it and is under the care of various consultants.

33. Part way through his evidence Mr Brennan-Banks changed his case and said that he no longer believed the claimant had bipolar disorder but now believed the opinion of one of the claimant's consultants that she may have a personality disorder instead. Despite Mr Brennan Banks' belief in his expertise at diagnosing the claimant despite whilst not having any medical qualifications, his counsel sought to distance her submissions from this and said that they did not seek to derogate from their acceptance that the claimant was disabled by reason of bipolar disorder. We record here that we also conclude that the claimant was disabled for the purposes of the Equality Act 2010 as she has an impairment (namely Bipolar disorder) which has a long-term impact on her ability to carry out day to day activities. Any doubt cast on that diagnosis during the hearing before us was debatable and we suspect a largely irrelevant (to us in terms of assessing whether the claimant has a disability) re-labelling exercise.

34. There were issues regarding the claimant's employment status. The respondent wanted to employ her as a self-employed consultant and this is how the role was recruited for via any agency. However, due to the changes brought about by IR20, the claimant was not willing to work as a self-employed contractor as she felt that the tax position was sufficiently uncertain and she had wound up her own personal company which would have enabled such an arrangement. This led to a disagreement with the recruitment agent and to the respondent having to pay a significant fee to the agent because they then entered into an employment contract with the claimant. The respondents were upset about this as the claimant was then the only employee at the first respondent with everyone else working as a consultant. However, the respondent was sufficiently keen at this stage to want to keep the claimant that

they agreed to her becoming an employee. At this stage their anger was aimed at the recruitment agent due to the large fee they had to pay.

35. We accept Ms Wang's evidence here that their main and overriding aim throughout their dealings with the claimant was to get the company an FCA licence so that they could start trading. Without that approval they could not start earning any money.

36. During the last quarter of 2018, the claimant started to experience difficulties with one colleague in particular and various grievances were brought. As these facts start to bleed into the reason for the dismissal, we make bare findings regarding these matters here.

37. The claimant brought a grievance against her colleague. That grievance led to Mr Brennan Banks attempting to organise mediation between the two colleagues. At the mediation, Mr Brennan Banks found the claimant's behaviour difficult and confrontational. The claimant describes her colleague's behaviour in the same way. Then, a consultants' firm also raised concerns about the claimant's competency to do her role. Mr Brennan Banks started to do an investigation into the claimant's performance.

38. The result of that investigation was the letter at page 230 inviting her to a performance review meeting. The letter listed 11 points of concern, had 19 attachments and totalled (from the bundle) 70 pages. The concerns are serious and include issues from her ability to do her job to her communications style and volume as well as her office attendance. It is clear from this letter and the preceding emails and correspondence that the respondents are frustrated by the claimant and very worried about her ability to do the crucial job that they have employed her, at great cost (she was the highest paid individual) to do. In addition they were concerned that she was creating difficult working relationships within the team.

39. Their concerns were to an extent evidenced in the bundle, in particular the claimant's voluminous emails and the quite serious allegations she was making about her colleagues including the respondents. One of the concerns that the respondents had was that the claimant seemed to them to be misreporting conversations and exchanges between her and colleagues to the extent that they, according to their evidence to us, had lost trust in the claimant. That lack of trust is evidenced by the fact that they recorded both the meeting on 15 February without her knowledge and the subsequent without prejudice meeting on 14 March 2019. We make no findings as to the veracity of their concerns about the claimant's ability to do her job as this was not an issue for us to decide today. However, we do think it is appropriate to find that at this stage the respondent did not trust the claimant, had serious and numerous concerns about her ability to do her job and her detrimental impact on relationships within the team.

Telephone conversation on 18 Feb between Mr Brennan Banks and the claimant

40. On 15 February, the respondent decided to invite the claimant to a capability hearing. They provided her with a significant amount of documentation and allegations and asked her to attend a meeting on Tuesday 19th February. That prompted the claimant to call Mr Brennan Banks on Monday 18 February to ask for more time to prepare for the performance review meeting. Mr Brennan-Banks made a note of that call at pg 315. We accept that the note was made at the time and recorded what the claimant said to him in note format. It does not (as accepted by Mr Brennan Banks) record much if anything of what he said in return. It is also clearly not a full note of a lengthy and complicated conversation. We do not accept that Mr Brennan Banks went back and created this document some time after as suggested by the claimant. It does miss out various points but that makes it more likely to be a contemporaneous as opposed to a somehow doctored note.

