EMPLOYMENT TRIBUNALS

Claimant: Ms D White

Respondents: 1. OneTek Business Solutions Limited
2. Lee Donaghey

Heard at: Manchester **On:** 7, 8, 9 and 10 December 2020

Before: Employment Judge Grundy
Mr G Pennie
Mr J Murdie

REPRESENTATION:

Claimant: Mr B Culshaw, Solicitor
Respondents: Mr Howson, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of disability discrimination under section 15 of the Equality Act 2010 fails and is dismissed.

2. The claimant's claim in respect of victimisation under section 27 of the Equality Act 2010 fails and is dismissed.

3. The claimant's claim in respect of notice pay fails and is dismissed.

4. The claimant's claim in respect of failure to provide written terms and conditions under section 38 of the Employment Act 2002 fails and is dismissed.

5. By consent on day 3 of the hearing the claimant's claim for unauthorised deductions in respect of expense payments was agreed between the parties and succeeds in the sum of £230.

REASONS

1. This case concerns the dismissal of a Business Development Manager from fairly short-lived employment with the first respondent. The second respondent is the owner and Managing Director of the first respondent.

The Issues

2. The Tribunal identified a List of Issues with the parties at the outset of this hearing on 7 December 2020, and factored in the questions as agreed by the parties within the Case Management Order of Employment Judge Shotter of 19 September 2019. It is also right to explain that the issue of disability, had been conceded by the respondent in that the claimant suffers from progressive kidney disease and it is accepted that that condition satisfied the provisions of section 6 of the Equality Act 2010.

3. The questions and issues for the Tribunal were agreed as follows:

(1) Were any of the factors set out at paragraph 33 of the Particulars of Claim (pages 16 and 17 of the bundle) in the mind of the respondent when he made the decision to dismiss the claimant? Those were:

(a) Mr Donaghey's concerns as to the claimant's ability to drive safely;

(b) The claimant's attendance at several hospital appointments because of her condition;

(c) The risk of future absences due to ill health caused by her disability;

(d) The likelihood that she would only be able to work part-time if she went on dialysis;

(e) The cost to the business of obtaining a medical report;

(f) The failure to achieve the targets was the genuine reason, and the failure to take into account absence and tiredness; and

(g) Replacement by a technical solution.

(2) If so, whether that amounted to unfavourable treatment for something arising from disability.

(3) Were any of those matters the reason that the claimant was dismissed by the respondent?

(4) Whether or not the respondent was able to justify the dismissal of the claimant as a proportionate means of achieving a legitimate aim. If so, the treatment would not be unlawful or discriminatory. The legitimate aim asserted on the face of the pleadings was to maintaining profitable in a sales environment. In the hearing that became the survival of the business.

4. So far as the victimisation claim is concerned, the issues identified were as follows:

(1) Did the respondent's reply by email at 2.53 threatening legal action, which was in response to the claimant's appeal submission on 9 January 2019 at 2.13, amount to a detriment? (The detriment was conceded to have caused upset by the respondent within the respondent's submissions.)

(2) Did the appeal influence the respondent's decision to threaten legal action? It is necessary for the Tribunal to consider whether the claimant has established a causative connection between the response to the protected act (the protected act being the making of the appeal) and the detriment. The issue in the victimisation claim boils down to the causative connection.

5. So far as the notice pay is concerned, the Tribunal identified with the parties the issue as to whether the claimant was entitled to one week's notice pay as paid by the respondent, as she did not complete her probationary period, or whether there was an oral variation of the terms of the contract such that the parties agreed that she would be paid until 31 December or until 25 December, and whether there was a legal obligation on the respondent to pay the claimant until 31 December.

6. In respect of the unauthorised deductions by way of unpaid expenses, at the outset of the hearing there was an issue as to the expenses claim. On the morning of day three the parties announced that they had reached an agreement that there should be judgment by consent for the claimant in the sum of £230 in respect of unauthorised deductions from wages, that being by means of unpaid expenses.

7. So far as the section 38 claim is concerned regarding failure to provide written terms and conditions, it is accepted that the claimant received a written statement of terms and conditions of employment. The Tribunal had to consider whether the claimant received full particulars of the commission structure and whether the claimant was entitled to two weeks' gross pay if the Tribunal concluded that this was not received.

The Hearing

8. The hearing itself has been conducted as an attended hearing at the Liverpool Tribunal over four days with social distancing measures in place. The claimant, Ms White, gave evidence on day one. The second respondent, Lee Donaghey, gave evidence on day two, and on day three Amy Griffiths gave evidence by Cloud Video Platform on a remote basis, to all other parties in the Tribunal room, which all parties were content with.

9. The parties each made oral submissions and Mr Culshaw provided submissions in writing, which have been received by the Tribunal. Mr Howson represented both respondents. The second respondent will be specifically identified when referred to in this judgment.

10. All of the witnesses confirmed their witness statement evidence and gave evidence by cross examination on oath of affirmation due to covid 19.

11. The Tribunal has also been referred to an extensive bundle of evidence containing over 500 pages.

12. The Tribunal had the balance of yesterday (9 December) and the morning (10 December) to consider findings and conclusions.

