



EMPLOYMENT TRIBUNALS

Claimant: Ms F El Bergui
Respondent: RIA Financial Services Limited
Heard at: East London Hearing Centre
On: 15 – 17 September (by CVP) &
29 – 30 September and 13 - 14 October 2020
Before: Employment Judge A Ross
Members: Ms J Clark
Mr L O'Callaghan

Representation

Claimant: In person
Respondent: Mr Haynes (Consultant)

JUDGMENT

The judgment of the Tribunal is that:-

1. The following complaints are not upheld:
 - (1) Automatic unfair dismissal under s.99(3)(a) Employment Rights Act 1996;
 - (2) Sex or pregnancy related harassment pursuant to section 26 Equality Act 2010 ("EQA");
 - (3) Victimisation (section 27 EQA);
 - (4) Direct disability discrimination (section 13 EQA);
 - (5) Disability discrimination (section 15 EQA);
 - (6) Breach of the duty to make reasonable adjustments (sections 20-21 EQA);
 - (7) Disability related harassment;

- (8) Breach of contract;
- (9) Unlawful deduction from wages.

2. The Claim is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Cashier from 17 October 2016 until her dismissal without notice (but with pay in lieu) on 3 August 2018.
2. By a Claim presented on 15 October 2018, after a period of EC, the Claimant brought complaints of automatic unfair dismissal, sex or pregnancy discrimination and disability discrimination.
3. Following further particulars provided in writing on 6 February 2017 and during a Preliminary Hearing (open) on 19 November 2019, the Claimant's complaints were identified by the Tribunal.
4. The complaints were set out in a detailed list of issues by Employment Judge Brook. This list was drawn up with the assistance of the parties after determination of the preliminary issue, with Employment Judge Brook concluding that the Claimant was a disabled person at all relevant times and that her disability was hypothyroidism.
5. At the hearing before us, the Claimant did not suggest that the Claim contained any further complaints, save in respect of section 15 Equality Act 2010; and such a complaint was added to the list of issues.
6. This hearing took place by both CVP and in person. 15, 16, and 17 September 2020 via CVP and 29 and 30 September 2020 in person. (On 30 September due to Covid19 one the members joined the hearing via CVP). The Panel met in chambers on 13 October 2020 and the decision was read out to the parties on 14 October 2020. The Claimant sought no specific adjustments for her disability at the hearing.
7. The Case Summary and reasons accompanying the case management orders made on 17 September 2020 explain the procedural matters which occurred during the first part of this hearing on 15, 16 and 17 September 2020. This hearing was adjourned on 17 September 2020, on application by the Claimant. At that point, the Claimant had almost completed evidence-in-chief, but had not at that stage referred to any documents.
8. Fortunately, the case could be re-listed without significant delay, albeit in two parts.
9. When the case re-started on 29 September 2020, the Claimant completed her evidence-in-chief by responding to some open questions from the Employment Judge and she was taken to certain documents. She confirmed that she had gone through the bundle and formulated questions to ask the Respondent's witnesses.
10. In the course of her evidence, the Claimant stated that, contrary to the list of issues,

she did not pursue the following as legal claims of discrimination:

- 10.1. Issue 14.14(ii) and 15.1 (insofar as 14.14(ii) was an alleged PCP). The Claimant had no complaint about the transfer to Seven Sisters branch.
 - 10.2. Issue 14.14(iii) and 15.1 (insofar as 14.14(iii) was an alleged PCP). The Claimant did not complain that she was required to work more than 3 days per week (her complaint was about the hours that she was required to work at the East Ham store from July 2017, not her earlier period working at the store in 2016 when she had worked 4 days per week).
 - 10.3. Issues 14.14(iv) and 15.2. The Claimant withdrew the exclusion from the contractual bonus scheme complaint.
 - 10.4. Issue 14.14(vi). At the start of the hearing on 30 September 2020, after disclosure of payslips from January to June 2017, the Claimant was asked further questions by the Tribunal and asked to give particulars of the non-payment of contractual sick pay alleged. The Claimant explained that she was not complaining about unlawful deduction from wages/breach of contract in respect of contractual sick pay. This factual matter was therefore not in issue and the complaints relating to it were withdrawn. Issue 15.3 required amendment by removing 15.3.1 to 15.3.3, and 15.3.7.
 - 10.5. The Claimant stated that she had only intended to allege failure to pay Statutory Sick pay; and she stated that this was due to mistake not discrimination. In relation to unpaid SSP, the complaints of harassment and victimisation were withdrawn. Issues 14.14(vii) and 15.3 required amendment.
11. Following the above clarification, the complaints withdrawn were dismissed.
12. The Claimant also stated on 30 September 2020 that she was complaining that her absence arose in consequence of her disability. The unfavourable treatment complained of was dismissal. This complaint under section 15 EQA was not reflected in the list of issues, so it was added by the Tribunal.
13. The full list of the remaining complaints was therefore as follows (with the relevant issue number, using the paragraph number from the Case Summary drawn after the Preliminary Hearing on 19 November 2019):
- 13.1. Automatic unfair dismissal under s.99(3)(a) Employment Rights Act 1996 (issue 14.1);
 - 13.2. Sex or pregnancy related harassment of the Claimant, the unwanted conduct being service of a notice of dismissal or her actual dismissal on 25 May 2017, because of the pregnancy of sex or pregnancy (issue 14.6);
 - 13.3. Victimisation of the Claimant by the above treatment (issue 14.6);
 - 13.4. Harassment related to sex or pregnancy, the alleged conduct being unreasonable demands for medical information about her pregnancy or

miscarriage, which questioned their genuineness, and a comment from Ms. Ezeagbo “I don’t want to have to catch you out” (issue 14.7);

- 13.5. Victimisation of the Claimant, relying on the conduct set out above (issue 14.7);
- 13.6. Direct disability discrimination, with the less favourable treatment being the acts listed at issue 14.14 i, v, viii, ix;
- 13.7. Failure to make reasonable adjustments in respect of working hours (but not the number of days of work) (issue 15.1);
- 13.8. Breach of contract/unlawful deduction from wages where the alleged breach/deduction was the failure to SSP (issue 15.3);
- 13.9. Victimisation of the Claimant by the above treatment (issue 15.3);
- 13.10. Harassment related to disability (issue 15.4).
- 13.11. Unfavourable treatment of dismissal, arising in consequence of her sickness absence, amounting to discrimination under section 15 EQA (added to the list).

14. The Tribunal revised the original list of issues as attached at Appendix A, with tracked changes, which the parties agreed was correct prior to judgment being delivered.

The Evidence

15. In order to preserve the principle of Open Justice, on 16 September 2020, the Claimant’s first witness statement was read out by the Employment Judge (because the Claimant had no copy of it at that stage, although she was then provided with a copy) and her second statement was read aloud by herself; and copies of Jurgita Strebulyte and Ian Hayman’s witness statements were present at the rear of the Tribunal room from 29 September 2020.

16. The Tribunal heard oral evidence from the following witnesses:

- 16.1. The Claimant (via CVP and in person)
- 16.2. Ian Hayman (in person)
- 16.3. Jurgita Strebulyte (via CVP, because she is based in Spain)

17. The bundle was prepared by the Respondent. The Tribunal directed that certain pages (302, 304, 305, 308-309, 310-312) were removed from it, because they included privileged information; and after enquiry of the Claimant, it appeared that she had not intended to waive privilege even though she had sent them to the Respondent’s representative as he was finalising the bundle.

18. Page references in this set of Reasons refer to pages in that bundle.

19. The Tribunal found that the Claimant was an unreliable witness, who was a very poor historian for reasons we demonstrate below. In contrast, we found Ian Hayman and in particular, Jurgita Strebulyte, to be reliable witnesses. We preferred the Respondent’s

evidence and relied on the facts shown by the documentary evidence rather than the Claimant's account where there was a material conflict of fact.

The Facts

20. The Respondent is a business providing money transfers. It has retail premises. The shops are relatively small, with a fixed number of tills. The teams operating the shops are fairly small.

21. At the relevant times, the retail team was 35-40 people spread across various London shops, managed by Ian Hayman.

22. The Claimant was employed as a cashier on a part-time basis. Her contractual hours were 24 hours per week.

23. The ability to attend work for rostered shifts is a key requirement of the cashier role with the Respondent,

24. Flexibility is a further requirement of the cashier role, as explained in the evidence of Jurgita Strebulyte, paragraph 2-11. There is flexibility built into the contract: see the terms and conditions of employment in respect of hours and location (p106-107).

The Claimant's contract

25. A copy of the Claimant's statement of terms and conditions is at p105ff. This was emailed to the Claimant on 14 October 2016 (p103) about the time that she was recruited. Although the front page stated full time, it was not in dispute that the Claimant worked part time throughout her employment. The covering email states that she will work 3-4 days per week, and made it clear that the agreed hours were 24 per week.

26. The Claimant probably did sign a copy of her contract. In any event, she read it and did not object to any term within it. We find that the written terms in this statement (save the reference in the title to her being full-time) were accepted by the Claimant and they formed her contract.

27. This contract states that the employee may be required to travel and work at various locations in the UK as determined by the needs of the business. In respect of hours of work, the terms provide that the normal hours of work are 24 hours, allocated from 9am to 7pm, Mondays to Sundays, but in addition, the employee may be required to work a reasonable amount of additional hours.

28. The Claimant's contract of employment included a 3 month probation period, which could be extended at the discretion of the Company. The relevant contractual term is at p.106.

29. The Employee Handbook, which was not incorporated into the Claimant's contract, contains provisions as to discretionary sick pay and Statutory Sick Pay ("SSP"): see p.62. The Claimant was sent a copy of the Employee Handbook at the time of her recruitment. It contained various procedures (including those relating to sickness absence at p.60). The Claimant in evidence confirmed that she recalled the Handbook and had read it.

30. In oral evidence on 29 September 2020, when asked by the Employment Judge, the Claimant could not identify precisely what SSP was unpaid nor when the last deduction in the series were made. She stated that the period was around the time of her pregnancy and miscarriage, and that she required payslips for the period January to June 2017.

31. On the following day, the Respondent provided the relevant payslips for January to June 2017 (added at pp.283a-d), which were raised with the Claimant at the outset of the hearing on 30 September 2020. The Claimant could not particularise precisely when the alleged deductions were made.

32. It was subsequently confirmed in evidence by Jurgita Strebulyte that the pay spreadsheet and table in the bundle at p282-283 included all payments made to the Claimant. Jurgita Strebulyte had used original documents held by the Respondent to formulate the calendar pages showing when the Claimant had worked (pp259-281), the spreadsheet showing what the Claimant had been paid each month (and whether the sum had been correctly calculated) at p282, and the table showing what SSP she should have been paid (at p.283). Her evidence about the accuracy of the information set out in the schedule and tables was not challenged, albeit the Claimant disputed some entries on the Calendar pages which showed that she had worked more than 24 hours per week after January 2017. We preferred the evidence of Jurgita Strebulyte who compiled her documents by reliance on pay records produced by the stores where the Claimant worked, which were compiled on the basis of hours worked or sickness absence. We accepted that the Calendar document and the pay schedule that she produced (p282-283) were likely to be entirely accurate or almost wholly correct.