41. We accept that during this conversation Mr Brennan Banks was largely sympathetic towards the claimant. He has been very open in telling the tribunal that his wife has been diagnosed with a similar condition and we find that his approach to the conversation was to listen to the claimant and find out what was happening as the claimant was expressing serious matters (such as having been catatonic at her daughter's 18th birthday party) and not having slept for 3 days.

42. We conclude that during that conversation, the claimant told Mr Brennan-Banks that she was not well and even if that is not the case that it was reasonable for him to believe she was unwell because of what she was saying during the call and how she was expressing it. We reach this conclusion for several reasons.

43. Firstly, Mr Brennan Banks' note is clear that she makes reference to being catatonic on her daughter's 18th birthday talking about having been unwell and the fact that she hasn't had any sleep for 3 nights and discussed having a hypermanic episode. This is clear from the note and also concurs with the claimant's evidence on this conversation. Whilst she may have been talking about what can cause an episode as opposed to asserting that she was experiencing one we find it plausible that she was not particularly clear in how she conveyed information about her health at this point. It is also clear that she is discussing her health in relation to the immediate issue of the performance review which was happening the next day, not solely in relation to the events regarding Dr Dunlop in the last quarter of 2018 as she now asserts.

44. We believe that her intention in telling Mr Brennan Banks about her condition was to obtain more time to respond to the performance review. In effect she was seeking to obtain a 'reasonable adjustment' so that she could properly prepare. This was entirely reasonable and plausible in the circumstances. She

had not slept for 3 nights and she was explaining to him that in those circumstances, given her illness, she needed more time. We accept however that this was not a straightforward conversation. The claimant's manner in divulging important information when stressed appeared to be often incoherent and not linear. We believe it is likely that there was no clear delineation between her account of what was happening to her at that time of the conversation and the ill health she had been suffering due to her concerns around Dr Dunlop. We therefore accept that at this time she either said that she was ill or gave Mr Brennan Banks a confusing account of what was happening such that it was reasonable for him to think that she was unwell and was telling him that she could not continue with the performance review and could not come into work at that time i.e. she was too unwell to work.

45. Our conclusion in this is also supported by the transcript of the without prejudice conversation on 14 March (pg408-459). In that conversation the claimant clearly also discusses that she has been significantly unwell. The fact that she said she could not carry on being at work is confirmed by pg 441.

TBB " You told me you could not work again"

C "No that was in the context of what I thought it was a discussion at, about me .. it was a without prejudice discussion… "

TBB "It was not, you know it was not…."

46. There is further confirmation of the fact that she said she could not come back to work at page 449.

"This was a small company and I thought I could cope and I couldn't."

47. In addition, at pg 408 she accepts in the first paragraph that,

"When I said that I didn't think I'd be able to work etc. so just put that as a bookmark."

48. Given the way that the claimant has communicated throughout these proceedings and from the complicated way she sometimes communicated during the meetings for which we have been provided with transcripts, we find it more plausible than not that she told Mr Brennan Banks during that call that she was unwell and that Mr Brennan-Banks reasonably concluded that she was too unwell to work.

49. Further, based on the content of the phone conversation with Mr Brennan Banks, the comments she herself has made about what was said in the conversation at the without prejudice meeting in March and the fact that she went to the GP and was prescribed diazepam all tend to show that the claimant

was unwell on 18 February. We accept, that the doctor does not believe she is experiencing a hypermanic episode at this time and that she was not experiencing an exacerbation of her disability, however she is clearly unwell through possible stress and anxiety and definite lack of sleep brought on by the impending performance review. Her husband was clearly worried enough about her that he wanted her to attend the doctor (paragraph 31 of her witness statement).

Letter of 22 Feb

50. On 19 February Ms Wang wrote to the claimant and confirmed that in light of her conversation with Mr Brennan Banks the claimant would be placed on sick leave and receive SSP. (p318). In that letter Ms Wang asks the claimant to let them know when she would be well enough to attend an OH appointment and also to send a doctor's letter confirming that she has the condition of Bipolar. We find that this letter was sent in good faith with Ms Wang relying on Mr Brennan Banks' reasonable understanding of the conversation on 18 February.