The Witnesses

13. The assessment of the witnesses is as follows.

14. It seemed to the Tribunal that the claimant had quite a "laissez faire" attitude to the ending of her employment, and she did not appear angry or hostile about her treatment. She accepted significant failures in her own performance in cross examination. We concluded that she was not seeking to mislead the Tribunal and gave a genuine view of events from her perspective.

15. In respect of Mr Donaghey, we considered him to be empathetic and supportive to the claimant. He has a strong work ethic and in the Tribunal's view is a supporter of diversity and disability, which to a degree the claimant acknowledged. In a very small workplace he employed more than one disabled employee. We considered that he was understandably extremely worried about his personal precarious financial situation and the impact on the work performance of the claimant for his own family and his son with Down's Syndrome.

16. We found the evidence of Amy Griffiths to be complimentary to Mr Donaghey's management in respect of her individual disability, her being a wheelchair user due to a spinal injury caused playing rugby. We found her evidence to be helpful, fair and balanced.

Findings of Fact

17. The Tribunal has made findings of fact in respect of the chronology. The Tribunal has not found it necessary to determine all allegations of fact that were litigated before it but it has made findings on those matters about which it considers necessary to determine in order to give a full and reasoned judgment on the issues in the case.

18. The claimant commenced employment with the respondent as a BDM on 23 April 2018. She was dismissed on 11 December 2018 at a meeting with Mr Donaghey and Ms Griffiths.

19. The respondent's business was incorporated in 2008 and covers IT areas, in particular support contracts selling IT software and hardware. Mr Donaghey had originally garnered business in the Winsford Industrial Estate population.

20. At the beginning of the claimant's employment the respondent had employed another BDM, Mark Holmes, but he was dismissed in June 2018 partly due to his performance and conduct, but the conduct also included derogatory comments towards the claimant which referred to her gender reassignment.

21. The claimant's contract of employment is at page 38 of the bundle of documents, and in particular provided for a probationary period of six months which would take the claimant to 22 October 2018.

22. The claimant's role was to develop and implement sales strategies, to contact prospective customers and sell products, and to (in the speak of the industry) "upsell" to existing customers.

23. Mr Donaghey explained, and the Tribunal accept, the sales pipeline process in that he anticipated the claimant would chase down leads, provide opportunities to the business, offer quotes and then make sales. We understood this to be a general sales progression but also he referred it to the IT sales in the respondent's operation.

The claimant's CV appeared to show that she had the relevant experience for the job.

24. At the time of her recruitment Amy Griffiths was the Administration Manager. There were a couple of other administration employees and a Technical IT Department which maintained services for the respondent. At its height the respondent employed as many as ten employees. It appeared there were about seven employees at the time the claimant was recruited.

25. The second respondent, Mr Donaghey, had invested £45,000 into the installation of the connections for the Wi-Fi roll out in the "Gay Village" area in Manchester under the rollout of a system called "GleeFi." The claimant's salary was £30,000 per annum. The respondent made calculations, which the Tribunal were taken to at page 196C, which considered the claimant's performance and the loss regarding the ability of the claimant to generate sales through April 2018 and November 2018.

26. So far as the "GleeFi" project is concerned, the Tribunal accepts that in August 2018, Mr Donaghey had taken out a loan for £189,900 for the business as shown from pages 51A-58, and provided the personal guarantee referred to at page 59. The loan of such a significant amount was to cover "GleeFi" and the Government voucher scheme, another project from which the respondent hoped to generate sales. The Tribunal finds that the respondents were responsible for building a fibreoptic connection for the village sector of Manchester and being able to set that up by line rental, offer three year contracts and maintain the line.

27. The Tribunal accepts the initial investment made by the second respondent and the calculations at page 196C. The monthly leading cost for a line was £600 and the monthly monitoring and maintenance was £250. We accept that the revenue was modest and the revenue was breaking even in respect of line rental and maintenance, or thereabouts. The Tribunal accepts that the claimant recruited a couple of other businesses, Tribeca, The Apartment and the Institute of Mechanical Engineers, and that that was why it was broadly breaking even, but the revenue stream in terms of meeting the cost going forward was not going to be enough to keep the business afloat. At page 196A that becomes evident on an ongoing basis. It was clear in the Tribunal's view that business jeopardy was looming if no further sales were achieved. The respondents were barely at break even for their ongoing costs.

28. After the excitement of GleeFi, which no doubt was well received by those customers who signed up for it, there were concerns raised by the respondent about the claimant's input and commitment. The respondent put before the Tribunal at paragraphs 48 and 49 of the witness statement of Mr Donaghey, and at page 201A of the bundle, a breakdown of the claimant's telephone calls for October, November and December to himself, to Amy Griffiths and the total talk time. On any view, even if the claimant was engaged in other methods of obtaining leads or opportunities, those figures seem incredibly low to the Tribunal as a calling log over those periods, that is even taking into account a period of a week's leave that the claimant had. The total figures proportionately seem extremely low. We accept that the claimant may have done some other outside work in respect of scoping or other researches, but nowhere was that documented or passed to the respondent. The claimant's own figures seem to show, and the claimant's acceptance of the figures on page 201A, that not enough calls were being made, and there was certainly not enough work

done for the respondent to gain leads. Further, the claimant did not use the CRM which the respondent would have liked her to use to set up progress in obtaining leads. It seemed to the Tribunal, and we so find, that the claimant lacked focus after the GleeFi project.