33. From the schedule at p282 and the table at p283, and the evidence of Jurgita Strebulyte, we concluded that the Claimant was correct in stating that she was not paid all the SSP to which she had been entitled. The shortfall of SSP due to her but not paid over the course of her employment was £972.78 shown in the table at p.283. Shortfalls in payment of SSP happened over the financial year 2017-2018. The table at p.282 shows that she was paid SSP for 21 May 18 to 14 June 2018. Therefore, the last date on which SSP was unpaid was, at the latest, in February 2018. The Claim was not presented until 15 October 2018.

34. The Claimant was asked why she had not presented the Claim for SSP or contractual sick pay within 3 months of the deductions or the last in the series, because one complaint was unlawful deduction from wages. The Claimant adduced no evidence to explain why it was not reasonably practicable to bring her claim in time. We found that it was reasonably practicable, and feasible, for the Claimant to present her Claim within 3 months of the last in the series of deductions, whether this was the end of June 2017 or February 2018.

35. The claim for SSP was also brought as breach of contract. However, the evidence at p.282-283 and the oral evidence of Jurgita Strebulyte demonstrated that although the Claimant had been underpaid SSP, she had been overpaid contractual pay by £1,146. Therefore, there was a net overpayment so the Claimant suffered no loss of pay at all.

Location and hours of work during employment until July 2017

36. Initially, the Claimant worked at the East Ham store. She worked four shifts, with

her hours spread over those shifts.

37. On 19 December 2016, the Claimant was moved from East Ham to Elephant and Castle store. The Claimant now worked three days a week, with the hours cumulating to 24 hours or thereabouts. From this point onwards the claimant had a three day a week rota.

38. On 24 December 2016, by email (p114) the Claimant asked to transfer from the Elephant & Castle shop; she raised her anxiety and panic attacks when travelling long journeys underground. The transfer was not connected to her disability of hypothyroidism, evidenced by her email at p.114, and which the Claimant accepted in evidence. The Claimant alleged that she had told Isela Caicedo about her thyroid problem – but it is inconsistent that this is not in her email at p114; the Claimant in cross-examination stated all knew about her thyroid and vertigo problems within her first year; but she could not say when. We noted that there was considerable documentary evidence in the form of Fit notes, none of which mentioned hypothyroidism, so we found it very unlikely that Ms. Caicedo had been told this. In answer to a question from the Tribunal, the Claimant's evidence was that vertigo had nothing to do with her hypothyroidism.

39. The Claimant was offered the chance to move to the Respondent's Holloway store (referred to as Seven Sisters store in the list of issues) to work 3 days (Monday, Friday, Wednesday or Saturday). The offer from Ms. Caicedo does not record any agreed, fixed hours and nor does the email headed "flexible working application". The Claimant's evidence was that it was agreed with Isela Caicedo that she work 9am to 4pm on two days and 9am to 6pm one day each week.

40. In January 2017, the Claimant transferred from Elephant and Castle to the Respondent's Holloway store. The Claimant agreed to this transfer (p.111-113). In evidence, when asked by the Employment Judge, the Claimant stated that the transfer to the Holloway store was not discrimination and she was happy with it and happy with her shifts there.

41. The Claimant claimed that she worked the pattern referred to at paragraph 39. This is not consistent with the calendar at p.262ff. We found that although C generally worked less than 24 hours at the Holloway store, she did not work the pattern alleged. We decided that, looking at the Calendar at p. 262ff, it was agreed that she would work 3 days, but not the hours alleged by the Claimant. The hours actually worked indicate there were no fixed hours, evidencing the flexible requirement for the role in terms of hours; and there was no complaint from the Claimant about the hours worked at the Holloway store at the time.

Appraisals, first dismissal, and reinstatement

42. On 7 January 2017, the Claimant's had her probation period extended due to not reaching levels of performance in certain areas. Mr. Hayman agreed with the Manager that the Claimant's probation would be extended by 1 month and she would receive re-training on particular areas.

43. The Claimant's second probation appraisal (on 10 February 2017) was by a different person, her supervisor, Javier Martin. The Claimant had improved on customer service skills but again failed the appraisal for the reasons given at p.122. We have no

information as to the follow up from this second failed appraisal and consequential extension of probation. However, the Tribunal noted that neither of the dismissals (25 May 2017 P174 and 3 August 2018 P241) were predicated by performance concerns.

44. The Claimant had also been absent sick on various occasions or had left work early feeling unwell. A complete (or almost complete) list of the Claimant's absences during her employment, and the reasons stated for each absence at the time, is set out at Appendix B.

45. The Claimant's supervisor, Javier Martin, was unhappy about the Claimant's absences, which increased his working hours, and days of work, to 6 days per week.

46. Mr. Hayman decided that her employment would be terminated and informed HR on 14 February 2017: see p.126. He planned to meet the Claimant on his return from holiday to discuss her appraisal, with a view to terminating her employment. His reasons were both performance and reliability levels. The erratic nature of the absences put strain on her supervisor at the store who had to work alone for longer hours and additional days when no cover available from other stores and affected service levels for customers.

47. The meeting did not take place as Mr. Hayman intended, because the Claimant began a lengthy period of sickness absence from 17 February 2017, into March 2017. The intention was to meet on 9 March 2017 at 3pm, but the Claimant phoned in sick on that day just before 4pm.

48. The Claimant returned to work on 10 March 2017. Sporadic sickness absence continued as described by Mr. Hayman in his witness statement.

49. Another supervisor at Holloway store, Claudia Gonzalez, emailed concerns to Mr. Hayman on 20 March 2017 about the Claimant's absences, including that the Claimant had texted that morning she was not coming into work because she was ill and the Claimant had opened the store 1 hour late on Saturday, and the fact that she was having to work alone due to the Claimant's absence. She emphasised the need for reliable cashiers who could open and close the store and work Saturdays without restrictions. The Respondent preferred staff not to work alone for safety reasons, given the cash handling nature of the business, although in fact staff did work alone.

50. Mr. Hayman asked what the nature of the sickness was; Ms. Gonzalez advised that it was personal and HR should speak to Claimant.

51. Mr. Hayman was not aware that the Claimant had been pregnant when making his decision to terminate her employment in February 2017. We accepted his evidence that the first he knew that she had been pregnant was the Fit Note dated 4 April 2017, provided on 6 April 2017 which gave miscarriage as the reason for absence.

52. It was clear from the Claimant's own evidence that Mr. Hayman could not have known that the Claimant was pregnant when he decided that her employment would be terminated. Although the Claimant's evidence during cross-examination was that she knew of her pregnancy in the first week of February 2017 when she told all the staff, when it was put to her by the Tribunal that the Fit Note of 22 February 2017 stated "Illness – under investigation" (with no reference to pregnancy), the Claimant was grateful and corrected her earlier evidence to state that she found out about her pregnancy at the end

of February 2017.

53. The reasons why dismissal had not happened prior to the miscarriage were that Mr. Hayman had been on annual leave and then the Claimant had been absent sick. The Fit Notes prior to this incident did not mention that the Claimant was pregnant, nor that she had hypothyroidism, and nor could Mr. Hayman or HR have deduced from the Fit notes that the Claimant had hypothyroidism nor that she was pregnant.

54. There is a text in the bundle from the Claimant on 30 March 2017, which appears to have been sent to Claudia Gonzalez only, which explains that she has had a miscarriage and been advised by GP to take 2 weeks off work.

55. From the text messages, the inference is that this text was not received by Ms. Gonzalez, who, from the text messages, found out about the miscarriage by text after the Claimant failed to attend on 1 April 2017.

56. On one Saturday, 1 April 2017, the shop was not opened at all because the Claimant had not attended nor informed anyone that she could not work.

57. Claudia Gonzalez emailed on 3 April 2017 to Mr. Hayman and HR: see p160, advising that she had not received any text before the absence on Saturday 1 April 2017. The email also stated:

“Even though you decide her to come back after this 2 weeks, I need someone else to work with me, it is very clear someone unreliable affects the performance of a small store like this one.”

58. A fit note was sent by the Claimant on 6 April 2017 which stated that she was unfit for work until 11 April 2017 due to miscarriage: p246. This was seen by Mr. Hayman.

59. A return to work meeting took place on 21 April 2017. This was a face to face meeting with Victoria Ezeagbo, HR manager at time, the Claimant and Mr. Hayman. At the meeting, the Claimant said that she was fit and able to return to work. In her oral evidence, the Claimant stated that Ms. Ezeagbo said to her during the course of the meeting, in relation to a request for the Claimant to provide medical evidence, *“I don’t want to have to catch you out”*. The Claimant alleged this was harassment related to pregnancy or disability.

60. Mr. Haywood was present at the meeting. In evidence, he could not recall such a comment being made.

61. The Tribunal found that the date on which this statement was made differed from that given at the Preliminary Hearing: see issue 14.7. The Tribunal found that any statement made to the Claimant orally must have been made at the RTW meeting on 21 April 2017, not on 25 May 2017, when the Claimant had not been in contact with the Respondent for several days.

62. The Claimant’s evidence was that this was an exchange in the context of a medical note produced by the Claimant, which was blurry and the full page not copied and consequently not accepted; the Claimant was asked to send it again. In response to the statement, the Claimant asked what Victoria Ezeagbo meant, because it made her feel that she was providing medical notes that were not genuine. In respect of this statement,

we found that the statement alleged was probably not made, and that if any similar statement was made, it was not reasonable for it to have the effect on the Claimant that she alleged. Our reasons are as follows:

- (a) The Claimant was a poor historian generally, which was further demonstrated in respect of this allegation, because she had not remembered the date of the meeting correctly.
- (b) The Claimant had not made any complaint at the time or subsequently about this alleged statement, until her Claim was presented.
- (c) Mr. Hayman was present at the meeting on 21 April 2017. We found that he was likely to have recalled such a statement, if it had the effect on the Claimant that she alleged in her Claim.
- (d) The absence of any complaint by her at the time, and Mr. Hayman's lack of any recollection shows that, if such a comment was made, it was not related to her pregnancy or hypothyroidism (an impairment which he could not have known about on 21 April 2017) or that at the time the Claimant did not believe that it humiliated her or harassed her.
- (e) Further, it was likely that any similar remark made at that meeting was intended to be light-hearted and was not intended to be unwanted in the context of a return to work meeting; otherwise, the Claimant would have complained at the time and Mr. Hayman would have been aware of this. It was not evidence that Ms. Ezeagbo did not believe the Claimant about her being sick following the miscarriage and being absent as a result. The Tribunal found that it was not reasonable for any such remark to have the effect alleged by the Claimant.

63. At the meeting, Mr. Hayman gave the Claimant the benefit of doubt that he felt about her ability to provide reliable attendance, and felt he would offer her retraining (evidenced by his email at p163).

64. The Respondent's sickness absence procedure (p.60-61) required employees to telephone their manager if they were absent sick. The Claimant's oral evidence was that when she commenced employment she read the Handbook containing the Respondent's procedures.

65. The Claimant was absent on 28 April 2017. On 27 April 2017, the Claimant sent a text message to Claudia Gonzalez stating that she would be off for two weeks, but without any fit note being sent at that point.