51. In response the claimant sent the letter from her GP dated 20 Feb 2019 (pg 322) which confirms her Bipolar diagnosis. The attachments which state that she was well at the time were not sent to the respondent. The letter that was sent does not refer to her health at the time it just confirms her diagnosis which is what the claimant had been asked to do. The attachments however that we have seen, show that the doctor felt she was not unwell on both 18 February and 20 February though we discuss in full the note of 18 February properly below. On 22 February the claimant wrote an email to Mr Brennan Banks saying as follows:

"During our phone conversation between you and I on Monday I did not say or imply that I considered myself unfit to work (i.e. I did not self-certify myself as sick). I have not declared myself to you or others at you as unfit to work before or since that call. Further I did not state or imply to you that my doctor and I discussed my current fitness to work nor implied or stated that the doctor stated that I was unfit to work or that she issued a sick note. As you will recall my reasons for calling you was simply to request more time to prepare my response to the allegations made by the company regarding poor performance and dishonesty, as at the time of the call (mid morning) I had been unable to even start preparing the formal response due that afternoon having been deeply upset over the weekend about my treatment and unable to sleep for three consecutive nights in connection with the matter."

52. This clear communication is backed up by the doctor's record that she was not, when she sent the email, unwell.

53. However, we accept that this is a temporary situation and that by the time the claimant writes the letter on 22 February, we have no evidence to suggest that she is not well enough to attend work even if she as unwell on 18 February.

The doctor's note on 20 February does not suggest any continuation of the symptoms complained of on 18 February and it is clear that she remains well.

54. We therefore consider that although it is reasonable to conclude that the claimant was stressed at this time and possibly very anxious, there is no medical or other evidence to suggest that the claimant was so unwell she could not work.

55. We accept that the letter was a clear indication that the respondent wanted the claimant to attend an OH appointment. Whilst we accept that the claimant's response on 22 February does not expressly deal with this point, we accept that in the circumstances it was reasonable for her not respond to that point in particular because she felt that the most pressing issue was to correct any misconception that she was in fact so unwell she could not work .

Events leading up to the without prejudice meeting on 14 March

56. Subsequently the respondent sent the letter dated 25 February reiterating that they thought she should remain on sick leave and saying that they wanted her to see an OH specialist and asking her to get in touch when she was ready to do that.

57. The claimant called the respondent on 27 February and spoke to Mr Powell. There is a huge dispute as to what was said during that call but Mr Powell accepted in evidence before the tribunal that the claimant had said she would be willing to go to an OH doctor during that conversation. No action was taken by the respondents to organise an appointment at that time.

58. A note of this conversation was disclosed late to the tribunal. The explanation received was that Mr Powell had not noticed that this key document was not in the bundle because he was very busy. We find that Mr Powell's approach to these proceedings was disappointing. Further, Mr Brennan Banks, when originally questioned about this meeting said he had not been a participant despite knowing that he had been in the room with Mr Powell whilst he was having that conversation and that Mr Brennan Banks wrote the note of the conversation that we now have. Whilst he did not lie, his answer was at best equivocal and certainly unhelpful to the tribunal.

59. Mr Powell states that because of the claimant's very personal disclosures in the call (which were very upsetting and need not be repeated here), he believed that the claimant was unwell and that he could not let her return to work. We accept that he believed that she was unwell but he had no medical evidence on which to base this and he did not take the claimant up on her offer to see an OH specialist during this conversation.

60. We conclude that the claimant was not referred to OH at this time because on 1 March the claimant emailed the respondents stating that she was willing to enter into a without prejudice conversation and also saying that she would be happy to attend an OH meeting beforehand if they wanted to.

61. They responded on 5 March stating that they were willing to have the without prejudice meeting with her on the basis that she confirms she is well enough to attend and carry out that meeting. By doing this. they unequivocally waive the need for her to see an OH whilst they are having without prejudice discussions.

62. We make the following observations on this situation:
    (i) There is no criticism from the tribunal that the parties agree to the without prejudice meeting and hope to try and sort it out that way. We find that both parties entered into that situation in good faith.
    (ii) It follows then that it was agreed in good faith that any referral to an OH doctor to assess her ability to return to work was unnecessary at this stage. It made commercial sense for the respondent to avoid unnecessary costs and it meant the claimant did not have to go through the process of seeing another health professional. Both agreed to this course of action.
    (iii) We conclude that the respondent at this stage trusted the claimant's own diagnosis of her health enough that they allowed her to attend this meeting. The respondent appeared at the hearing to feel that they were entitled to have made a blanket decision about the claimant's health that if she was not well enough to go through a performance review she was therefore not well enough to attend work. However, they were also willing to accept that she was well enough to go through a different difficult meeting because she said so. Further they have held up her behaviour at this meeting (robust and fully able to engage with them) as proof that it was acceptable for them to speak to her in the way that they did (discussed below) and to waive the need for her to see an OH doctor before attending the meeting. We accept that the claimant was well enough to attend the meeting and that the respondent considered this to be the case at the time.
    (iv) We find that the respondent waived any contractual requirement for the claimant to attend the OH before being paid by saying in the 5 March email that the claimant did not have to see an OH specialist at this time.