29. The respondents believed that the claimant could play a significant part in its business, and in particular in assisting and taking forward the Government voucher scheme, but in fact it was Amy Griffiths who took this forward rather than the claimant. It was Amy Griffiths who provided the customer lists and the application reports, and she was the pilot of that ship rather than the claimant.

30. The respondents continued to ask for the claimant's input in September and October and asked the claimant to provide business plans, but it does not seem that the claimant was forthcoming in that.

31. So far as the Government voucher scheme is concerned, we accept Mr Donaghey's evidence that the scheme was such that the Government would pay for the installation of high speed fibreoptic internet connection to businesses, and if accepted to the scheme, the respondent wanted to recruit new customers and install high speed fibreoptic broadband to them. This would then be of advantage to the customer in terms of the Government paying and to the respondent in terms of winning that work. It was Amy Griffiths who took that forward.

32. At paragraph 62 Mr Donaghey had identified that the first stage in being awarded the funding was creating a list of potential clients in an area and attributing the overall cost of the building the network to each connection made, so without the list of potential clients in an area no funding could be obtained.

33. As indicated, the claimant was invited to be involved with the work in gathering lists of potential customers. The Tribunal accepts, that the claimant showed scant regard for the work that was being done in this area and for the buzz that was being generated.

34. It transpired then that the respondent was not satisfied with the claimant's work performance and on page 162 of the bundle, as a result of that lack of satisfaction, Mr Donaghey sent the claimant an email which said:

> "Following on from our discussions regarding probation I am writing to confirm the extension of your probation period. We have chosen to do this to give us time to address the low numbers of sales and lack of sales plan since the GleeFi deployment. This takes us up to December when we will review again. I will work closely with you during this time to help you in any way I can. Thanks Davina. Lee"

That was sent on 1 October 2018 at 10.01am.

35. The claimant acknowledged that review email by saying, "Ok, thanks" at 10.07am on 1 October 2018.

36. We find that the claimant did not make the respondent aware of her disability at the outset of her employment. We have been shown no documentary evidence from either side which deals with that, but certainly at some point down the line the claimant remarked about her disability to Amy Griffiths and then to Lee Donaghey in

respect of her medical condition and her health condition, such that our finding is that in effect the respondent was drip fed the information about the claimant's medical condition, but the respondent was certainly aware of that condition at the time of the probation review and the respondent showed concern and empathy, particularly from within the respondent Mr Donaghey and Amy Griffiths, and in particular it is agreed that Mr Donaghey even took the claimant to a hospital appointment.

37. At this time there were ongoing informal meetings regarding performance and no progress in terms of the claimant stepping up to the plate.

38. On 19 November 2018 there was a team meeting in which Mr Donaghey asked the claimant to outline what sales strategies she had developed or was planning on developing. That followed on from the meetings in October. The claimant at that meeting confirmed there were no sales strategies and there were no customers in the pipeline. This was obviously of grave concern to Mr Donaghey at that time. He talked about the air in the room evaporating and the worry around the number of sign-ups that there had been by the claimant. He asserted that up until this point the claimant had only signed up around 12 new customers in eight months, and albeit that there would naturally be a lead-in time for anyone in a sales position, at this stage no doubt that was of grave concern. Mr Donaghey says:

> "Everybody in the room knew that this would be the death knell of the company. We had committed to this plan by cancelling some of our most demanding and least profitable IT support customers, which had been the claimant's suggestion."

39. Mr Donaghey asserts, and we accept, that he felt he had let the rest of the team down as he had placed faith in the claimant to deliver a sales strategy that could be worked with, and now the company was embarking on the next few months with a palpable sense of dread. Mr Donaghey gives a vivid description of the team knowing the potential consequences to their jobs and to the business. In fact there was no sales strategy, there was no pipeline and there was nothing to follow up, despite the hope of £1.6million potential business and 500 possible customers.

40. The respondent was concerned for the claimant's health at this point and invited her to use some of her holidays such that she did have a week's leave. No doubt on his own account in relation to the respondent he was very concerned about the business he had set up in 2008.

41. We have considered carefully the financial situation of the respondent's company and the documentation to which we have been referred. In particular the respondent has supplied business bank statements which go back to 2017, so for example looking at the first statement on 1 November 2017 (page 79T) the bank account is in credit to the tune of £11,648. There is then a small overdraft (69 O) in December just at £556.16. However, on our reading the bank account was not significantly overdrawn from November 2017 to 24 April 2018, and at times the credit balance was in the mid £20,000 and remained mainly in credit. Looking at the bank accounts provided from page 98 detailing the position from October 2018, on 1 October 2018 the overdraft was running at £15,190.60. At times it did continue to hit five figures.