66. As a result, Claudia Gonzalez made a formal request for a change of cashier: see p.167. In this email, Claudia Gonzalez explained that the Claimant had a medical condition before but now had opted herself to take more time off for a period of two weeks, and that this affected her co-workers, and Claudia Gonzalez ended up covering the store working shifts of 10 hours on various days. Claudia Gonzalez explained that it was a small store and she needed a reliable and committed cashier and that the Claimant was making many basic mistakes.

67. In light of Claudia Gonzalez's further email of 27 April 2017 (p163), reporting that

the Claimant was taking two weeks more sickness absence and requesting a different cashier because the Claimant *“was unable to do it anymore”*, Mr. Hayman sought advice from HR.

68. On 4 May 2017, Ms. Ezeagbo asked the Claimant for more information as to what had changed since the return to work meeting. The email (p.168)) stated:

“We need to determine if you are able to fully perform in the capacity to which you were hired. This level of uncertainty leaves us and more so the store in a difficult situation. Please provide a doctors note ASAP detailing the nature of the absence.”

69. There was no response from the Claimant, save that a Fit Note provided on 8 May 2017 covered for absence until 19 May 2017.

70. After 19 May 2017, the Claimant did not contact HR or her managers and did not provide a further Fit Note. The Claimant had informed her line manager that she would be returning on 20 May 2017. In fact, the Claimant failed to return to work and was unreachable by her team. As far as Victoria Ezeagbo was concerned, the Claimant was absent without permission.

71. On 25.5.17, the Claimant’s employment was terminated by email letter, without notice: see p.174. The letter explained her team had tried to reach her without success. The stated reason for termination was:

“You have continued to not follow the proper sickness and absence reporting procedure, and as a result, we are dismissing you with immediate effect”

72. Mr. Hayman was informed that the Claimant’s contract had been terminated.

73. In her oral evidence, the Claimant stated that a Fit Note was provided for the period up to 25 May 2017. However, we found that this Fit Note is dated 26 June 2017, and that it was not provided until about that date.

74. When asked why the decision was pregnancy-related, the Claimant referred to the timing of it and that the Respondent was aware of her complications. The Tribunal did not draw any inference from the timings or the knowledge that managers knew of the pregnancy and miscarriage from 6 April 2017. There was not something more which indicated a pregnancy-related dismissal.

75. We found that the reasons for the decision to terminate the Claimant’s employment were those set out in the email of 25 May 2017. The Claimant’s pregnancy and miscarriage were unrelated to the decision to dismiss. Our reasons were because of the facts set out above, specifically:

- a. The Claimant had said she was fit to return to work at the meeting on 21 April 2017, so that was reasonably what Respondent expected.
- b. The Claimant went off sick almost immediately on 28 April 2017 and did not follow sickness reporting procedure.
- c. The Claimant did not provide any fit note or written evidence for her absence until 8 May 2017.
- d. The fit note provided on 8 May 2017 expired on 19 May 2017.
- e. The Claimant was then absent without any reason provided, and without any contact with her managers, until 25 May 2017 when dismissed.

- f. The Claimant communication of 27 April 2017 was vague and did not explain what her medical issue was. The Claimant had been requested (p168) on 4 May 2017 to provide reason for her absence. In response, Victoria Ezeagbo stated as set out above (at p.168).

76. The Tribunal noted that performance was not raised as an issue.

77. In evidence, the Claimant stated that she called Victoria Ezeagbo when she received the email which terminated her employment. In her oral evidence, the Claimant stated that she did not tell Victoria Ezeagbo that she would seek legal advice, but that she said that the Respondent could “*go ahead, but I will do what I need to do*”. This evidence is inconsistent with her Claim form (p.8, section 8.2). The Tribunal found this demonstrated that the Claimant was not a reliable witness, because she had a poor recollection of events.

78. On 2 June 2017, the Claimant met with Victoria Ezeagbo. She provided additional details about factors affecting her well-being which the Respondent did not know. This is recorded in an email to Mr. Hayman and others (p.175). Victoria Ezeagbo stated that the Claimant’s GP had agreed she needed grief counselling, which Victoria Ezeagbo agreed to look into. The intention was that the Claimant would be ready to work by the beginning of July 2017. A temporary member of staff was hired to provide cover pending the Claimant’s return to work.

79. The Claimant stated in oral evidence that Victoria Ezeagbo had made up some of the content of this email. The Tribunal found that, whatever the Claimant now believed, Victoria Ezeagbo had been sympathetic to the Claimant. The email to Mr. Hayman at p.175 was prepared in the normal course of her duties. However, the Tribunal found that the Victoria Ezeagbo should have set out what was, in effect, the appeal decision in writing for the Claimant, giving her an outline of the reasons and the plan going forward.

Hours of work and events at the East Ham store July 2017

80. The Claimant was absent through sickness until 6 July 2017. On 6 July 2017, the Claimant transferred from Holloway to the East Ham store. The Claimant continued to work around 3 days per week. The Claimant stated in cross examination that the shifts were longer than she had worked at the Holloway store. We considered the Calendar record starting at p.280-281. This showed, for example, that she worked the following hours in those weeks when she was rostered to work (and where she was not absent sick or on leave):

From 6.7.17: 26 hours
W/C 10.7.17: 26 hours
W/C 17.7.17: 26 hours
w/c 24.7.17: 33.5 hours
w/c 31.7.17: 26.5 hours
w/c 7.8.17: 38 hours
w/c 14.8.17: 26.5 hours
w/c 21.8.17 9.5 hours (plus sick absence)
w/c 28.8.17 26.5 hours
w/c 4.9.17: 26.5 hours

w/c 11.9.17: 14.5 hours plus 4.5 hours sick
w/c 18.9.17: 26 hrs
w/c 2.10.17 17.5 hours (plus sick leave)
w/c 9.10.17: 14.5 hours plus sick leave
w/c 16.10.17: 23 hours
w/c 23.10.17: 26.5 hours
w/c 30.10.17: 26.5 hours
w/c 6.11.17 8.5 (plus sick leave)
w/c 13.11.17: 26.5 hours
20.11.17: 17.5 hours
27.11.17: 9.5 hours

In the majority of weeks, the Claimant worked slightly more than her contractual hours of 24 hours per week.

81. On 5 October 2017, the Claimant sent an email to her Manager, Mr. Hassan.
82. This email shows that at some point in the past the Claimant had “mentioned” that she had a thyroid problem, but the inference from the email is that she did not explain that it meant that she could not give consistent attendance in line with rostered shifts. In this email, the Claimant states that the thyroid problem is serious and that she is dependent on medication, and that she was advised to do less hours by her GP. The tribunal believe that reference to a ‘thyroid’ problem gives no indication as to what if any impact the thyroid impairment has on the Claimant’s day to day activities, although it does request adjustment of fewer hours of work.
83. The email of 5 October 2017 is ambiguous; it is either stating that the Claimant would like to do two shifts or three shifts. Read literally, it is asking that she be allowed to do two shifts of 9-4pm and maybe one 9-6pm shift, or maybe 9-5pm, on one day. Therefore, the Tribunal finds that the Claimant was offering to work 23 or 24 hours per week.
84. The Tribunal found that, at this point, the Respondent did not know, and could not reasonably be expected to know, that rostering the Claimant for shifts of more than 9am – 4pm or totalling in excess of 24 hours put her at a more than minor disadvantage.
85. Jurgita Strebulyte did not know that the Claimant had a thyroid-related health condition until 5 October 2017 when she saw Mr. Hassan’s email. Later, she saw the Claimant’s sickness absence self-certificates provided on 19 October 2017, after Respondent had insisted that the Claimant must provide documentation about her absences. These self-certificates (pp255-257) simply stated “Thyroid”. Moreover, there was no information or medical evidence on the Claimant’s HR file about any condition related to her thyroid; we found that no such information had ever been provided by the Claimant and that her recollection was incorrect, because we found that any such fit note or medical note would have been retained on the HR file.
86. On 30 November 2017, the Claimant sent an email to Mr. Hayman requesting that she worked only until 4pm on Thursdays. The email stated that she was struggling with the long hours on Thursday because of her health conditions, and that she had requested the reduction before. After seeing this email, Jurgita Strebulyte arranged to meet the Claimant to discuss her health conditions in more detail so that steps could be taken to

support her.

87. The meeting took place on 1 December 2017. Jurgita Strebulyte and the Claimant discussed the Claimant's symptoms and the previous arrangements that the Claimant had had in Holloway store. Jurgita Strebulyte agreed that the Claimant's shifts could be adjusted so that she worked no longer than 8 hours per day, but that the Claimant was needed for 24 hours per week to ensure adequate staff cover in the stores. The Claimant's evidence was that it was agreed her working hours would be two days 9 to 4 and one full 12 hour day. Jurgita Strebulyte denied this, and said that it was agreed that shifts would be modified to 3 days per week, 8 hours per day and that the Claimant was happy with this arrangement.

88. Jurgita Strebulyte wrote to the Claimant to summarise what was agreed on 5 December 2017 (pp184-185).

89. The Tribunal was confused as to the Claimant's demands in the context of her disability relied upon, and the later medical evidence from her GP, because it was unlikely that the pattern alleged by the Claimant would have helped the Claimant to work a full 12 hour day. We preferred Jurgita Strebulyte account of what was agreed, which was generally corroborated by her email of 5 December 2017.

90. The Tribunal found that from the beginning of November 2017, the Claimant only worked more than 24 hours in a week on 1 occasion. From December 2017, the Claimant worked an average of 6-8 hours per shift; the nature of the Respondent's business meant that she could not work only 9-4pm every day due to the requirements to cover tills and serve customers throughout the working day and the requirements of other team members to have whole days off.

91. Furthermore, as a result of the email of 30 November 2017 and the meeting with Jurgita Strebulyte on 1 December 2017, until the end of her employment, during the weeks when the Claimant was at work rather than absent sick, she worked less than 24 hours per week on average, with the calendar showing that on most weeks she was rostered to work less than 24 hours per week. The inference from the hours rostered and work demonstrates that Jurgita Strebulyte stepped in and made sure that an adjustment was made for the number of hours that the Claimant was rostered. We found Jurgita Strebulyte was a reliable witness on this and other matters.

92. The annotated calendar (from p.275ff) shows that after 1 February 2018, the Claimant was absent sick until 7 March 2018. Thereafter, she had further substantial periods of sickness absence. These periods are shown in Appx B. The Tribunal found that none of these absences were due to the Claimant's hypothyroidism, because this was not the stated reason for the absence on any fit note. The reasons for absence included depression, tonsillitis, and arm pain. There was no credible or medical evidence that any of these were linked to hypothyroidism; and the Tribunal did not accept the Claimant's allegation that the arm pain was linked to hypothyroidism because it was not included in either letter produced by the Claimant from her GP (dated 21.5.18 and 4.7.18).

93. There was no evidence that the Claimant suffered any less favourable treatment at any time because of her disability. She gave no evidence about any comparator, nor did she explain why any treatment complained of was because of her disability.

Allegation of unreasonably demanding medical evidence

94. In her oral evidence, the Claimant stated that the requests that she relied upon were solely written requests for medical evidence and that they were contained in the bundle. Her evidence was that these came first from Victoria Ezeagbo and then from Jurgita Strebulyte.

95. However, the List of Issues, at 14.7, refers to the statement which we have found was not made by Victoria Ezeagbo on 21 April 2017. We have explained above why any such comment was not harassment.