Without prejudice meeting – 14 March 2019

63. There was a full transcript of the meeting in the bundle and we base our findings about this meeting primarily on that transcript. This was a meeting of many phases. There were parts that were civil and constructive, other parts that degenerated into threats and inappropriate behaviour on both sides.

64. A general observation of the claimant's behaviour during this meeting was that it fluctuated. We consider that she had a list (possibly not a physical one) of

claims that she had either been advised she may have or thought she may have and possible financial values attached to those claims. Unfortunately, she started the meeting by telling the respondents that she had legal claims against them and that the purpose of the meeting was to avoid those claims. She also clearly told them that she had significant amounts of legal insurance to cover her if she did need to bring those claims. It is not clear what the purpose of these two statements would be save to indicate to the respondent that she was serious about enforcing her rights whatever those rights may be. Essentially, she was willing to enforce what she believed to be her rights if a resolution could not be found. However, the way in which she subsequently articulated her possible claims, their possible origins and their possible values was confused and not very linear for much of the meeting. She kept talking about seemingly irrelevant matters and had to keep being brought back to the point of the meeting by the respondents. We accept that it may have been a frustrating meeting for the respondents in that regard. However, we conclude that despite this behaviour, her genuine aim in the meeting was to obtain a settlement and leave the respondent.

65. A general observation of the respondents is that they started the meeting hoping to that they could ensure that the claimant left without the need to go through the formal capability process that they were about to embark upon. That was a very attractive proposition to them. They did not approach this as a meeting with a potentially vulnerable unwell individual who is having a bipolar episode, but as a meeting with an adversary who they were convinced was somehow out to sabotage their business. This is evidenced by the fact that they recorded the meeting without telling the claimant and they all three attended the meeting. Despite this behaviour, we consider that their genuine aim at the beginning of the meeting was to try to obtain settlement.

66. The meeting degenerated at various stages. We have described above why we think that the claimant's initial starting point for the meeting was unhelpful and resulted in a very defensive attitude from the respondents. However, we make no criticism of any of the parties for the conversations they had about the possible value of any settlement and whether they were or were not willing to accept or settle a discrimination claim which the respondents disputed. That was, after all, the purpose of the meeting even if it wasn't what was achieved.

67. We do not find that the respondent put pressure on the claimant to accept a derisory offer when she was not actually offered a specific sum of money at the meeting nor expected to give them a decision that day or for several weeks thereafter. The reference to additional performance shortcomings/allegations whilst unsettling for the claimant was no more than part of the general discussion between them about possible claims and their possible strengths and weaknesses – i.e. both parties set out what they felt were their relative bargaining positions albeit that the claimant says that she felt it was threatening at the time.

68. Likewise, we find that whether or not the claimant left as a result of the negotiations was part of the discussion. We accept that there was some 'brinkmanship' in operation as to who was going to agree/suggest that the claimant left as part of the deal. However, it was clearly in both parties' minds that the claimant would leave – we understand the nuance of the claimant not being seen to be resigning or too keen to leave because of the value attached to that, but it was a bargaining position, not a threat that the claimant was definitely going to be dismissed.

69. We move on then to specifics of the allegations against the respondent that are included in the claim and/or that we were taken to in evidence by both counsel.

70. We conclude that the respondent did accuse the claimant of withholding her bipolar diagnosis at least partly in order to set them up by becoming an employee. The respondents believed at the time that by becoming an employee the claimant had gained additional rights in respect of discrimination claims. The premise for their accusation was that she had become an employee without telling them about her condition just so that she could bring a claim against them once she had disclosed her condition. The tribunal concludes that this was an objectively offensive thing to say to someone in the circumstances. They were accusing her of lying or deceitfully withholding information when all she was doing was not telling them about her health condition. At the meeting Ms Wang also raises that they felt set up and uses the terminology of 'playing games' as if the claimant was using her health to set the respondent up.