42. We accept that the evidence of the figure on 11 December when the claimant was dismissed when there was an overdraft balance of £4,049.35 would be a

snapshot of the overall position, however we are satisfied from the evidence that has been given by Mr Donaghey, both orally and in the documentation, that the business was in serious trouble. At paragraph 107 Mr Donaghey refers to the overdraft of £4,049 on 11 December. He also refers to large payments going out later in the month such as wages, and no new income coming in, as confirmed. He indicates that by the end of the month the respondent would be close to the overdraft limit of £25,000 and that on 31 December the overdraft balance actually hit £18,526. We accept that he was behind, there were debts to suppliers and a debt to HMRC. We accept that the business usually transacted between £30,000-£50,000 and that the £25,000 overdraft was less than one month's worth of cash reserves, and that the respondents were heading closer to the wire. We accept that Mr Donaghey had given a personal guarantee, his house was at risk, it was getting nearer to Christmas and he had a family with a disabled child to support. We accept he sold his car and that this was clearly an extremely worrying situation for him.

43. In terms of the chronology, (to go back slightly), we accept that there was a meeting on 22 November which is spoken to in the statement of Amy Griffiths and which she confirmed, where the claimant and herself met with the PR company of the respondent, and she details the claimant becoming hostile during the meeting and her having to step in to calm conversations. We accept her evidence that during the meeting it was clear the claimant had no sense of the company direction, something she had previously been so passionate about. After the meeting the PR company mentioned to her that he was concerned about the claimant and asked if she was ok. He also stated he did not feel he had a clear direction from her for the last couple of months but did not understand why. It was clear that Amy Griffiths was concerned about the claimant and her reactions at that meeting. The respondent was, in the Tribunal findings, showing clear interest in the claimant's condition and the understanding and response of the respondent is clear in the Tribunal's view.

44. On 28 November 2018 the respondent had determined to ask the claimant for medical reports to gain a greater understanding of the situation and the claimant's behaviour. The claimant agreed to the letter being provided to her GP. The Tribunal finds also that the claimant had other things going on in her life as detailed by Mr Donaghey and the statement of Ms Griffiths, one of the matters being a breakdown of a relationship, another being the carrying out of DJing work in the Village, which the claimant said was not significant but nevertheless would probably have an impact on things such as fatigue and ability to carry on at work, especially if those commitments did impinge on early to late evening.

45. The claimant's consent to the contact to the GP is found at page 167 of the bundle of documents, and the letter which was in some depth drafted by Mr Donaghey is at pages 183 and 184. It details the concern that the respondent had in respect of the role that the claimant was carrying out, and in respect of the impact potentially around her disability and her ability to continue to perform in the role. It explains that Ms White had told the respondent she regularly experiences bouts of dizziness and is regularly tired, and so the respondent was concerned about her ability to drive. In the letter the respondent asks:

> "From you we would like assistance in clarifying the facts so we can plan for the future. Any advice for the future would be welcomed. We realise that many of the details are confidential so we have sought Ms White's permission to ask these questions. The reason we are asking more detailed questions is

> that if Ms White is at the final stage of kidney failure then we would like to help her adjust to get the post possible outcome for everyone involved."

46. On page 184 there was a list of questions numbered 1-11, which the claimant was looking to ask the GP to clarify. The extent of that letter does show the compassionate side of the respondent.

47. The claimant says that the respondent received a reply from the GP (or at least the reply itself is dated) 5 December 2018, in which the costing for that report was going to be £180 for the full report with a consultation with the claimant, and £100 for a paper report. Albeit that the respondent had set the hare running of inviting answers to questions on the medical condition of the claimant, we accept the respondent did not follow through and obtain the answers to those questions but we do not accept that was because the respondent was not prepared to pay £100 or £180 for such a report. We accept the evidence of Lee Donaghey and Ms Griffiths that they had not seen the letter of 5 December 2018, which recorded what those costs would be at the point that the claimant was dismissed on 11 December 2018. We do not agree with the submission of the claimant on that basis, and it is our finding that at the time of the dismissal that letter was not before Mr Donaghey.

48. It was not a case of the claimant agreeing and the respondent then turning his face against the answers to the questions, it was the imminent danger of the business folding that caused Mr Donaghey to not be prepared to wait any longer rather than a couple of hundred pounds in respect of an answer to some of the questions, albeit that the timescale for the answer of those questions was at that time unknown. We find that the respondent was most worried about the business viability by 11 December.

49. On 11 December 2018 there was a meeting held between the claimant, Mr Donaghey and Amy Griffiths. There was no procedural invitation to a disciplinary meeting. The fact that Amy Griffiths was there was unremarkable in respect of her attendance, and it may have been that Mr Donaghey thought she would offer support to the claimant, but it could not be said that she was an invited companion such that the claimant had invited her to attend with her as a companion at a disciplinary meeting.

50. We accept the respondents are a small operation, but again at a meeting where an employee's employment is terminated it is unhelpful to have no documentation. We are confident that Ms Griffiths did offer the claimant support at the conclusion of that meeting. The respondent was not leaving the claimant to it so to speak. The respondents, through Mr Donaghey, were aware the claimant would be potentially upset by that conclusion and that meeting, and had ensured that at least Ms Griffiths could be there. We accept the evidence of Ms Griffiths that she did not know whether or not the claimant would be dismissed at that meeting, but generally it could be a possibility, but she had not been told by Mr Donaghey that it was going to happen.