96. The Respondent's evidence was that it had never made unreasonable requests for information, and that all requests were a genuine attempt to understand the Claimant's health condition or conditions, to enable them to support her better and plan their business operations.

97. In respect of the alleged unreasonable demands for medical evidence from the Claimant, the Tribunal found that the written requests in the bundle from Victoria Ezeagbo were all reasonable, and were not repeated requests for the same evidence or for the same period. On 27 February 2017, Victoria Ezeagbo had requested a clear copy of the fit note dated 22 February 2017; this was a request for a clear copy of a Fit note, not evidence of a repeated request; and when this request was made, neither the Claimant nor Respondent knew that she was pregnant. The request made on 11 April 2017 was prompted by the Claimant not providing a fit note to cover the period of sickness that the Claimant had indicated would continue until 19 April 2017. The request made on 18 April 2017 was made ahead of the return to work meeting planned for 21 April 2017, which was intended to discuss her sickness absence. The request of 4 May 2017 was entirely reasonable because the Claimant had not provided a fit note or letter from her GP to cover the ongoing sickness absence, which was in breach of the Respondent's sickness absence procedure, which the Claimant was aware of; this fit note was not provided until 8 May 2017. None of these requests were related to her pregnancy nor to her disability; they were related to the Claimant's failure to follow the correct procedure.

98. In respect of the later requests, these appear (in the absence of any particulars from the Claimant) to be those made by Ms. Strebulyte from 1 December 2017 onwards. We found as follows on the issue of whether these requests were unreasonable.

99. On 1 December 2017, Jurgita Strebulyte met with the Claimant as explained above. At the meeting, given that the Claimant had stated that she had an existing health condition which prevented her from giving regular attendance, and which might require the Respondent to know how to manage her condition if she became ill on shift, Ms. Strebulyte told the Claimant that she would need to assess her case further and required a medical opinion to do so. Ms. Strebulyte handed the Claimant the "Consent to obtain a Medical Report" letter and consent form at p.180ff. The Claimant promised to read it and to return it to her once she had done so, completed with her consent.

100. On 21 December 2017, the Claimant informed Ms. Strebulyte that her GP was on leave. Jurgita Strebulyte responded to say that all the Claimant needed to do was to sign the consent form. No response was provided.

101. By an email of 10 January 2018, the Claimant informed Jurgita Strebulyte that she

had changed her mind. The email stated that the Claimant felt Ms. Strebulyte should not have asked for this information because it was very personal and she found the idea of providing it distressing. The Claimant offered to ask her doctor for a letter explaining her symptoms.

102. In the Claimant's email of 10 January 2018, she stated that she suffered from chronic thyroid and vertigo and that she had provided medical evidence about these conditions to the Respondent in the past.

103. Jurgita Strebulyte was unable to find any such evidence. We found that no such evidence had been provided in the past because the Claimant did not raise her chronic thyroid problem with her GP as a reason for any sickness absence recorded on a Fit Note. We found that the Claimant's recollection was so confused about matters in the past that her evidence could not be relied upon. We found that she was likely to have confused the one time that she mentioned her thyroid on 5 October 2017 with fit notes that she had submitted months before for entirely different conditions.

104. On 10 January 2018, Ms. Strebulyte replied stating a doctor's letter would be helpful. On 11 January 2018, she emailed the Claimant (p.194) explaining what information she required from the GP, and asked to know when the letter would be provided. The GP reports provided later by the Claimant do not address the questions set out in this email, and we inferred that the GP was not given the email at p.194.

105. On 18 January 2018, Jurgita Strebulyte sent an email to the Claimant which included:

"You have not to date provided me with your doctors feedback of your medical condition. I will therefore arrange an independent Occupational Health assessment which you will be required to attend"

106. On 20 January 2018, the Claimant returned the consent form, confirming that she did not consent.

107. After this, the Claimant left for holiday. This coincided with the Claimant having depression, which lasted for 3 weeks after the holiday. The Claimant then had tonsillitis and she was absent sick again until 7 March 2018.

108. At the beginning of May 2018, C requested that she should be permitted to work shorter hours during Ramadan because she was fasting. She sought to work 6 hours per day. On 12 May 2018, the Claimant filed a flexible working application to reduce her working hours to 6 hours per day, stating that her health condition could be aggravated during Ramadan. Jurgita Strebulyte requested by email (p220) that the Claimant provided her with medical evidence so that the Respondent could make an informed decision; religious holidays were busy periods for the Respondent's stores.

109. In response, on 20 May 2018, the Claimant emailed asking where the medical notes were that she had provided before which referred to her suffering from "thyroid and vertigo". In fact, we accepted the evidence of Ms. Strebulyte and found that the Claimant had not provided any medical evidence of her hypothyroidism. The email chain from 17 May to 21 August 2018 between Jurgita Strebulyte and the Claimant shows that Ms. Strebulyte tried hard to explain to the Claimant why she was seeking a medical opinion on

her precise condition and the type of information the Respondent required.

110. On 23 May 2018, the Claimant informed Jurgita Strebulyte that she was signed off work due tonsillitis. The Claimant sent a fit note (for May 2018) and a letter from the GP dated 21 May 2018. The letter is at p.224.

111. The GP letter p.224, 21 May 2018, does not address the questions asked by Jurgita Strebulyte. In particular, the letter attributes most of the Claimant's absence in the last year to depression and tonsillitis. The inference from the letter is that the hypothyroidism has produced tiredness and lethargy but not sickness absence.

112. Jurgita Strebulyte understood the letter to be referring to a reduction in the number of hours per day; but Jurgita Strebulyte could not understand why the hypothyroidism meant the Claimant could not attend work at all on many days. The GP letter also did not give any indication of potentially serious and urgent health risks that might arise, such as a coma, which the Claimant had referred to in her email of 20 May 2018.

113. The Claimant was absent sick until 14 June 2018. The last two weeks of this absence were stated on the fit note to be due to arm pain.

114. Jurgita Strebulyte invited the Claimant to a return to work meeting to discuss her health position, the options and a team complaint letter about the Claimant's lack of collaboration. The notes of the return to work meeting on 19 June 2018 are at p232-237. These demonstrate that the Claimant was not co-operative in allowing the Respondent to gain an adequate knowledge of her impairments, and how they affected day to day activities or her ability to attend work as rostered.

115. Jurgita Strebulyte found that the Claimant's absences appeared unrelated and for different reasons on the face of the medical evidence. She noted that none of the absences appeared to relate to a thyroid condition.

Dismissal

116. Mr. Hassan, manager, at East Ham complained about the degree of sickness absence of the Claimant. By 4 June 2018, the Respondent provided cover, in the expectation that the Claimant would not attend work.

117. The Claimant's numerous sickness absences led the team at the East Ham store to complain that they had to continue to cover her sickness absence. This is explained in the email from the manager, Mr. Hassan, of 7 June 2018, which included:

"Most of them already given up, they have told me that they also have family life and they are not going to cover her shifts anymore."

118. Mr. Hassan was told by Jurgita Strebulyte to continue to roster the Claimant and to ensure that he had a full team without the Claimant's attending. Mr. Hassan responded by explaining why the Claimant's absences were causing problems and complaints, particularly because the Respondent were 2 people short over three stores including East Ham: see email 7 June 2018 p.226.

119. After 21 July 2018, the Claimant was absent sick on further days.

120. After the return to work, a further GP note dated 4 July 2018 (p.238) had been provided by the Claimant. This stated that the Claimant had a past medical history which included hypothyroidism and vertigo. The GP stated that “these things” caused her to become faint with dizziness and nausea, flushing, feel as though she would pass out, and that the symptoms could come on very quickly and last for hours; and it was very hard to predict when she was going to have these episodes. The GP asked that the R accommodate her at work if possible; no specific adjustment was proposed.

121. Jurgita Strebulyte and the rest of the management team believed that, in the light of the medical evidence, the Claimant was unlikely to attend shifts assigned to her on a regular basis. In general terms, the records held by the Respondent showed that the Claimant was absent when she felt unwell.

122. Jurgita Strebulyte and the Respondent’s management believed that this would remain a problem for the Respondent and her colleagues at the store. This was because the business required there to be adequate number of employees at each store, so that customers would not be lost by delays in service. Flexibility and reliability were necessary as explained by Jurgita Strebulyte in her evidence.

123. By letter dated 3 August 2018 (p241), the Claimant was dismissed. The stated reasons were that the Respondent had tried to balance the flexibility required by the Claimant with the requirements of the business and the needs of other colleagues at the store. It stated that the service provided and the success of the teams depended on employee availability to perform their duties when assigned to work; and that the uncertainty over her availability and increased pressure and discontent of other staff required her role to be evaluated. The letter explained steps that had been taken to assist the Claimant: adjusted working schedules; provision of shifts on preferred days; support by other staff covering her absences. It went through her absences (41 days sick on at least 15 separate occasions), the fact that she failed to follow company reporting procedures, and that she had been slow in obtaining medical evidence from her doctors.

124. The Tribunal found that the Claimant was dismissed for the reasons stated in the dismissal letter as further explained in Jurgita Strebulyte’s evidence. The decision was taken by the management team as a whole. We accepted Jurgita Strebulyte’s evidence that there was no alternative to dismissal in the circumstances.

125. Had the Respondent reduced the Claimant’s number of shifts, or her hours, the Tribunal found that neither of these adjustments would have made any difference to her attendance and reliability; there was no evidence that the Claimant would have attended work in accordance with the hours set out in an amended roster.

126. The Tribunal accepted that the repeated sickness absence was unfair for other cashier team members; they would make plans which they would have to cancel, because they felt responsible to cover shifts at the store.

127. The dismissal letter did not provide a right of appeal. We found that the letter should have offered a right of appeal, but we drew no adverse inference from the absence of this offer of any appeal, which we found an oversight by Jurgita Strebulyte.

128. The Tribunal found that the Claimant was not dismissed because of her disability. We found that any non-disabled cashier who had had the same absence as the Claimant,

coupled with her failure to co-operate in terms of the provision of medical evidence and the failure to comply with the sickness absence reporting procedure, and the same medical evidence, would have been dismissed at the same time as the Claimant was dismissed.

Jurisdiction

129. The Claimant did not lead any evidence to explain why certain complaints were presented out of time.

130. Although the Claimant stated that after her dismissal on 25 May 2017, given the reinstatement, she hoped for a fresh start, this did not explain why she had failed to present her Claim within 3 months of the 25 May 2017 dismissal or the acts of discrimination complained of thereafter. The Claimant accepted that it was practicable for her to present her complaints in time.

131. The Claimant in effect alleged that she was subjected to continuing act of harassment and discrimination after she was reinstated. The Tribunal did not accept that there was any such practice or a continuing act in the sense meant in Hendricks. The Claimant's perception, after the events, was not a reliable record of what had in fact happened over the time leading up to her dismissal on 3 August 2018.

The Law

Unfair Dismissal

132. The effect of Section 99 Employment Rights Act 1996 and Reg 20(3)(a) Maternity and Parental Leave Regs 1999 is that an employee shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is connected to her pregnancy.