71. Our findings in this respect are reinforced and compounded by the fact that the second and third respondents reiterated their allegations before the tribunal despite having had advice from lawyers who have no doubt told their clients that all workers are protected against disability discrimination not just employees. Mr Powell maintained that he believes that the claimant had a moral obligation to disclose her condition to them. To what end it is not clear. It is worth noting that his behaviour towards her would seemingly reinforce why most people with disabilities choose not to disclose them to their employers unless they have to. The claimant was under no obligation to disclose to them that she had bipolar. She chose to do so in order to obtain reasonable adjustments to a disciplinary process. Their anger at her for not doing so coloured their approach to her thereafter. Mr Powell's anger before the tribunal was palpable and we consider that it was likely that he behaved in a similarly aggressive way at the meeting with the claimant. His comment that 'nobody fucks with Zoyo' was clearly aimed at the claimant given that she had mentioned possible claims against the respondent. He was angry and he showed it. This was not, as he has stated, just a repeat of a comment he made to the whole team about a third party. It was made in a context whereby it could only have been aimed at the claimant given that she was referring to legal action against them.

Occupational Health referral/report

72. We don't think that there was any delay from anyone once the settlement discussions had collapsed. There was no delay in referring the claimant to OH nor by the claimant in actually attending the appointment.

73. Much was made of the claimant's amendments to the subsequent OH report. However, the delay was only 10 days and it is the right of the claimant to consider the report and suggest amendments. We do not accept the respondents' evidence that indicated that this made the report unreliable or incorrect. This was their choice of OH doctor and he concluded unequivocally that the claimant was fit to work and had been fit for the previous 6 months. We were not provided with evidence to question this doctor's professionalism and had he disagreed with the claimant's amendments we are sure he would have said so and not signed the report in his name. We make the same observations in respect of all the medical evidence we were provided with in this case. Whilst we accept that it is common for GPs to have to rely on the facts as presented to them by their patients, we do not accept that this means that they would falsely say that someone was fit to work when they were not. To suggest such unprofessionalism across 5 different doctors shows the level of general disregard for other peoples' opinions that the respondents had in general.

Conclusions

Unauthorised deduction from wages

74. We uphold the claimant's unauthorised deduction from wages claim because there is clear evidence that she was well enough to work from 20 February 2019 and no contractual right for the respondent to cease paying her in those circumstances.

75. The claimant's contract of employment states at clause 11 that:

"11.1 You will be entitled to SSP subject to and in accordance with the statutory rules. Your qualifying days of employment for the purposes of SSP are Monday to Friday. Any additional sick pay paid to you by the Company will be entirely at the Company's discretion.

11.2 You agree to consent to medical examinations (at the Company's expense) by a doctor nominated by the Company should the Company so require."

76. We have concluded that the claimant was not sick from 20 February onwards. She was therefore not entitled to SSP because she was not unwell in accordance with the statutory scheme.

77. We also conclude that she agreed to medical examinations by the respondent's doctor but in any event, payment of any kind was not conditional on that agreement. Such conditionality is entirely absent from this clause and cannot be inferred or implied from any aspect of the contract.

78. The claimant's contract of employment does not allow for non-payment of her wages in any other relevant clause.

79. We considered the two cases that both the claimant and respondent took us to namely Agarwal v Cardiff University & Anor [2018] EWCA Civ 1434 and Beveridge v KLM UK Ltd UKEAT/1044/99.

80. Beveridge concluded that if an employee is willing and able to perform work in accordance with the contract, the employer has an obligation to page wages unless there is a contractual right not to do so. We have concluded that from 20 February the claimant was fit and able to carry out her work. She indicated this very clearly in her letter dated 22 February and the medical evidence we have unequivocally confirms that she was fit to work on 20 February and thereafter. The expert reports thereafter all confirm that she had not recently had a bipolar episode and this includes the respondents' own occupational health report.

81. Counsel for the respondent submitted that they had two conflicting accounts – that of the conversation that Mr Brennan Banks had with the claimant on 18 February and the email from the claimant. This was also reinforced by Mr Powell's conversation with her on 27 February. She stated that the respondents remained sufficiently concerned and that as an inexperienced employer all they could do was to follow their process and understand their contractual position.