51. The Tribunal considers that the claimant must have known that any meeting in December could be to discuss her probation, and given that the probation had been extended, which would always be a red light rather than green light, it could signal the end of her employment. Page 185H is the follow-up letter to that termination, which was quite extensive and long from the respondent. It expresses the difficulties in relation to the sales process, it explains that Mr Donaghey had concluded that the

claimant did not have the skills to do anything more than approach customers from a list provided and that that was only a small part of the sales strategy. Mr Donaghey concluded that the tasks of the Business Development Manager could not be done by the claimant, and he says towards the end of that letter:

> "Because of all of this we have taken the decision to terminate your employment. We clearly have no choice as you have explained you would never have been able to fulfil the requirements of the role. You were notified that your probation period had not been completed successfully. We were happy to extend that while we investigated the reasons behind why you were not selling anything, but unfortunately we must now confirm that you did not successfully complete your probation period. Your notice period within your probation period is one week. You also have expenses outstanding that we are presently reconciling due to historical errors."

52. The claimant emailed Mr Donaghey on 19 December 2018 at 14:16pm to query the notice payment. She indicates in that email that she thought that she would be paid up to 31 December, "…understood to be garden leave and also discussed on subsequent telephone calls as you wanted to give me time to get myself sorted and although it happened at the wrong time of year you would help out if needed", and querying the confirmation letter which intimated notice to be 18 December, and explaining she was unclear as to when she was being paid to and if she was to receive a full month's salary on 31 December. It also queried the expenses position and asked for the process of appeals.

53. There is an email in the bundle at page 178 from Amy Griffiths to Payroll indicating an end date to payroll to be processed on 18 December but not to process as a leaver at this stage, indicating that they did not want the payroll to be closed, certainly the expenses were still a live issue between the parties at that stage.

54. At page 179 on 31 December 2018 the second respondent emailed the claimant at 14:55pm to explain further the termination on 11 December 2018, stating they did not want the claimant to suffer hardship over Christmas but raising issues in respect of the claimant's posting a status on Facebook requesting a contact "provide her with details of an employment solicitor." The respondent also suggests that the claimant added business contacts gained through work with the first respondent to the personal Facebook page. The respondent was naturally concerned about potential damage to the GleeFi project that had already been up and running given the contacts, and to the implication that the claimant needed an employment solicitor because of issues regarding her employment. The respondent articulates that he was concerned about the damage to the company because of the lack of a coherent sales plan, and he says he is struggling to muster the motivation to pay more money than is required.

55. After that email the claimant replies on 4 January 2019 (page 185) with an email asking for clarification of the expenses and payment of those. At page 185A on 7 January 2019 at 14:03pm again the claimant reiterates that she wishes her expenses to be paid. She says in that email:

> "Please can you make payment immediately otherwise I will have to seek a legal remedy."

56. That email is 4 January 2019.

57. On 9 January 2019 at 14:53pm the claimant sends an extensive letter of appeal. In the letter of appeal, she goes through various grievances and her employment perspective from 23 April 2018, and it concludes with the appeal on the grounds of "no probation meeting and as such no signed minutes, failure to provide adequate training, discrimination arising from disability, failure to make reasonable adjustments instead of placing unachievable targets such as several hundred new customers and withholding my expenses owed".

58. The respondent, through Mr Donaghey accepts the response sent was at page 186 on 9 January 2019 at 15:23pm, saying:

> "Hi Davina
>
> I'm writing to inform you that it is my intention to take legal action to claim damages caused to OneTek due to your negligence. The business has suffered considerable financial loss because you did not fulfil the requirements of your role. I will respond to your appeal as part of that. I will be preparing court documents in the coming weeks and will file them with the appropriate court with a copy sent to you directly."

59. It is that response, which the claimant criticises, her having done a protected act in sending the appeal. The respondents accept this was a protected act.

60. We accept that Mr Donaghey was enduring a pretty torrid Christmas time 2018. His grandfather was seriously ill in hospital during Christmas 2018. The personal circumstances in relation to his finances and home life, have already been outlined by the Tribunal to a degree. Further, his house was up as collateral as personal guarantee and he had a family to keep. In those circumstances, and in reply to the claimant's previous threat of legal proceedings, we consider that that was a kneejerk reaction not referable to disability but referable to the general situation in which the respondent found himself at that point.

61. Mr Donaghey is no stranger to disability or to prejudice due to having a son with Down's Syndrome. He is no stranger to it because he employed Ms Griffiths who is a wheelchair user, and the Tribunal finds and accepts her evidence that Mr Donaghey made reasonable adjustments for her and was not an employer who had any issue with her disability. We therefore find that he has a good understanding of diversity and disability issues, especially for a small employer. The response, , was not down to disability, it was borne out of some anger in respect of the Facebook posts but more definitely in relation to protection of his business. It was not connected to the issue of disability. It was concerns about loss of the business and seeing his life work going to the wall.