133. The general rule in such a complaint is that an employee is not required to prove his or her case. The Claimant need only produce some evidence that the real reason put forward by the employer was not the true reason. If the employer is arguing dismissal was for a different reason, it is for him to prove the real reason and that it was potentially fair. If the employer fails to prove that reason, the issue is whether the employer has disproved the reason advanced by the Claimant (ie. a reason connected to her pregnancy in this case). If not, dismissal is for the reason advanced by the Claimant.

134. For a complaint of automatic unfair dismissal for a reason connected with pregnancy to succeed it is essential that the employer knew or believed that the woman was pregnant.

Pregnancy: Less Favourable Treatment

135. Although there was no place for a hypothetical male comparator in the case of the dismissal of a female employee for being pregnant, it is not wrong for an employment tribunal to make such a comparison in order to determine whether pregnancy or some other reason was the ground for the particular treatment of a pregnant female employee: Madarassy v Nomura plc [2007] ICR 867.

136. A Tribunal has two routes open to it:
136.1. To identify the attributes of a hypothetical comparator; or
136.2. Go straight to the question: why was the complainant treated as she was?

Breach of the duty to make reasonable adjustments

137. In practice, when hearing complaints of disability discrimination, an Employment Tribunal should first deal with the complaint alleging the failure to make reasonable adjustments: see Archibald v Fife Council [2004] IRLR 651 at paragraph 32.

138. Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out the relevant statutory provisions at the outset:

“20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...
”

139. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 (“The Code”). Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

- 143.1 The phrase “provision, criterion or practice” (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements including one-off decisions and actions.
- 143.2 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by “reasonable steps”.
- 143.3 Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage.

140. In Carrera v United First Partners Research, the Employment Appeal Tribunal held that a Provision, Criterion or Practice did not require an element of compulsion; an expectation or assumption placed upon an employee may suffice. HHJ Eady gave the following guidance at paragraph 31-37:

- 140.1. The identification of the Provision, Criterion or Practice was an important aspect of the Tribunal's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments.
- 140.2. It is important to be clear as to how the Provision, Criterion or Practice is to be described in any particular case.
- 140.3. The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice".
- 140.4. The Tribunal had taken an unduly narrow view of the Claimant's identification of the Provision, Criterion or Practice, and that it should, instead, have adopted a real world view of what a requirement was in the context of the case.

141. The Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

- 141.1. the relevant provision, criterion or practice made by the employer; and/or
- 141.2. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;
- 141.3. the identity of non-disabled comparators (where appropriate); and
- 141.4. the nature and extent of the substantial disadvantage suffered by the Claimant.

142. The above steps follow the guidance provided in Environment Agency v Rowan [2008] IRLR 20 at paragraph 27.

143. Substantial disadvantage is such disadvantage as is more than minor or trivial.

144. In Archibald v Fife, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).

145. This Tribunal reminded itself that even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.

146. The Tribunal considered Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216. The following is a fair summary of it for our purposes in this case:

- 146.1. The nature of the comparison exercise under section 20 required the tribunal to ask: does the Provision, Criterion or Practice put the disabled person at a substantial disadvantage compared with a non-disabled person? The fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the Provision, Criterion or Practice bit harder on the disabled, or a category of them, than it did on the able-bodied. The Employment Tribunal and the EAT had erred in holding that the s.20 duty had not been engaged because the policy applied equally to everyone (see paragraphs 46-48, 58, 63 of judgment).
- 146.2. There was no reason artificially to narrow the concept of what constituted a "step" within the meaning of s.20(3). The only question was whether it was reasonable for it to be taken. Although the proposed steps would have been, if taken, capable in principle of ameliorating the disadvantage resulting from the operation of the policy, the steps required to avoid or alleviate such disadvantages were not likely to be steps which a reasonable employer could be expected to take.
- 146.3. It may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.

Requirement of knowledge

147. The requirement of knowledge under section 15(2) EQA compared to the knowledge required to trigger the duty to make reasonable adjustments (Sch 8 para 20 EQA) are similar but not identical.

148. The duty to make reasonable adjustments does not arise if the employer does not know, and could not reasonably be expected to know, that an employee has a disability and is likely to be placed at a disadvantage referred to in the three requirements within section 20: EQA 2010 Sch 8 para 20.

149. The legal principles emerging from the appellate cases on the application of the knowledge provisions relevant to section 15(2) EQA were summarised in A Limited v Z [2020] ICR 199. Of these principles, the following are relevant when considering complaints under sections 20-21 EA 2010.

- 149.1. The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P.
- 149.2. The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently

reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

149.3. The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

“5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a ‘disabled person’.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”

149.4. The question is not what the respondent might reasonably have been expected to do, which was to make inquiries into the claimant's mental health, but to consider what the respondent might reasonably have been expected to know after making those inquiries.

150. In respect of the knowledge requirement before the duty to make reasonable adjustments arises, the Code gives the following guidance on para 8 Sch 20 EQA, at paragraphs 6.19 – 6.21.

150.1. An employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

150.2. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

Harassment

151. Section 26 provides, where relevant:

“(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.”

152. Paragraph 7.9 of the Code states that “related to” in section 26(1)(a) should be given “a broad meaning in that the conduct does not have to be because of the protected characteristic”.

153. The Code continues that “related to” includes a situation where the conduct is related to the worker’s own protected characteristic, or where there is any connection with a protected characteristic.

154. In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, we considered Dhaliwal v Richmond Pharmacology [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26. We find it helpful to set out the following extracts of the judgment of Underhill J(P):

- “14 Secondly, it is important to note the formal breakdown of “element (2)” into two alternative bases of liability – “purpose” and “effect”. That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so). It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of “element (3)” as discussed below).
- 15 Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held

liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. ... The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a “subjective” element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. See also our observations at para 22 below.

...

- 22 On that basis we cannot accept Mr Majumdar's submission that Dr Lorch's remark could not reasonably have been perceived as a violation of the claimant's dignity. We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase...”

155. Paragraph 15 above is authority for the proposition that the criterion in section 26(4) EA were overall objective criterion. The Tribunal found that, applying Dhaliwal and the reasoning of Underhill J, this was a correct interpretation of the law.

156. The Tribunal considered Paragraph 22 of Dhaliwal, and Paragraph 13 of Grant v HM Land Registry [2011] IRLR 751.

157. We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

Direct Discrimination

158. Section 13 Equality Act 2010 (“EQA”) provides:

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

159. The required comparison must be by reference to circumstances. Section 23(1) EQA provides:

“On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case.”

160. Whether the comparison is sufficiently similar will be a question of fact and degree for the tribunal, see Hewage v Grampian Heath Board [2012] ICR 1054.

161. In Shamoon, at 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

“...employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.”

Causation in direct discrimination cases

162. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877 as explained by Peter Gibson LJ in Igen v Wong [2005] ICR 931, paragraph 37.

Discrimination arising from disability

163. Section 15 EQA provides:

“(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.”

Causation

164. The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability "*includes anything which is the result, effect or outcome of a disabled person's disability*": see para 5.9.

165. There are two parts to the causation test:

- a) There must be "something arising" in consequence of the Claimant's disability; and
- b) The unfavourable treatment must be because of that "something arising."

166. In Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Simler J summarised the proper approach to determining section 15 EA claims in paragraph 31

167. As noted in Pnaiser, the causal link between the "something" that causes unfavourable treatment and the disability may include more than one link.

168. In City of York Council v Grosset [2018] ICR 1492, Sales LJ noted that section 15(1) posed two questions. The first question involves examination of the employer's state of mind (did A treat B less favourably because of an identified "something"); the second question of whether the "something" for section 15 purposes arises in consequence of the employee's disability is an objective matter. See Grosset at paragraphs 37-38.

169. In Dunn v Secretary of State for Justice [2019] IRLR 1998, the Court held (per Underhill LJ):

18. "Because of". It is a condition of liability for disability discrimination both under section 13 and under section 15 that the complainant should have been treated in the manner complained because of either (under section 13) his or her disability or (under section 15) the "something" which arises in consequence of that disability. That will typically, though not invariably, involve establishing (with the benefit of section 136 if required) that the disability, or the relevant related factor, operated on the mind of the putative discriminator, as part of his or her conscious or unconscious "mental processes". Establishing an employer's "motivation" (as it is often put – NB that this is not in this context the same as "motive") is of course a familiar exercise in discrimination law generally. The most recent authoritative exposition is in the judgments of the majority in the Supreme Court in R (E) v Governing Body of JFS [2009] UKSC 15, [2010] 2 AC 728: see in particular per Lady Hale at paras. 62–64 (pp. 759–760).

Employer's knowledge of causal link

170. It is no defence if the respondent did not know that the 'something' leading to the unfavourable treatment was a consequence of the disability: see City of York Council v Grosset [2018] ICR 1492.

Burden of proof

171. As with other types of discrimination complaints, a claimant bringing a complaint of section 15 discrimination bears an initial burden of proof. He/she must prove facts from which the tribunal could decide that an unlawful act of discrimination has taken place.

172. This means that the claimant has to show:

- That he was disabled at relevant times;
- That he has been subjected to unfavourable treatment;
- A link between the disability and the “something” that is said to be the ground for the unfavourable treatment;
- Evidence from which the tribunal could infer that the “something” was an effective reason or cause of the unfavourable treatment.

173. If the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination, the burden shifts, in accordance with section 136 EA, to the respondent to prove a non-discriminatory explanation, or to justify the treatment under section 15(1)(b).

174. Simler P stated in Pnaiser that:

“Although it can be helpful in some cases for Tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible”.

Discrimination by Victimisation

175. Section 27 provides, where relevant:

“A person (A) victimises another person (B) if A subjects B to a detriment because
–

- (a) *B does a protected act, or*
 - (b) *A believes that B has done, or may do, a protected act.*
- (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;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.”*

176. The detriment must be “because of” the protected act, but this is not a “but for” test: see Bailey v Chief Constable of Greater Manchester [2017] EWCA Civ. 425. Although motivation is not required, the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment must be shown to exist: see R (E) v Governing Body of JFS [2009] 1 AER 319, approving Nagarajan v London Regional Transport [1999] IRLR 572 on this point.

177. If the Tribunal is satisfied that the protected act is one of the effective reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason.

178. The proper test as to whether a detriment has been suffered is set out in Shamoon, above.

Burden of proof in discrimination cases

179. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in Igen v Wong [2005] EWCA Civ 142, Madarassy v Nomura [2007] ICR 867, and Efobi v Royal Mail Group [2019] ICR 750.

180. In Efobi, at paragraph 10, Elias LJ explained the correct approach to the burden of proof for a discrimination complaint:

“The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer’s explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved.”

181. The burden of proof is not shifted simply by showing that the claimant has suffered a difference in treatment or detrimental treatment and that he has a protected characteristic or has done a protected act: Madarassy at paras 56-58 (followed in Efobi).

182. However, it is important not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where, as in this case, the tribunal is in a position to make positive findings on the evidence one way or the other: Hewage v Grampian Health Board [2013] UKSC 37.

183. In Igen v Wong, at paragraph (11) of the Appendix, it is pointed out that, if the burden of proof shifts, it is necessary for an employer to prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic, because “no discrimination whatsoever” is compatible with the Burden of Proof Directive. The guidance in Igen v Wong was approved by the Supreme Court in Hewage v Grampian Health Board.

184. In respect of the application of these provisions in complaints of breach of the duty to make reasonable adjustments, we considered the guidance in Project Management

Institute v Latif [2007] IRLR 579 (Elias P, as he then was, presiding) at paras 44, 53-54.