82. However, we find that they did not follow their process or their contractual position. There was nothing in the contract that allowed them to unilaterally remove someone from the workplace without pay because they thought she might be unwell. We do not doubt that on some occasions this may be appropriate pending the outcome of an occupational health opinion as to whether it was safe for someone to be in the workplace. However, where that person is not agreeing that they are unwell and they are expressly saying that they are well enough to work, it cannot be that the employer has the power to reduce their wages without any medical evidence to base their decision on particularly in the absence of a contractual clause which expressly sets this out. Had they suspended her on full pay pending the outcome of an OH report then it is unlikely that they would have breached the contract. We do not accept that clause 11.2 implies that SSP is payable unless and until the claimant is certified as well by an OH doctor. The clause does not say this and it simply cannot be right. If that was the case then in theory, an employer could stop paying an employee for a potentially indefinite period of time whilst it arranged or even failed to arrange an OH appointment.

83. The respondent stated that if we applied Agarwal we could conclude that C was ready and willing to attend work but not able as she was required to be assessed by a doctor nominated by R. Firstly Clause 11 does not say this or make any pay whether it be statutory or anything else, conditional on a medical examination. It simply states that if required an employee will submit to a medical examination – which the claimant does. Secondly, all the available medical evidence shows that she was able to work.

84. We conclude that the claimant was not well between 18-20 February as the medical evidence on this is equivocal and the claimant has accepted that she had not slept for 3 days and was prescribed diazepam. The note of 20 February concludes that her symptoms have not recurred thus indicating that she had been unwell beforehand.

S 15 Disability discrimination claim

85. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14*, it was held that there were two distinct steps to the test to be applied by tribunals in determining whether discrimination arising from disability has occurred:
    (i) Did the claimant's disability cause, have the consequence of, or result in, "something"?
    (ii) Did the employer treat the claimant unfavourably because of that "something"?

86. In *Pnaiser v NHS England and another [2016] IRLR 170* the EAT summarised the proper approach to claims for discrimination arising from disability as follows:
    (i) The tribunal must identify whether the claimant was treated unfavourably and by whom
    (ii) It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant
    (iii) The tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator
    (iv) The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability

87. We conclude that Mr Brennan Banks placed the claimant on sick leave because he believed that she was suffering from a bipolar episode on 18 February during the phone call and he felt that it was in her best interests to do so at that time.

The fact that the claimant has Bipolar gave rise to the respondents' mistaken belief that she was having a bipolar episode.

88. The claimant has accepted that if the decision to place her on sick leave was for her health and safety then it follows that it was a proportionate means of achieving a legitimate aim. Therefore, at this stage the claim must fail as the respondent has justified their decision.

89. However, once the respondent had notification from firstly the claimant that she well enough to work and then her GP confirming this, they refused to believe that information and continued to keep her on sick leave which is unfavourable treatment particularly given the lack of pay but also because she was being removed from the work place.

90. The cause of that treatment is accepted by the respondents as being that they believed she was unwell and suffering from a bipolar episode. This can only really be caused by the fact that the claimant had told them that she was diagnosed with a Bipolar disorder.

91. The issue for the tribunal then is whether the treatment was a proportionate means of achieving a legitimate aim.

92. In submissions Mr Moore made the following points with which we agree.

The decision to continue to have the claimant on sick leave must remain proportionate throughout the period from February to July. The first point at which it could be said to be disproportionate is her email on 22 February. This is then reinforced by her sending a doctor's note on 18 March which indicates that at not point had she had a manic episode or that there was any sign that she had had a manic episode. Further the claimant clearly verbally agrees during her conversation with Mr Powell that she is happy to go and see an OH doctor of their choosing – which they do not arrange. Instead they choose to disbelieve her medical evidence but fail to obtain their own and continue to keep her on sick leave. They clearly do not believe that she remains so unwell that she cannot attend a meeting by the fact that they agree to the without prejudice meeting and in so doing waive their need to have her see an OH doctor.

93. We conclude that the failure to trust the claimant's assessment of her own health arises from the fact that they believed she was suffering from a bipolar episode. That they had little or no understanding of what that meant for the claimant, how long it may last, and what impact it might have on her ability to work. These were not questions that they troubled themselves with. They had made a decision on 19 February based on a conversation on 18 February and refused to revisit that decision despite the claimant's insistence that she was well and the medical evidence that confirmed it. No plausible reason other than that they believed she was or had suffered from a bipolar episode was put

forward by the respondent to explain their insistence that she remain on sick leave and therefore only receive SSP. Therefore, once that 'diagnosis' was no longer true, then they no longer had a legitimate aim. Certainly, keeping the claimant on sick leave without pay is not a proportionate means of keeping the claimant out of the work place. If, as they say, they had legitimate concerns about the claimant's ability to do her job, they cannot justify her removal from the business without pay as proportionate. Weighing up the reasonable needs of the business against the discriminatory effect on the employee (Land Registry v Houghton and others UKEAT/0149/14 we do not consider the actions of the respondents proportionate.