62. So far as our final findings of fact are concerned, the meeting on 11 December 2018 was no doubt a difficult one for both the claimant and second respondent and for Amy Griffiths, but it was clear in the mind of Mr Donaghey that there was no pipeline, there was no strategy, and there was no other way forward other than the ending of the claimant's employment at that stage, and indeed other employees left the business quite soon after. At that meeting itself we do not accept that words were used which could lead the claimant to the conclusion that she was going to be paid until 31 December 2018, such that the parties entered an oral agreement to vary the terms of notice. It maybe that platitudes were offered on the basis of not wanting hardship to be suffered, but we consider it would be a re-

interpretation of the conversation at that meeting by the claimant to result in the conclusion that she was going to be paid to the end of the year. We are fortified in those findings by the evidence of Amy Griffiths who, although she did not recall the exact conversation, did say she recalled Mr Donaghey referring back to the contract, so we are not satisfied that there was a promise made orally to pay the claimant until 31 December 2018 but we do accept there was a general offer of help which is in keeping with our general findings about the respondent's evidence and attitude.

63. So far as the contract of employment is concerned at page 38 of the bundle and particularly page 39, we do not find that the "we" that has been referred to would be the individuals concerned and the company. The "we" that was discussed within the evidence is plainly the company, but the particular paragraph on page 39 in respect of remuneration reads as follows:

> "Your basic salary will be £30,000 per annum payable monthly by bank transfer as detailed on your pay statement. You will also receive commission based on sales you have made. Details of that structure will be agreed in a separate document and may change depending on the circumstances of your role. Commission will start at 5% of GP of sales although we will specify different commissions for different products. All other authorised additional hours worked will be paid at an agreed variable for the agreed work."

64. It seems that this has only arisen on the conclusion of the claimant's employment and at no time did the claimant seek, on the documents that we have seen, to chase down any type of separate document or agreement, and in the Tribunal's judgment on the evidence that we have heard and the findings that we make the different percentage for different products does not seem to have been in play. The claimant has not queried what products and what percentage, and neither has she queried the production of a separate document. We are also concerned that in fact there was a lack of profitability here to which any commission structure could sound, so in terms of our findings we are not convinced that the duty to provide the separate document had arisen at the time of the conclusion of the claimant's employment.

The Law

65. In relation to the law regarding discrimination arising from disability, the Tribunal had regard to section 15 of the Equality Act 2010, discrimination rising from disability. Section 1 provides:

> "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."

66. Section 2 states:

> "Subsection 1 does not apply if A shows that A did not know or could not reasonably have been expected to know that B had the disability."

67. Plainly the knowledge point is not referable in this case.

68. The constituent elements in bringing the complaint of discrimination arising from disability which a claimant must prove are therefore the unfavourable treatment because of something arising in consequence of their disability, and the justification (in this case namely whether the claimant was a proportionate means of achieving a legitimate aim).

69. The Tribunal considered the authority of **Charlesworth v Dransfield Engineering Services Limited UKEAT/0197/16** in the Employment Appeal Tribunal, a decision of Mrs Justice Simler DBE, who at paragraph 12 refers to causation and quotes the analysis in the case of **Basildon Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**, and in particular Langstaff J, the President at that time, referring to the two stage approach identified by the statutory provision, both causal albeit differently expressed. First, there must be something arising in consequence of the disability. Secondly, the unfavourable treatment must be because of that something. He held that the words "arising in consequence of" may give some scope for a wider causal connection than the words "because of" but considered that the difference, if any, will in most cases be small. At paragraph 13 Mrs Justice Simler also says:

> "It seems to me that words in respect of cause are used synonymously to mean both cases an influence or cause that does in fact operate on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause",

to borrow the words of the President (as he then was) Underhill in **IPC Media Limited v Miller [2013] IRLR 707** at paragraph 17. She directs us:

> "It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be because of something, nothing less will do. Provided the 'something' is an effective cause though it need not be the sole or the main cause of the unfavourable treatment, the causal test is established."

70. We also considered the Court of Appeal decision in the **City of York Council v Grosset [2018] EWCA Civ 1105**. This is a case that was reported in the public domain because the claimant was a teacher who had allowed a class of 15 year old pupils to watch the film Halloween which was X rated, and he was dismissed for gross misconduct but succeeded in his disability discrimination claim, referable to the justification defence. In the case the Court of Appeal considered that a significant factor in the conclusion that the dismissal was not proportionate was its assessment that if reasonable adjustments had been put in place to reduce the claimant's workload he would not have been subjected to the same level of stress. It was the stress that had led him to show the pupils the film, and the conclusion in respect of justification was that the dismissal was not a justified action.

71. The Tribunal also considered examples from the Code of Practice which are referable more to sick leave. Nevertheless that authority was of assistance in terms of the illustration of the defence.

72. In respect of victimisation, the Tribunal first of all considered section 27 of the Equality Act 2010, which provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act.

(2) Each of the following is a protected act:

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act; or

(d) Making an allegation, whether or not express, that A or another person has contravened this Act."

The false information paragraphs do not apply.