185. In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Jurisdiction: Time Limits

186. Section 123 EA 2010 provides so far as relevant that:

"(1) ... proceedings on a complaint ... may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

- (a) when a person does an act inconsistent with doing it, or
- (b) if a person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it."

187. A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

188. Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: Hendricks v Commissioner of Police for Metropolis (2003) ICR 530 at paragraph 54.

189. The exercise of the power to extend time is the exception, not the rule. The Tribunal cannot extend time unless C convinces the ET that it is just and equitable to do so: see Robertson v Bexley Community Centre [2003] IRLR 434 at para 25.

190. One of the complaints in this case is of the failure to comply with the duty to make reasonable adjustments imposed by section 20 EA 2010. To determine when the failure is to be treated as occurring, section 123(4) EA 2010 must be applied. The proper application of these provisions has been considered in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 at paragraphs 11-15:

- 190.1. Applying subsection 123(4)(b), the failure to comply with the duty is to be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustments.
- 190.2. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.
- 190.3. The period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.

191. The principles to be applied in the application of section 123 EA 2010 are as follows:

- 191.1. The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion: Abertawe Bro Morgannwg University Local Health Board v Morgan, paragraph 17.
- 191.2. Unlike section 33 Limitation Act 1980, section 123(1) EA 2010 does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, paragraph 33.
- 191.3. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer

that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraph 25.

- 191.4. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:
- (a) the length of, and reasons for, the delay and
 - (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraph 19.

Submissions

193. At the end of the evidence at the hearing, the Claimant indicated that she would prefer to prepare written submissions when given the option of oral or written submissions. A case management order was made directing the parties to file submissions sequentially, with the Respondent agreeing to provide their submissions first.

194. The parties filed written submissions, which were read by the Tribunal ahead of the Chambers day on 13 October 2020. There is no need for the Tribunal to attempt to summarise the submissions; but each submission was taken into account.

Conclusions

195. Applying the law set out above to the findings of fact, the Tribunal reached the following conclusions on the issues for determination. For ease of reference, and to avoid confusion for the parties, the Tribunal have used the numbering given to the issues in the list of issues prepared by Employment Judge Brook.

Sex/Pregnancy discrimination

Jurisdiction: Issues 14.3 and 14.9

196. Issue 14.3 raises the question of whether the Tribunal has jurisdiction to determine the unfair dismissal complaint, because, if there was no dismissal, there would be no power to hear the UDL complaint.

197. The Tribunal concluded that the Claimant was dismissed on 25 May 2017. However, the meeting between the Claimant and Victoria Ezeagbo on 2 June 2017 was in effect an appeal against the decision to dismiss. The appeal was, in effect, allowed. The Claimant was reinstated. This had the effect of reviving the contract of employment, a process which the Claimant agreed to. This outcome is consistent with Roberts v West Coast Trains [2005] ICR 254 and the case-law referred to within it.

198. Issue 14.9 raises the issue of whether the complaints of sex and pregnancy discrimination, harassment and victimisation were presented within the time limit provided by section 123 EQA.

199. The Tribunal applied the law set out above. Unless there was a continuing act as defined in s123(3)(a) EQA, the complaints of the incidents on 21 April and 25 May 2017 were presented substantially out of time. The Claim form was presented on 15 October 2018, after Early Conciliation between 11 September 2018 and 11 October 2018.

200. The Tribunal directed itself to Hendricks. However, we found that there was no act extending over a period, whether involving these complaints of pregnancy or sex discrimination when viewed alone or viewed together with the complaints of disability discrimination. The acts that gave rise to these complaints were single, free-standing events; there was no ongoing situation in which the females were treated less favourably because of sex or pregnancy. Indeed, from the findings of fact made, the Respondent treated the Claimant sympathetically overall. Despite the fact that she had failed her probation, and a decision to dismiss her had been made in February 2017, the Claimant was not dismissed on her return from the long period of sickness absence related to her pregnancy. Further, on learning of the reasons for not complying with the sickness absence reporting requirements, on 2 June 2017, the Claimant was reinstated and offered counselling.

201. We took into account that we had a wide discretion whether to extend time. We considered whether these two complaints had been presented within such further period as was just and equitable. We decided that these complaints were not presented with such further period as was just and equitable for the following reasons:

- a. The Claimant led no evidence at all to explain why the complaints had not been submitted in time. There was a lack of evidence to support the argument that it was just and equitable to grant an extension.
- b. From questions from the Tribunal, it was apparent that it was feasible for her to present her complaints in time. There was no practical obstacles identified in the evidence.
- c. In answer to a question from the Tribunal, the Claimant stated that after the dismissal on 25 May 2017 she had gone back to work and had decided to give it another chance; she was under the impression that the Respondent would be more understanding and reduce her hours. The Claimant said that then harassment in respect of repeated demands for medical notes began and she was being ignored. The difficulty for the Claimant is that, on her case, she must have discovered this fairly shortly after her return to work and certainly by 1 December 2017. There was no explanation for any further delay after this point. In any event, the Tribunal has found that, at all times, the requests for Fit notes and medical evidence by the Respondent were reasonable requests made for non-discriminatory reasons.
- d. The Tribunal accepted that the Claimant had had the periods of sickness identified by her fit notes and self-certification notes. However, there were periods in between these when she was fit to work and to go on holiday leave. The Tribunal concluded that despite her various impairments, and her disability, the Claimant had ample opportunity to present these complaints within time.

202. However, in the alternative, and in case the above decisions on jurisdiction are found to be wrong in law, the Tribunal went on to determine the remaining issues relevant to the complaint of automatic unfair dismissal.

Issues 14.1 – 14.6: sex/pregnancy discrimination or sex/pregnancy related harassment or victimisation

203. The reason or principal reason that the Respondent served notice of dismissal on the Claimant on 25 May 2017 for the reasons set out in the email of that date at p.174. The reasons for dismissal were reasons relating to her conduct, specifically being absent without explanation or permission and for her failure to comply with the Respondent's absence and sickness reporting procedures.

204. At the date of the dismissal, the Respondent's managers, including Victoria Ezeagbo who sent the notice of dismissal, knew (from 6 April 2017) that the Claimant had been pregnant and had miscarried. However, the Claimant's pregnancy and miscarriage did not form part of the reasons for the notice of dismissal.

205. Turning to issue 14.6 (direct sex or pregnancy discrimination, harassment related to sex/pregnancy or victimisation), we concluded:

- a. The notice of dismissal did not amount to an act of harassment. It was not related to her sex or pregnancy. Although unwanted, it was not served with the purpose of causing the proscribed environment in s26(1) EQA, nor was it reasonable for it to have that effect on the Claimant.
- b. The notice of dismissal did not amount to an act of direct sex discrimination. The notice was not served because of her sex or pregnancy.
- c. The notice of dismissal was not served because of any protected act. The Claimant gave no evidence of any protected act.

206. In respect of issue 14.7, the Respondent did not repeatedly or unreasonably demand medical information from the Claimant about her pregnancy or miscarriage. We repeat the relevant findings of fact above at paragraphs 94 to 115.

207. The remark allegedly made by Victoria Ezeagbo on 21 April 2017 was probably not made. But, if we are wrong about this, we concluded that the Claimant's current perception about that remark being offensive or humiliating is not how she interpreted events at the time.

208. The Tribunal concluded that what, if anything, was said was likely to have been a light-hearted remark in a positive return to work meeting at which the Respondent had decided to give the Claimant a second chance (despite the fact that she had failed her probation appraisal twice). It was not reasonable for the remark to have the effect on the Claimant that she alleged.

209. In short, whatever was said at the meeting on 21 April 2017 did not amount to harassment nor could it be detrimental so as to amount to victimisation. Victimisation

could not succeed as a complaint in any event in the absence of any evidence of a protected act.

Disability Discrimination:

Failure to make reasonable adjustments to working hours

Issue 15.1.3 & 15.1.7 what were the PCPs & the substantial disadvantage?

210. Issue 15.1 in the PH summary did not set out the Claimant's case advanced before the Tribunal at this hearing.

211. The Claimant relied upon only 14.14i (requirement to work longer shifts than 9am-4pm).

212. The Tribunal decided that the Provision, Criterion or Practice was as follows: the requirement to work the rostered hours or the shifts assigned.

213. In the alternative, the relevant Provision, Criterion or Practice was the requirement or practice that the Claimant should work her contractual hours.

214. The Claimant's range of impairments (other than her disability) caused her attendance to be unreliable and therefore put her at a substantial disadvantage in terms of being able to work rostered hours, evidenced by the fit notes and the GP letter of 21 May 2018.

215. However, the hypothyroidism did not place her at a substantial disadvantage in terms of her reliability or sickness absence. On the face of the medical evidence submitted by the Claimant, this did not generally affect her attendance. From the self-certification records, this caused her absence on only 3 occasions, amounting to less than 2 weeks absence, in Autumn 2017. The inference from her evidence and GP report of 21 May 2018 was that the symptoms of hypothyroidism were controlled by medication from around February 2017 and did not cause absence.

Issue 15.1.8. Knowledge of disability

216. In any event, the Respondent did not know and could not reasonably be expected to know that the Claimant was a disabled person until it received the GP letter of 21 May 2018. Prior to this, from the information provided by the Claimant in her email of 5 October 2017 and her self-certification, the Respondent could not reasonably be expected to know that the thyroid problem referred to had a more than minor adverse effect on her ability to do day to day activities which was long-term. Despite the best efforts of Ms. Strebulyte, the Claimant failed to provide any medical evidence about her hypothyroidism until 21 May 2018. Moreover at the meeting on 1 December 2017, the Claimant agreed to work her contractual hours, at 8 hours per day over 3 days.

217. However, from the GP letter of 21 May 2018, the Respondent did not know and could not reasonably be expected to know that the Claimant was likely to be placed at a

substantial disadvantage by these Provision, Criterion or Practice's. At the meeting on 1 December 2017, the Claimant agreed to work her contractual hours, at 8 hours per day over 3 days, and it is apparent from the correspondence that she was offering to the Respondent that she would work more that 9am to 4pm shifts.

218. It was only when the Claimant provided the GP letter of 4 July 2018 that the Respondent knew or could reasonably be expected to know that the Provision, Criterion or Practice referred to placed her at a substantial disadvantage, because her disability was part of a series of impairments which meant that symptoms could come on without warning and in an unpredictable way. This pointed to the fact that her attendance could well be unreliable and that she would face more than minor disadvantage in working to a roster or her contractual hours.

Issues 15.1.4 and 15.1.5

219. In our judgment, the duty to make reasonable adjustments in respect of the above PCPs did not arise until about 4 July 2018.

220. However, the Respondent did not breach the duty, because before it had the opportunity to make any further adjustment, the Claimant was absent sick for a further period, after which the Claimant was dismissed for the reasons set out in the evidence of Ms. Strebulyte and the letter of 3 August 2018.

221. In any event, the adjustment proposed, to reduce any shift worked by the Claimant to 9am to 4pm, would not have overcome the substantial disadvantage. The Claimant's range of impairments, including hypothyroidism, made her attendance for work unpredictable and unreliable. There was no evidence that reducing her shifts to 9am to 4pm would have any effect on her ability to attend work at all.

222. Moreover, from about 1 December 2017, Ms. Strebulyte had ensured that the Claimant usually worked less than 24 hours per week. This had not improved her attendance by decreasing her level of sickness absence. There was no evidence that reducing her hours to 2 shifts per week would have had any improvement on her ability to attend work.

223. If the Tribunal is wrong about both the above points, and that the duty to make reasonable adjustments arose at the time of the meeting on 1 December 2017 between Claimant and Jurgita Strebulyte, we found that the Respondent discharged the duty to make reasonable adjustments. From 1 December 2017, Jurgita Strebulyte arranged it so that the Claimant generally worked less than her contractual hours, and that on most weeks, on average, her shifts were 6 -8 hours long. It was not possible given the demands of the business and the need to cover the tills and meet customer needs and the needs of colleagues to work hours they had agreed, to simply allocate the Claimant 9-4pm each day that she worked. Jurgita Strebulyte acted reasonably in making the adjustments that she made, given that the Claimant had not co-operated by providing any medical evidence or agreeing to an OH examination.

Issues 14.10-14.14

Issue 14.13: Jurisdiction

224. The rostering of the Claimant for shifts of longer than 9am – 4pm was a practice which continued from July 2017 until 17 July 2018. This complaint was therefore in time.

225. The dismissal of the Claimant on 3 August 2018 was in presented in time.

226. As for the remaining complaints in respect of repeated and unreasonable requests for medical information about her disability, the Claimant did not identify these in her evidence save by saying that they were those in writing all of which were in the bundle. The latest of these written requests was 26 July 2018. An oral request was also made at the return to work meeting on 19 June 2018.

227. There was a continuing act in respect of this complaint of disability discrimination. The Claimant was complaining of a practice or policy over time.

228. In any event, if this is not correct, the Tribunal decided that it was just and equitable to extend time for presentation of these complaints, even if there was no continuing act and several requests were presented out of time. The extension required was shorter than in respect of the sex/pregnancy discrimination complaints and the Respondent had called the relevant HR manager to give direct evidence about them, who gave clear evidence showing no difficulty with recollection.

Issue 14.12 & 14.14

229. The act of discrimination alleged at 14.14i is that the Claimant was required to work longer shifts than 9am to 4pm. There was no evidence that the Claimant was treated less favourably than any other cashier in this respect; the Claimant did not identify any specific comparator.

230. At the East Ham store, between about July 2017 and October 2017, the Claimant often worked longer than her contractual hours, but this was because there were insufficient staff to cover the hours required to be covered by the Respondent at the store; it had nothing to do with her disability. Any cashier in her position (who was part-time) would have been assigned longer shifts to cover more hours than 9am to 4pm.

231. The alleged failure to make reasonable adjustments at 14.14v is addressed in the section below.

232. The complaint that the Respondent repeatedly or unreasonably demanded medical information from the Claimant must fail in view of the findings of fact set out above. The requests for medical evidence and fit notes were reasonable. The Claimant failed to comply with the sickness absence reporting procedures by providing fit notes at the time required. The Claimant failed to co-operate with the sensible requests for medical evidence made by Jurgita Strebulyte. The medical evidence sought would enable the Respondent to understand her condition and/or what reasonable adjustments might be required.

233. The Tribunal concluded that the act of dismissing the Claimant on 3 August 2018 was not an act of direct disability discrimination or harassment. The reasons for the dismissal were those set out in the dismissal letter. Any hypothetical comparator would have been treated the same.

Issue 15.4: Repeated and/or unreasonable demands for medical information

234. We repeat the findings of fact and conclusions set out above. The requests for medical evidence made by the Respondent at all times were reasonable and properly made in accordance with normal management duties.

235. Insofar as the requests were related to the disability of hypothyroidism, it was not reasonable for the Claimant to consider that they had the effect in s.26(1) EQA of harassing her. After all, she knew what the Respondent's procedures were in respect of sickness reporting and her contract provided that she may be required to undertake a medical examination.

New issues: Discrimination under section 15 EQA

236. In the course of her evidence, the Claimant explained that her case was that she had been dismissed on 3 August 2018 because of her absence and that her absence arose in consequence of her disability.

237. The Tribunal concluded that dismissal was unfavourable treatment.

238. However, the evidence before the Tribunal was that the vast majority of the absences set out in Appendix B did not arise in consequence of her disability, but due to other sickness or impairments, evidenced by the fit notes, GP letters, and other documentary evidence.

239. The Claimant's evidence was that she was taking medication for her symptoms of hypothyroidism regularly from January to February 2018, which supports this conclusion, because it leads to the inference that those symptoms were well controlled given that Hypothyroidism did not appear on any GP Fit note as a reason for absence.

240. Moreover, the unfavourable treatment arose in consequence of all the matters set out in the dismissal letter, including failure to provide medical evidence in time, failure to follow the company's policies and procedures, and the unpredictability over when she would be able to attend work.

Failure to pay Statutory Sick Pay

241. In respect of the failure to pay SSP, the Claimant stated that this was not intended to be an allegation of discrimination.

242. This complaint was set out in the revised list of issues as either a claim for unlawful deduction from wages, or breach of contract.

243. On the Claimant's evidence, the last in the series of deductions could not have extended beyond 30 June 2017 or February 2018. Therefore, the complaint of unlawful deduction from wages was several months out of time. We concluded that it was reasonably practicable for the Claimant to have presented this Claim within 3 months of 30 June 2017 or February 2018; there was no evidence from the Claimant to explain why putting in the complaint within 3 months was not feasible. Even allowing for her period of illness after her miscarriage, the Claimant returned to work in April 2017 for a short time and then again on 6 July 2017.

244. In respect of the claim for breach of contract, although the Respondent did breach the contract by failing to pay SSP as explained in the findings of fact, the Claimant suffered no loss, because she had been overpaid contractual pay as explained above. The complaint of breach of contract is dismissed.

Employment Judge A Ross
Date: 4 December 2020

APPENDIX A

REVISED LIST OF ISSUES (WITH REVISIONS MARKED)

Sex/Pregnancy Discrimination

- 14.1. Was the reason or principal reason for the Respondent serving notice of dismissal on the Claimant on 27th 25 May 2017 a reason or set of circumstances relating to her sex and/or her pregnancy or miscarriage?
- 14.2. Did the Respondent know the Claimant was Pregnant or had miscarried?
- 14.3. Was there an effective dismissal pursuant to the provisions of Section 99(3)(a) Employment Rights Act 1996?
- 14.4. What is the Respondent's stated reason for the notice and/or actual dismissal?
- 14.5. Was this dismissal principally because of the Claimant's sex and/or her pregnancy or miscarriage?
- 14.6. Did the said notice of dismissal and/or actual dismissal constitute sex/ pregnancy related victimisation and/or harassment of the Claimant?
- 14.7. Did the Respondent repeatedly and/or unreasonably demand medical information from the Claimant about her pregnancy or miscarriage? The Claimant asserts the Respondent knew of her delicate and vulnerable state but persisted in these requests and did so in a manner that questioned the genuineness of her ill health. She asserts that on or around 25th May 2017 in relation to one such request the Respondent's Ms Victoria Ezeagbo told the Claimant 'I don't want to have to catch you out'. The Claimant believes this was as much related to her disability as it was to her then pregnancy and miscarriage.
- 14.8. Was this remark made to the Claimant? If so did these requests and/or remark amount to victimisation and/or harassment of the Claimant?
- 14.9. The Claimant asserts that the conduct set out above was contiguous with the conduct relied upon as disability related (see below). Are any the above complaints out of time as sex/pregnancy discrimination? If so is it just and equitable to extend time in respect of the same?

Disability Discrimination

- 14.10. The disability relied upon by the Claimant is Hypothyroidism which disability persisted during the period of the Claimant's employment.
- 14.11. Did the Respondent know/could reasonably be expected to have known that the Claimant had this disability at the times the Claimant says she was discriminated

against? If so then when did the Respondent know or could reasonably have been expected to know of this disability?

- 14.12. Did all/any of the alleged act(s)/ omission(s) set out below occur?
- 14.13. The Claimant asserts that these act(s)/omission(s) form part of a course of discriminatory conduct. If held not to be a course of conduct then are any the above complaints out of time as disability discrimination? If so is it just and equitable to extend time in respect of the same?
- 14.14. The Claimant asserts that the following acts/omissions of the Respondent amounted to discrimination/less favourable treatment of her:
- i. Requiring her to work longer shifts than 9am to 4pm;
 - ii. ~~Requiring her to work at the Seven Sisters Branch;~~
 - iii. ~~Requiring her to work more than 3 days per week;~~
 - iv. ~~Excluding her from the Bonus Scheme;~~
 - v. Failing to make reasonable adjustments in respect of the above;
 - vi. ~~Failing to pay contractual sick pay (breach of contract and as victimisation/harassment);~~
 - vii. ~~Underpaying statutory sick pay (breach of statutory obligation and as victimisation/harassment);~~
 - viii. Repeatedly and/or unreasonably demanding medical information from the Claimant about her disability (victimisation/harassment);
 - ix. Dismissed the Claimant by reason of her disability.

15. So far as may be necessary the Claimant relies upon her non-disabled co-workers as comparators. The Claimant relies upon these acts/omissions as part of a continuing course of discriminatory course of conduct by the Respondent. If any are held not to be a course of conduct then are any the complaints out of time as disability discrimination? If so is it just and equitable to extend time in respect of the same?

Failure to Make Reasonable Adjustments to Working Hours

15.1 Allegations i, ii, & iii above are relied upon by the Claimant as failures to make reasonable adjustments pursuant to the provisions of Section 20 Equality Act 20. The Claimant asserts that on being transferred to the Respondent's Seven Sisters Branch, further away from her home than her initial place of work, it was agreed that her daily hours would not exceed 9am to 4pm for a maximum 3 days a week, these being the hours she could cope with given her disability. The Claimant alleges the Respondent did not keep to these agreed hours/days which are the reasonable adjustments relied upon by the Claimant. The Issues for the Tribunal are:

- 15.1.1 Was there an agreement that on moving to the Seven Sisters Branch the Claimant would only be required to work a 3 day week with 9am to 4pm daily hours?

- 15.1.2 If so was that agreement broken and why?
- 15.1.3 If no such agreement, or that agreement having lapsed, what are the provisions, criterion or practices ("PCP") that it is alleged placed the Claimant at a substantial disadvantage in and about her working hours in comparison to a person who is not disabled and what is the date of each event on which it is alleged these PCPs were applied?
- 15.1.4 Was the Respondent under a duty in respect of any PCP to make reasonable adjustments in respect of the Claimant? Did in fact any PCP place the Claimant at a substantial disadvantage in comparison to persons who did not have the Claimant's disability?
- 15.1.5 If so, did the Respondent take such steps as were reasonable (taking into account its knowledge of the Claimant's disability) to avoid disadvantage to the Claimant?
- 15.1.6 If any particular act or omission relied upon by the Claimant out of time? If so, is the said act or omission part of a series of acts or omissions and if so, is the last in the series in time? If not, then is it just and equitable to extend time?
- 15.1.7 What is the substantial disadvantage at which the Claimant was placed?
- 15.1.8 Did the Respondent know or could reasonably be expected to have known that the Claimant was likely to be placed at that substantial disadvantage?
- 15.1.9 What are the steps which the Claimant says would have been reasonable for the Respondent to take? In what way would those steps have prevented the substantial disadvantage relied upon by the Claimant?

Exclusion from the Contractual Bonus Scheme

~~15.2 As to this allegation (iv above) the Claimant asserts that the Respondent calculated bonus targets on the basis of attendance making no allowance for sickness absences. This is the Respondent's Practice, Criterion or Policy (PCP) now relied upon as discriminatory by the Claimant. When at work the Claimant asserts that she performed well and met or exceeded daily targets. However, the Claimant was frequently absent by reason of her disability, such absences allegedly caused/exacerbated by the Respondent's failure to make reasonable adjustments to her working hours. By reason of her disability absences the Claimant was unable to meet the targets and was thus effectively excluded from the bonus scheme. The Claimant asserts that her disability absences should not have counted against her. The Issues for the Tribunal are:~~

- ~~15.2.1 What are the provisions, criterion or practices ("PCP") that it is alleged~~

~~placed the Claimant at a substantial disadvantage in comparison to a person who is not disabled and what is the date of each event on which it is alleged these PCPs were applied?~~

~~15.2.2 Was the Respondent under a duty in respect of any PCP to make reasonable adjustments in respect of the Claimant? Did in fact any PCP place the Claimant at a substantial disadvantage in comparison to persons who did not have the Claimant's disability?~~

~~15.2.3 If so, did the Respondent take such steps as were reasonable (taking into account its knowledge of the Claimant's disability) to avoid disadvantage to the Claimant?~~

~~15.2.4 If any particular act or omission relied upon by the Claimant out of time? If so, is the said act or omission part of a series of acts or omissions and if so, is the last in the series in time? If not, then is it just and equitable to extend time?~~

~~15.2.5 What is the substantial disadvantage at which the Claimant was placed?~~

~~15.2.6 Did the Respondent know or could reasonably be expected to have known that the Claimant was likely to be placed at that substantial disadvantage?~~

~~15.2.7 What are the steps which the Claimant says would have been reasonable for the Respondent to take?~~

~~15.2.8 In what way would those steps have prevented the substantial disadvantage relied upon by the Claimant?~~

Failure to Pay Sick Pay

~~15.3 The Claimant asserts (vi & vii above) there are sums outstanding in respect of both contractual & statutory sick pay. She relies upon these alleged failures as amounting to breach of contract/statutory obligation and as harassment and/or victimisation. The issues for the Tribunal are:~~

~~15.3.1 Was the Claimant contractually entitled to sick pay?~~

~~15.3.2 If so, was the Claimant entitled to receive contractual sick pay from the Respondent during her periods of absence?~~

~~15.3.3 If so, did the Claimant receive her full contractual entitlement?~~

~~15.3.4 Did the Claimant qualify for statutory sick pay?~~

~~15.3.5 If so, did the Claimant receive her full entitlement?~~

~~15.3.6 What was the Respondent's reason for underpayment?~~

~~15.3.7 Did any underpayment amount to sex and/or disability harassment/ victimisation of the Claimant by the Respondent?~~

Repeatedly and/or Unreasonably Demanding Medical Information from the Claimant

15.4 The Claimant asserts that throughout her employment the Respondent repeatedly and persistently requested medical information as to her state of health and did so in a manner that questioned the genuineness of her ill health. The Respondent allegedly persisted in making these requests despite knowing the Claimant's delicate and vulnerable state. This conduct the Claimant says was unreasonable. The Claimant asserts that on or around 25th May 2017 in relation to one such request the Respondent's Ms Victoria Ezeagbo told the Claimant 'I don't want to have to catch you out'. The Claimant believes this was as much related to her disability as it was to her then pregnancy and miscarriage. The Claimant asserts the conduct set out above was contiguous with the conduct relied upon as sex/pregnancy discrimination (see above) and relies upon the same as part of a course of discriminatory conduct. The issues for the Tribunal are:

- 15.4.1 Did the Respondent make persistent requests for medical information?
- 15.4.2 Did the Respondent request the same in a 'disbelieving manner'?
- 15.4.3 In all the circumstances were these requests reasonable?
- 15.4.4 If not reasonable then did the conduct amount to disability discrimination?
- 15.4.5 Did Respondent's Ms Victoria Ezeagbo tell the Claimant 'I don't want to have to catch you out'? If so then did this amount to victimisation/harassment of the Claimant?

15.5. Section 15 EQA disability discrimination

15.5.1. Did the following thing(s) arise in consequence of the Claimant's disability: The Claimant's sickness absence.

15.5.2. Did the Respondent treat the Claimant unfavourably by dismissing the Claimant?

15.5.3. Did the Respondent dismiss the Claimant because of that sickness absence?

15.5.4. If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

15.5.5. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Dismissal

16 What was the reason for the Claimant's dismissal?

Remedy – Polkey Reduction

17 In the event of the Tribunal making an award is it just and equitable for the Tribunal to reduce the same to reflect the prospect of the Claimant's dismissal in any event. In particular, if it be found that the Respondent did not follow a fair procedure, then whether the Claimant would have been, or would have been likely to be, lawfully dismissed in any event. If there is to be a Polkey Reduction to any award, then what should this be?

Contributory Fault

- 18 Whether there was any contributory fault on the part of the Claimant, such that:
- i. The Claimant's conduct was culpable or blameworthy;
 - ii. The Claimant's conduct caused or contributed to the dismissal;
 - iii. Should the Tribunal make a deduction for contributory fault and if so, what deduction?

Mitigation

19 Has the Claimant complied with a duty to mitigate her loss? If not, should the Tribunal make a deduction to the compensatory award?

APPENDIX B

EL BERGUI v RIA FINANCIAL LIMITED

Case Number: 3202167/2018

The dismissal letter (P241) dated 3 August 2018 referred to 41 days sick absences broken down into at least 15 separate occasions.

Based on a calendar provided by Jurgita Strebulyte (JS), which we found to be accurate, and also evidence from the bundle and evidence exposed during the course of the hearing, the Tribunal was able to consider the absences and the reasons provided by the Claimant.

ABSENCES

Bold numbers are those not supported by Fit notes/Self-certification or explained by documents or witnesses during the hearing

October 2016

No absences

November 2016

- 22nd worked 3 hours: bleed, dizziness, feeling unwell
- 23rd, 24th, 26th: menstrual. (JS Witness Statement Para 29)

December 2016

- 19th, 20th: unwell, anxiety and panic attacks. (IH Witness Statement para 7)
- 26th, 28th: a lack of trains from the Claimant's home to the Elephant and Castle. (P114 and P261)

January 2017

- 23rd worked 6 hours: felt unwell

February 2017

- 3rd: felt unwell P263
- 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th: 17th: vertigo, 20th: vertigo. (Ian Hayman Witness Statement Para 18. Fit note 17/2/17 to 5/3/17 sent on 22 February "*Under investigation*" P245. 27th Feb: strong abdomen pain and still feeling unwell: JS Witness Statement para 32)

March 2017

- 1st, 2nd, 3rd, 4th, 5th: Fit note 17/2/17 to 5/3/17 sent on 22 February. *Under investigation* (P245)
- 9th: phoned in 3.58pm with meeting scheduled with IH for 3pm. hospital appointment/felt unwell. (P134 and P358)
- 18th: late: pain and bleeding (P135)
- 20th left early: feeling ill (JS Witness Statement Para 33)
- 24th Left early: sister came in to collect her/attended emergency appointment (JS Witness Statement para 34)
- 29th: Not well (P137)

April 2017

- 1st : miscarriage/Ultrasound (P138)

- 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th: miscarriage (Fit note 4/4/17 to 11/4/17 submitted 6 April Stated Miscarriage P246)
- 28th, 29th, 30th : “need more time off. Not as well as I thought”/miscarriage (P156. Fit note 27/4/17 to 19/5/17 (sent on 8 May) stated miscarriage P247)

May 2017

- 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st: miscarriage, dyspepsia. (Fit Note 19/5/17 to 5/7/17 dated 26 June stated *miscarriage dyspepsia*) P248)

June 2017

- 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th: Miscarriage, dyspepsia (Fit Note 19/5/17 to 5/7/17 dated 26 June stated *miscarriage iii, dyspepsia* P248)

July 2017

- 1st, 2nd, 3rd, 4th, 5th: Miscarriage, dyspepsia (Fit Note 19/5/17 to 5/7/17 dated 26 June stated *miscarriage iii, dyspepsia* P248)

August 2017

- 22nd, 23rd: Left early both days. Self-certification dated 19 October 17 stated *thyroid* (P255)
- 25th: mum ill (IH Witness Statement Para 42)

September 2017

- 14th: Left early: 4.5 hours worked: Thyroid (Self-certification dated 19 October 2017 stated *thyroid*).
- 27th, 28th, 29th, 30th. Fit note 27/9/17 to 4/10/17 (*dizziness*) P249. For same period 27/9/17 to 4/10/17 there is also Self-certification dated 19 October 2017 (*thyroid*) P257

October 17

- 1st, 2nd, 3rd, 4th: Fit note 27/9/17 to 4/10/17 (*dizziness*) P249. For same period 27/9/17 to 4/10/17 there is also Self-certification dated 19 October 2017 (*thyroid*) P257
- 7th, 8th, 9th, 10th, 11th, 12th. Hit leg almost fainted. (Self-certification 7/10/17 to 12/10/17 dated 19 October 2017 P258)

November 2017

- 8, 10: visited GP surgery (explained 20 December 2017 P187)

December 2017

- 1st: phoned JT after meeting, not well and went home
- **14th: No reason given**
- 15th: Late (JT Witness Statement Para 133)

January 2018

- 5th : Migraines (P196)
- 21st: **Unauthorized absence** – C thought she had holiday booked P202)
- 22nd, 23rd, 24th, 29th, 30th, 31st: Fit note 22/1/18 to 19/2/18 (*depression*) P252
This period covered six days of C holiday leave (22-31 January 18)

February 2018

- 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th Depression (Fit note 22/1/18 to 19/2/18 states *depression* P252)
- 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th: tonsillitis: (Fit note 21/2/18 to 7/3/18 stated *tonsillitis* P252)

March 2018

- 1st, 2nd, 3rd, 4th, 5th, 6th, 7th: tonsillitis (Fit note 21/2/18 to 7/3/18 stated *tonsillitis* P252)
- 22nd, 23rd, 24th, 25th, 26th: *feeling unwell* (JS Witness Statement Para 96)

April 2018

- No absences

May 2018

- **2nd** (left early), 3: no reasons given
- 16th: absence without permission (Claimant misunderstood rota page 217)
- 17th : arrived Late.
- 20th: left early, felt unwell (P217)

- 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th: tonsillitis (Fit note 21/5/18 to 28/5/18 stated *tonsillitis* P253)
- 29th, 30th, 31st: Arm pain (Fit note: 29/5/18 to 14/6/18 dated 6 June stated *arm pain* P254)

June 2018

- 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th (Fitnote 9/5/18 to 14/6/18 dated 6 June (*arm pain*) P254)
- 7 June: pain in arms, unable to move (P227)

July 2018

- **24th, 25th : no reasons given**

August 18 Dismissed on 3rd