94. Given that they had medical evidence and the claimant's own evidence to substantiate that they were wrong in their own diagnosis of the claimant and then subsequently had that position confirmed by their own OH doctor who stated that she had not been unwell for the duration of her absence, they still failed to give her back pay her for that period.

95. They were happy to have a difficult without prejudice meeting with her, but not allow her to return to work. The situation can no longer be justified as a proportionate means of achieving a legitimate aim because their aim is not to protect the claimant's health and safety, but to keep her out of the workplace and not have to pay her whilst she was not working for them. Even if they did have a legitimate aim, their approach was not proportionate. They accepted she was well enough to attend the without prejudice meeting on 14 March which would indicate that they no longer believed that she was too unwell to work. Even if we are wrong on that, they had clear medical evidence in the form of her GP note on 18 March 2019, which they had no justifiable reason to disbelieve. From that point on, their insistence that she remain off sick and therefore on SSP, was no longer proportionate. We therefore uphold this part of the claimant's claim.

96. The behaviour relied upon by the claimant as discriminatory at the meeting of 14 March is:

    (i) Refusing the send the claimant for a medical assessment to ascertain if she was fit to work;

    (ii) Stating that the claimant transitioned from contractor to employee in order to set up the 1st respondent and sue them for discrimination since summer 2018.

    (iii) Pressuring the claimant to accept a derisory settlement offer by saying that they had uncovered more serious evidence since her 15 February performance review letter

    (iv) When discussion did not lead to a successful agreement on settlement terms, by placing the Claimant again on mandatory sick leave, despite the fact she was fit to and

well to work, and had supporting evidence from doctors to indicate this.

97. We have concluded that the respondents did not refuse to send the claimant for a medical assessment. We accept that the process was paused from 1 March with both parties' agreement to enable settlement conversations to continue. The fact that we find that requiring the claimant to remain on sick leave for this period is not proportionate, does not mean that we think that they refused to send the claimant to an OH doctor at this time. We accept that the referrals process was paused. This is demonstrated by the fact that shortly after the settlement talks collapsed, they referred the claimant to an OH appointment.

98. We have also found that the respondents did not pressurise the claimant to accept a derisory offer in that meeting.

99. We believe that point (iv) is covered in our findings regarding the continued requirement that the claimant remain on sick leave from 18 March onwards.

100. We turn then to point (iii) above and the comment that the Claimant transitioned from contractor to employee in order to set up the 1st respondent and sue them for discrimination since summer 2018. This comment shows the level of anger that the respondents were feeling at this time. However, they are not angry because they believed she was suffering a bipolar episode – the something arising that the claimant's representative relies upon. They are angry because they mistakenly believe that they have been 'set up' when the claimant asked to be classed as an employee not a self-employed consultant. We are not justifying their anger, but it is not caused by their belief that she is suffering from a bipolar episode, it is caused by a combination of the claimant's mention of legal action in the meeting and the fact that they want to dismiss the claimant for poor performance but now feel temporarily unable to do so because of the claimant's disclosure about her condition. Their belief in her level of under performance at this stage was incredibly upsetting to the respondents. Ms Wang's evidence was that they had relied upon the claimant to get the licence and now believed that her work to date had frustrated that process as opposed to enabled it. We make no comment on whether her understanding of the claimant's performance was correct – that is for the later claim – but we do accept that they had genuine feelings of anxiety and frustration that the whole situation was stalling the business's ability to progress.

101. This is not a claim for victimisation under s 27 Equality Act 2010, the claimant must establish that the treatment arises from the respondent's belief that she is suffering a bipolar episode and we conclude that this was not a contributory factor in this comment. We therefore do not uphold this part of the claim.

Direct Disability Discrimination – s13 Equality Act 2010

102. The claimant relies upon the same acts for s 15 as she does for her direct discrimination claim.

103. We accept that in respect of the decision to place the claimant on sick leave, the claimant has established a prima facie case that shifts the burden of proof to the respondent to establish a non-discriminatory reason (Shamoon). This is because, on finding out that an employee has been diagnosed with a disability, they remove her from the work place. The appropriate comparator is a senior executive employee facing performance related concerns and asking for more time to prepare for the disciplinary hearing due to stress and anxiety.

104. We conclude that the original decision to place her on sick leave was not less favourable treatment. Had such a comparator told Mr Brennan Banks they were extremely stressed and not sleeping and needed more time to prepare for the performance review, we believe that Mr Brennan Banks would have made the same decision and said that they should be on sick leave. However, from the 22 February onwards, if the comparator were to clearly, coherently and logically state in writing that she is in fact well enough to work and had only been asking for more time to prepare, we conclude that the respondent would have believed the claimant and allowed her to return to work.

105. The respondent witnesses kept stating that all they wanted was for the claimant to come back to work and not to drag this situation out because they wanted to go through with the performance review process. We think that this would have happened had the respondent not known that the claimant had bipolar and therefore disbelieved her own account of her health. There may still have been conversations about settlement and an agreed exit – but we do not believe that the respondent would have continued to insist that someone who was not bipolar, who was in exactly the same situation, was unwell and unable to work. We therefore uphold this part of the claimant's claim.

106. With regard to the treatment in the meeting. We again accept that taken in the round the claimant has established a prima facie case that shifts the burden of proof to the respondent needing to establish a non-discriminatory reason for the treatment. As in our conclusions for the s15 claim, we have found as findings of fact that points (i) and (iii) did not in fact occur and we have dealt with (iv) above.

107. We have carefully considered the test in Nagarajan v London Regional Transport [1999] IRLR 572 and our obligation to consider what was the respondent's conscious or subconscious reason for treating B less favourably. This is necessarily subjective process. (Igen v Wong [2005] IRLR 258). We have also considered the fact that the discriminatory reason need not be the sole or even principal reason for the respondent's actions; it only needs to have had "a significant influence on the outcome" (Owen & Briggs v James [1982]

IRLR 502 (CA) and Nagarajan. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment "but does not need to be the only or even the main cause" *(*paragraph 3.11, EHRC Employment Code and paragraph 4.12, EHRC Services Code*).*

108. Turning then to (ii) and the comment about the claimant having hidden her diagnosis in order to become an employee and then sue the respondent. The comment itself was made by Mr Brennan Banks (p437) but he was part of a wider conversation about the claimant playing games and comments by all three of the individual respondents about the claimant 'playing games' and generally setting the respondent up. We the tribunal have found it difficult to reach a conclusion on this matter. We find that the overarching reason for the respondents' comments were their belief in her poor performance, that they had had to pay their recruitment consultant a lot of money for her to become an employee and their perception at the meeting that she was threatening the first respondent with legal action.

109. Whilst we believe that any underperforming senior executive doing something similar would have incurred their anger and frustration, we also find that the claimant's disability must have played some part in the respondents' thinking. This conclusion is based on the fact that they mention her withholding the diagnoses in the comment itself and because in evidence Mr Powell clearly felt that the claimant ought to have disclosed her health to them before she got the job and was angry with her for not doing so. Therefore the feelings of anger which we have found displayed at the meeting were in part motivated by the claimant's disability. On a conscious level the respondent refers to it in the comment itself and on a subconscious level, the anger from all three individual respondents about it is clear at the meeting and before us at the hearing.

110. A senior executive in exactly the same position without a disability would not have had anything to withhold or disclose thus not giving rise to the respondents' sense of subterfuge or deceit by the claimant. The fact that she was disabled and chose not to initially divulge this information at least in part caused the angry comment by the respondent and caused them to believe that she had been planning some sort of legal action all along. In our view, a non-disabled senior executive would not have been treated in the same way and would not have such an allegation of deceit made against them because they would not have had anything to withhold.

Personal Responsibility

111. We find that the decision to keep the claimant on sick leave after either 30 February or 18 March was an ongoing situation that was not made by any one of the individual respondents. We consider that the placing of the claimant on sick leave was done collectively on behalf of the first respondent as opposed to being a single decision by any one or all of respondents 2, 3 or 4.

112. We have considered the comment made at the meeting. Whilst it was said by Mr Brennan Banks it was in a context where all 3 individual respondents were discussing the situation and the claimant's disability. They purpose of the meeting was for the three individual respondents to act collectively on behalf of the first respondent and attempt to negotiate on behalf of the First respondent not themselves.

113. We therefore consider that the appropriate liability for the discrimination claims is the first respondent on the basis that it is difficult to ascertain who within the 3 individual respondents drove the behaviour. All actions taken by them were on behalf of the first respondent and the first respondent does not seek to rely upon the statutory defence. The discrimination claims are therefore upheld against the First respondent.

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Employment Judge Webster

17 December 2020