73. Section 27(4) states:

"This section applies only where the person subjected to the detriment is an individual. Detriment was conceded. The issue that arises is causation. Has the claimant been subjected to a detriment because he has done a protected act?"

74. There is no requirement for a comparator. We have to consider the causation aspect which requires knowledge of the protected act and a causal connection between the protected act and the detriment.

75. The primary objection of the victimisation provision is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so, and we had that in mind in reaching our conclusions.

76. So far as the law in respect of the notice provision is concerned, we fall back on common law of contract: was there an oral variation of the terms in the written contract of employment by what was said on 11 December 2019?

77. The law in respect of the section 38 Employment 2002 claim, the relevant section at section 38 is a lengthy section and it is not cited in full but section 38(1) of the Employment Act 2002 provides:

"Failure to give a statement of employment

This section applies to proceedings before an Employment Tribunal relating to a claim by a worker under any of the jurisdictions listed in schedule 5. If in the case of proceedings to which this section applies the Employment Tribunal finds in favour of the worker but makes no award to him in respect of the claim in which proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) of the Employment Rights Act 1996 (the duty to give a written statement of initial employment particulars or of particulars of change) or, in the case of a claim by an employee under section 41B or 41C of that Act duty to give a written

statement in relation to rights not to work on Sunday, the Tribunal must subject to section 5 make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead."

78. So the employer will be ordered to pay the employee two weeks' pay or, if it is just and equitable in the circumstances, the higher amount of four weeks' pay where the condition is triggered and the Tribunal considers there has been a failure.

Submissions

Respondent's Submissions

79. The Tribunal heard submissions on both sides from both the respondent and the claimant. In brief, Mr Howson made concessions relating to some of the factors outlined in the particulars of claim relating to disability – (a), (b), (c) and (e) and not (d), (f) and (g), those as outlined at the outset of the List of Issues. He drew attention to the claimant's employment as a whole both pre and post Pride. (Pride being the celebration of gay rights taking place annually at August Bank Holiday and well known to Mancunians). He pointed to the claimant's acceptance of her failure to perform, and he pointed to the circumstances of the respondent's debt. He drew our attention to what was in the mind of the second respondent at the time and asserted that was to preserve his business, and he invited the Tribunal to conclude that the justification aspect should succeed.

80. On the victimisation point, Mr Howson accepted that the making of the appeal could amount to a protected act but said that the causation was broken in that there was a response sent but he did not accept that that was the cause of the detriment to the claimant. He asserted it was the claimant's conduct in the Facebook posts asking for an employment solicitor and further jeopardising the respondent's business that was the causative event. He drew our attention to the threat of the legal action proposed by the claimant before the protected act by the claimant, and asserted that the protected act was not the material influence. He asked us to prefer the second respondent's evidence in respect of the monetary claim and said that there had not been an agreement on the section 38 claim.

81. This is a summary of the submissions on from both sides.

Claimant's Submissions

82. So far as the claimant's submissions, which were received by email and were sent and seen by the Tribunal before our consideration of the submissions and whilst we were deliberating, they were received both in writing and spoken to orally. The claimant contends that the Tribunal should reject Mr Donaghey's evidence because of inconsistency in part between the pleadings and the oral evidence and his expression of having been deceived by the claimant. It is asserted that the claimant's case of underperformance is only one factor and not the only factor, and that the factors in the particulars of claim relate directly to disability.

83. The claimant submits that it was unjustifiable for the respondent to abandon the desire to seek medical evidence, and that there was some general agreement of the claimant displaying behaviours, which were symptoms of her disability. We were

asked to accept that it was not reasonable for the respondent not to wait for the GP response.

84. The claimant also criticises the respondent’s financial disclosure and suggests an urgent medical report should have been obtained or clear targets given. The claimant also asserts that there was a contradiction in respect of the second respondent’s evidence as to his business if we accept the claimant's position in respect of paying notice to 31 December 2018.

85. On the section 27 victimisation claim it is submitted that the causation has not been broken and it was the complaint of disability discrimination in the appeal letter which amounted to the protected act and which was the material factor which caused the respondent to reply in the manner in which he did in the email. Detriment was obviously conceded on that matter.

86. So far as the expenses were concerned, as already indicated that judgment is given in the claimant’s favour by consent in the sum of £230.

87. So far as the section 38 claim is concerned, the claimant submits no separate document regarding commission has ever been provided to her and it is asserted that given the employment contract starts with a reference to the company paying different amounts of commission on different products, the claimant has not been able to calculate what she is owed and therefore it is right, it is argued, that the claimant should receive two weeks’ pay in those circumstances.

88. Regarding notice, the submission was on the lines that the Tribunal should accept the claimant's evidence that she had been told she would be paid to the end of the month and therefore there was a variation of the notice period of one month.

Conclusion

89. Having made significant findings of fact and having considered the legal provisions, which apply in this case, the Tribunal has unanimously reached the following conclusions.

90. It was accepted and conceded by the respondent that the factors at paragraphs (a), (b), (c) and (e) – the driving, the absence for hospital appointments, the risk of future absences and the cost of obtaining a medical report – were linked to the claimant’s disability. Paragraphs (d), (f) and (g) were not accepted. It did not seem to us that the aspect of dialysis loomed large in the conversations, but the other aspects would satisfy the aspect of arising from disability in the first causative section in any event. Tiredness we considered, as our findings have made clear, may have been in the respondent’s mind also. It seemed to us that (g) was not really an issue that was raised within the oral evidence and we make no finding in respect of (g).

91. What we do consider important and what encapsulates, in the Tribunal’s view, the mindset of Mr Donaghey at the relevant time is paragraph 31 on page 22:

> “At this point we had a sales employee that was entirely outside of the sales activity that was driving the business forward. Ms White did not present any sales progress whatsoever and was adamant that there was nothing in her condition that would affect her ability to work. Ms White was amongst the

> highest paid employees in the business. We had recently had to let other employees go as we couldn't afford to support them due to the prolonged lack of sales. It was a nightmare situation with a clear conflict between our personal desire to help Ms White and the financial situation of the business that you could argue she created."

92. In our judgment, therefore, the reason for the claimant's dismissal was the poor performance of the claimant and her failure to succeed in her probationary period, which was extended. The claimant, as we have made clear in the findings of fact, had failed to make a list of leads and failed to make a strategic plan, despite many requests. Those matters are on the face of them potentially arising from her disability. Although we do have regard also to the pages of the bundle that show she was engaged in other activities such as the DJing. We also take into account that the claimant's activities in relation to her employment were very thin on the ground as we have found in the telephone evidence, and it appears that she was not adding value and not taking the job seriously. So the poor performance did arise, in our view, from the disability sufficient to satisfy the first legal test, and those were matters for which the claimant was dismissed although there was a mixture of factors in our view. The respondent plainly did take into consideration the absences, as stated, and it has conceded in respect of (a), (b), (c) and (e). We do not make any finding about (g), the replacement by a technical solution as it was not the case litigated.

93. Returning to the question of whether the respondent is able to justify dismissal of the claimant as a proportionate means of achieving a legitimate aim. We have already in our findings considered that keeping a business alive, survival of a company, is in the Tribunal's judgment a legitimate aim. As Mr Donaghey has made clear, the claimant was a well-paid employee. She was not the only member of staff who left or who was dismissed. We are clear from the financial evidence and the oral evidence of Mr Donaghey that the writing was on the wall unless dramatic action was taken.

94. It was proportionate to lose the claimant given her job and for ultimately Mr Donaghey to step into the breach, which we accept is what happened, in order that sales could be taken forward and the business to stay alive. Although regrettably it is two years down the line that we are hearing this case, regrettably from both of the parties' stances in terms of having to wait for a Tribunal hearing for a significant period of time, that has in fact assisted us in considering the factual evidence and the situation now, because we accept that the company has stayed alive and that it was proportionate for the respondent to dismiss the claimant at the time that it did in order to keep the business alive.

95. So far as the victimisation claim is concerned, returning to the issues, we do not now need to deal with detriment because that is conceded, there was upset, but we do need to deal with the cause and effect. From our findings on this matter we are led to the conclusion that the response of the respondent was not retaliatory, it was not "nasty", it was understandable in the context firstly of the claimant making the first threat of legal action, and secondly in relation to the fact that the claimant's other letters had pursued expenses and/or notice, and had not chosen to argue any disability discrimination at that stage such that it appeared to the Tribunal that the disability discrimination was not a factor which was affecting Mr Donaghey when he sent the reply. We do not consider that the reply was caused, in whole or in part, by the claimant's protected act. Facebook was clearly looming large, the worry of losing

further business was no doubt very much at the forefront of Mr Donaghey's mind, so we do not find that the victimisation claim succeeds.

96. So far as the notice point is concerned, as indicated, applying contractual principles and considering the contract of employment, the first principle would be having regard to the written contract of employment and the appropriate level of notice. The claimant had less than a year's service and a week's notice is not in issue on that basis unless there is an oral variation. The paragraph regarding notice in the contract is at page 43:

> "Notice of termination to be given by employer
>
> One month up to successful completion of your probationary period one week; if there was a successful completion of probationary period but less than five years' service it was one month."

97. So the claimant would be entitled to one week subject to any oral variation. On our findings, as already indicated, we do not accept that there was a promise to pay to 31 December 2018 nor to 25 December 2018, so the claimant having been paid one week's notice there is no further obligation on the respondent to pay any further payment.

98. So far as the section 38 claim is concerned, given our findings in respect of the contract and the aspect of commission, the Tribunal are of the view that there is no breach of section 38 since the commission structure was not at play in the circumstances of this case so we make no award under section 38.

99. It follows that the only award upon which the claimant succeeds and for which we do give judgment is the sum of £230 by consent referable to the claimant's expenses on the conclusion of her employment. That is the judgment of the Tribunal, which is unanimous.

Employment Judge Grundy

Date 23 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 January 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2402069/2019**

Name of case: Ms D White v 1. Onetek Business Solutions Ltd
2. Lee Donaghey

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **7 January 2021**

"the calculation day" is: **8 January 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals