Case No: 2700957/2014

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Studer-Martinez	**v**	**Telefonica Digital Limited**

Heard at: Watford **On:** 13 May 2015

Before: Employment Judge Manley

Appearances: **Mrs VH Parsons**
Mr C Surrey

For the Claimant: Mr A McPhail, Counsel
For the Respondent: Mr D Northall, Counsel

JUDGMENT

1. There was no repudiatory breach of contract on the part of the respondent. Even if there had been such a repudiatory breach, the claimant delayed in resigning. There was no dismissal and therefore no constructive unfair dismissal.

2. The claimant was disabled from October 2013 but there was no unfavourable treatment of her for something arising out of that disability and her claim for disability discrimination also fails.

REASONS

Introduction and Issues

1. This was a matter which had been discussed at a preliminary hearing in November. That preliminary hearing set out the issues as follows:

Unfair dismissal claim

1.1. *"Has there been a repudiatory breach of the claimant's contract by the Respondent, or a course of conduct by the Respondent sufficient to amount to such a breach?*

1.2. *Did the claimant resign and treat herself as dismissed in relation to any alleged breach by the respondent?*

1.3. *Did the claimant resign in good time following the alleged breach of contract?*

1.4. *If the claimant was dismissed, what was the reason for the dismissal?*

Disability

1.5. *Does the claimant have a physical or mental impairment, namely anxiety and depression? (*now conceded by the respondent as being disabled from 21 October 2013 so further issues not set out here*).*

Section 15: Discrimination arising from disability

1.6. *The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is the respondent's conduct in applying undue pressure on the claimant and putting pressure on the claimant to leave her employment. No comparator is needed.*

1.7. *Does the claimant prove that the respondent treated the claimant as set out in paragraph 6.1 above?*

1.8. *Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?*

1.9. *Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? .*

1.10. *Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?"*

2. In summary the claimant's claims are for constructive unfair dismissal and discrimination arising from a disability. It had been agreed that this would be a liability only hearing.

3. The tribunal spent some time reading the essential documents in the 600 page bundle. We also read witness statements and heard from the following people:-

- Ms C Leung, the claimant's former colleague
- The claimant

For the respondent we heard from:-

- Mr S Alder, director of global partnerships and consumer security
- Ms N Dexter, senior HR business partner
- Mr A Stone, global labour relations and training lead
- Mr N Tilley, head of HR strategy and planning

4. We also read a witness statement from Mr F Michel, global director, public engagement on behalf of the respondent but he did not attend the hearing.

5. In the usual way, the tribunal having read those statements, the witnesses were cross-examined and the representatives made submission before our deliberations. By agreement, we gave oral judgment to the parties without reasons at the end of the hearing. These reasons are now those which explain how we came to that judgment.

Facts

6. We only make findings of fact where they are of relevance to the issues to be determined. Other facts emerge over the course of a relatively long hearing, some of which are disputed and some which are not, but these will not be referred to here unless they touch directly on the issues or are necessary to understand the whole picture.

7. The claimant commenced working for the respondent as a personal assistant (PA) on 24 January 2011. The respondent is one of three divisions in the UK, Telefonica UK, Telefonica Europe and the respondent. All of them operate out of Bath Road in Slough but Telefonica Digital also has offices at Air Street in Soho. They are part of the same group but operate as separate legal entities. We understand that the respondent has around 239 employees in the UK. There are also employees abroad, particularly in Spain and in the US.

8. In February 2012 the claimant became PA to Mr Alder who was then the director of global partnerships and devices. The PA team supported various directors and often worked from time to time for other directors because of absence or travelling, holidays, etc. Mr Alder was based initially in San Francisco and there is an eight hour time difference between there and the UK. That meant that, for the majority of the UK working day, Mr Alder was not yet 'at work'.

9. At some point, although we are not sure when this occurred, the claimant applied for a job as executive assistant, which is a post senior to PA, to be working for Mr Alder's line manager, Mr Shurrock. Ms Emma Bannister also applied and it was she who was successful in securing that post.

10. The claimant's work included what we would consider to be usual work for PAs. It was diary management, travel plans, hospitality, logistics, meetings and some responsibilities with respect to invoicing and so on. The claimant also had access to Mr Alder's work emails and systems so that she could prioritise work on his behalf and spot anything that was needed to be dealt with urgently.

11. At some point in the summer of 2012 the claimant began to perceive that Ms Bannister was asking her to carry out other work apart from that which she carried out for Mr Alder. We accept that the claimant felt that she was being asked to do quite a lot of work which was not necessarily her responsibility. We also understand that this was the way in which the PA teams worked. In any event, there was a non work related incident around 6 July when Ms Bannister, with whom the claimant had been a little friendly, called the claimant at home in some distress. The claimant tells us that she raised issues about her personal life and an allegedly violent husband. The claimant felt uncomfortable having been given that information but she gave some advice to Ms Bannister.

12. Shortly before 11 July, Mr Alder became aware that the claimant had been claiming overtime for work carried out in the evening. His understanding was that, given the eight hour time difference, she would carry out work

which he asked her to do on one day the following morning. It seemed that she was dealing with those matters, some of them at home, in the evening so that her working hours (particularly in the morning) were possibly relatively free of work for Mr Alder as he was not at work at that time. In any event, overtime had been paid and showed as being authorised by him partly because she had access to his systems. As a result of this and of some other matters which had been raised, Mr Alder had a one to one meeting with the claimant where a number of matters were discussed. By an email which he sent later (on 1 August) Mr Alder summarised what was discussed. In summary, he discussed what he called "focus and image" where he suggested that she should try and remain focused and remain at her desk. There was then a question of "workload" and here he suggested that she should take breaks and that she should try and complete tasks for him in the European morning so that she was not working after hours. He also dealt with the question of overtime and made reference to work/life balance. He said that it would mean a more focused day for the claimant and 'realignment of key activities'. He said that he would approve the hours for the recent overtime submission but that would not do so into the future. As far as a topic called "relationships" was concerned he mentioned issues between some of the "PA community" and said that he hoped it would not distract them from delivering goals. He suggested that the claimant keep away from gossip or negative interactions and said :"*I know you can do this'*.

13. The claimant replied to that by an email of 6 August. She appeared to accept Mr Alder's suggestions and was relatively positive about what he said, agreeing in large part with him. She did not, in that email, suggest any difficulties with Emma Bannister.

14. It was the claimant's evidence that, having discussed matters with Mr Alder, in her words that she should "push back" extra work, she raised this with Ms Bannister and said that her response was aggressive. It is clear that the discussion, whatever the content was, did not lead to any significant changes. The claimant now says that Ms Bannister was harassing her and indeed at some point she has said that she was bullying her. When the claimant later put in a grievance about this, she made reference to emails sent by Ms Bannister over the course of their employment. The grievance appeal officer (Mr Bartholomew) looked at these in November 2013 and made the following comment – "*I've read through it all and I have to say that I can see no evidence to substantiate her claims. The tone of Emma's emails are polite, reasonable and friendly*". The tribunal, having also read the emails, agrees with that comment and would add that the claimant's emails to Ms Bannister at this time also show no difficulties and seem to be entirely normal in the context of a friendly workplace relationship.

15. On 26 July 2012 the claimant was unwell at work. She says now that that was a panic attack but that is not what she communicated to Mr Alder which was to the effect that she had had a "*funny turn*". He replied to say "*Oh dear best get things checked out. Hope you are feeling better."*

16. On 2 August the claimant had a meeting with Ms Dexter of HR. She had become involved because she knew about the claimant claiming overtime in the way she had and had begun to hear something about the difficulties

with the "PA community". The claimant's case is that she told her directly that the issue was with Ms Bannister but Ms Dexter does not agree that it was said that clearly and we find that the claimant is not reliable on this. There is no contemporaneous evidence to show that she raised the issue of Ms Bannister being the particular issue. It was clear that the claimant was saying that she was unhappy in her post. This was communicated to Ms Dexter both at 2 August meeting and later on 23 August and the possibility of a secondment which the claimant had heard about to a maternity cover post in Telefonica Europe arose. The claimant secured an interview and by email of 30 August Ms Dexter said:

> "I think this is a great opportunity but if you decide it is not right for you and you want to resolve the current issues you have in role I will equally support you but this has to be your decision in how you want to progress."

17. She made it clear in that email that the claimant would return to her permanent role after any such secondment. The claimant also gave evidence that she had seen Ms Saunders who was the governance and compliance director and that she suggested the claimant should put in a grievance. She also said that Ms Saunders had said that she should think carefully about it and consider the effect on her family and possibly take some advice on her health. It appears that the claimant did do this towards the end of August. She had met with Mr Alder on 27 August where she mentioned stress and some unhappiness with her work. When he was cross-examined, he recalled that she mentioned Ms Bannister but he was sure that she did not give any further details about the difficulties. The claimant's case is that she was dissuaded by Mr Alder from raising a grievance but we accept that that was not discussed and he certainly did not say anything to the effect that it involved senior people, as now alleged. It would be highly unlikely that he would say that as it would not be correct. We record here that we do not accept the claimant's evidence that both Ms Dexter and Mr Alder dissuaded her from raising a grievance.

18. On her secondment, things seemed to progress very smoothly with the director with whom she began to work, Mr Michel. He was obviously, on all the evidence before us, very satisfied with her performance. There then came a time in April and May where Mr Michel expressed to the claimant the hope that she would get a new job working exclusively for him at executive assistant level. At the end of May the claimant noticed that there was an advert for a PA in Telefonica Europe Corporate Affairs. She thought that this was recruiting for the job she was carrying out for Mr Michel and she emailed him suggesting that. He replied: "*Which means you're about to get another one*". By early June Mr Stone, who was HR business partner at Telefonica Europe, had become involved in this as the respondent and other companies in the group have procedures to be followed with respect to appointments, head count and so on. Richard Poston was Mr Stone's senior manager and he had first to work with him on structures and job descriptions and then provide a business case to Sally Ashford HR director. Ms Ashford might approve, amend or reject the proposals.

19. By email of 7 June 2013 Mr Stone said to Mr Michel:

> "I appreciate Sandra will and can read this but there is no secret here that Sandra wants

> to work with you and you want to work with Sandra – common sense would tell me that we have an obvious solution there – but what we must do in private with you me and Richard is agree the position (does it remain the same or do we review based on Sandra's duties for you) and have a conversation wider about how we then support Pete and others if you solely take Sandra.
>
> We also have the obvious budget issues which I feel Richard will be quite on board with but I need his agreement around Sandra, Adrianna, Nicki (on maternity leave) and 1 other cover until Nicki returns. I think this is all workable."

20. He asked for job descriptions and so on to be sent to him. Matters continued to be discussed with Mr Stone talking to Mr Poston about matters. In a text message of 12 July to the claimant Mr Michel said: "*I've told him you were moving on and have asked Andrew to get things done chop chop and I will not bear any delay*". It is true to say that the claimant appeared to believe that this matter was going to go smoothly. On 15 July Mr Stone made it clear to the claimant that there was no approval for the new position and he confirmed that in a discussion with her. In an email, she expressed "*disappointment*" when she heard about the "*head count problem*" and went on to say: "*After two months of discussions and me accepting the role verbally with Fred*". Mr Stone replied to this immediately in these terms:

> "To be clear and for the avoidance of any doubt – you are and remain on secondment. If anything changes then naturally myself and Fred will update you. In the absence of any update, you will automatically return to your substantive role in Telefonica Digital at the end of your secondment the date of which I am confirming at present."

21. There is no doubt that the claimant must have been clear at that point that she was not being formally offered a post but that Mr Michel wanted her to have that post and that she herself was keen to do it. There was no misunderstanding as it was abundantly clear that further approval needed to be secured. In the meantime, Mr Stone was trying to deal with another PA who worked for the CEO of Europe who had decided she did not need to be working in the UK. Mr Stone took the view that that candidate was "at risk" and he said as much in an email to Mr Michel on 22 July. In essence, it was being suggested that that employee should take any new role of working for Mr Michel which might be approved or she would be at risk of losing her job.

22. By 24 July the claimant wrote to Ms Dexter as follows: "*I would like to catch up with you in regards to my secondment. There is a possibility for me to stay but I have a few queries around it.*" The claimant hoped to be retained in Telefonica Europe working with Mr Michel but knew that it was not yet approved.

23. On 21 August she met with Ms Dexter and we have seen a note the claimant made of this meeting. It is not clear to us whether she made this note before, at the time or after the meeting but she does record "*could raise a grievance but will lose my job in the end*". Ms Dexter denied that she said any such thing and, as we say above, we do not accept that she discouraged the claimant from bringing any grievance.

24. By letter of 28 August the claimant's position at Telefonica Europe was

made clear to her. Mr Stone wrote to her stating that the job she had been carrying out was a secondment and that they were prioritising an individual who was potentially at risk of redundancy. He added this:

> "Should any offer have been expressed to you to make the seconded role more permanent (verbally or in writing) then I am herein serving four weeks' notice of termination of this offer to make the seconded role permanent due to us prioritising the individual as identified above. This is with immediate effect. However we are prepared to continue your secondment until 13 October 2013 which gives you over four weeks' notice."

25. Mr Stone made it clear the claimant had to return to Telefonica Digital at the end of secondment. A letter sent by solicitors on behalf of the claimant was then answered in similar terms as well as a denial that any grievance had been raised.

26. The claimant did decide to raise a grievance after a meeting with Ms Dexter on 1 October. In that meeting the claimant indicated that she might be thinking of leaving and Ms Dexter suggested that she might be able to offer some monetary compensation if she did so - '*maybe double her notice period'*. The claimant suggested 18 months pay and Ms Dexter made it clear that would not be agreed. In any event, the claimant indicated that she wanted to raise a grievance. Ms Dexter replied asking her to '*raise any formal matters by 1 October'*. The claimant asked for a little longer and raised a grievance on 7 October.

27. The claimant's grievance raised a number of matters. She first set out "*Issues involving Emma Bannister and other matters prior to starting mass secondment in October 2012*". Under that heading she raised a number of matters with respect to Ms Bannister, overtime and various meetings she had with Mr Alder and Ms Dexter.

28. She then set out concerns under the heading "*Job offer and breach of contract by the compan*y" which included the belief that she had been offered a post by Mr Michel which had subsequently been withdrawn by Mr Stone. These were the two matters that the claimant was complaining about. Towards the end of that document she said this:

> "It is clear from the timeline of events and attached evidence that a new contract was formed between the company and me. The offer of the new role was clearly made to me (and included specific terms), I accepted the offer, that role would have paid me a considerably increased remuneration package and there was clearly an intention to form a binding contract. By withdrawing the offer in the way the company has done, the company has breached that contract and I have suffered considerable financial loss as a direct result. I have been advised that I could pursue my claim to the Tribunal and/or court. However I would like to settle the matter directly with you if at all possible and therefore raised this grievance"

29. The claimant had asked Ms Dexter if she could work from home while the matter was investigated and by email of 13 October Ms Dexter agreed to this and said: "*This does sound sensible for Monday-Wednesday. We hope to be complete on the investigation and findings by this point and have taken any necessary actions so should plan to be back in the office Thursday/Friday*". Ms Dexter was asked questions on this as it was

suggested that this short time frame indicated the matter had been "predetermined". Ms Dexter denied that was the case and, that, in fact, the matter took a little longer and the claimant did remain at home during the investigation. She accepted that both she and Mr Stone were named in the grievance. Mr Stone, on receipt of the grievance, had said in an email to more senior managers that they should "*let me deal with this for you in the background and do my best to get through the messy situation working with Nicki Dexter closely*". In fact, as Mr Stone and Ms Dexter were named it was passed to someone else to deal with. We accept this evidence.

30. Mr Tilley was appointed to investigate the grievance. He saw a number of people starting with the claimant herself. He spoke to Emma Bannister who denied bullying and harassing the claimant and was indeed very surprised to hear about the complaint. When interviewed she said "*I personally feel this situation is awful. I was very kind to Sandra – I had her dog in July last year at my house for over a week to save her kennel fees of £300. If the situation with me was so bad in July why did she let her dog stay with me? Also, if Sandra felt aggrieved why has she left it a year to bring her complaint to light*?" He also spoke to Mr Michel who reiterated that he had not made an offer to the claimant; Ms Dexter; Mr Carey (another PA), Mr Stone, Ms Collins and Ms Balmer (PAs) and then had a second investigation meeting with Ms Dexter and Mr Alder. By 18 October a detailed outcome letter was sent to the claimant. In essence, the grievance was not upheld.

31. Mr Tilley found that:

> "Having interviewed many parties, I have been unable however to find any specific evidence to suggest that Emma acted inappropriately towards you".

He then dealt with each of the issues raised about Ms Bannister including additional duties, reduction of working hours and lack of encouragement to raise a grievance. He did find in the claimant's favour.

32. With respect to the issue about secondment, Mr Tilley recognised that Mr Michel and the claimant had a very "*effective working relationship*" but concluded:

> "I can see no evidence of you being offered a formal contract by HR, who are the only party authorised to do so and as such no revocation of contract occurred in this case".

33. The claimant had raised two further issues by email of 16 October and he also dealt with that at the end. He concluded:

> "Finally, as the secondment to Europe was always intended as a temporary position it is now expected that you return to Telefonica Digital on the 21 October 2013, where your substantive role has not been back-filled on a permanent basis as per Telefonica policy. It is my hope that you are able to put previous matters behind you and continue to build your career within the Telefonica Group".

The claimant was informed of her right to appeal.

34. The claimant appealed that outcome. In that appeal letter she makes reference to two PA's, Maria Silvena Marizcurena and Kerstin Oetker and

said that they had not been interviewed by Mr Tilley. The claimant had not mentioned these names to Mr Tilley in spite of having the opportunity to comment on the minutes and in fact adding some extra points referred to above. She raised other issues and repeated what she had said before about her perception. She also made reference to the further evidence in the form of emails as stated above in paragraph 14.

35. Mr Tilley having completed the grievance, the claimant was then expected to return to work. By email of 21 October Ms Dexter had written to the claimant and stated:-

> "Steve and I would like you to return to the office this week splitting your time between Bath Road and Air Street. Can you advise which days you plan to be at each location? I will arrange a session for us both to support your return when I know you are in Air Street".

She said she looked forward to seeing the claimant. By email of 22 October Ms Dexter reminded the claimant of the "*Be Supported*" service of the respondent with a link to their page.

36. The claimant had informed Mr Alder that she was not well and by the 22 October she was sent a referral form to occupational health which was completed either by Mr Alder or by Ms Dexter or a combination of the two. The claimant signed this document on the 24 October and it set out there the stress related matters previously referred to. In that document the respondent said it would "*begin to manage Sandra per our Conduct and Attendance policy from this point but she has only just become absent from work so we are at the beginning of that process*". The respondent has a Conduct Attendance and Performance Policy, known as "CAP". For sick absence there are triggers for starting the process, one of which is 28 days' continuous absence. Under the section for 'Absence with an underlying heath reason' which was the relevant one for the claimant, there are steps 1 to 4. Step 1 is Informal meeting and Action plan and Step 2 is Formal meeting and Action Plan.

37. The respondent asked the occupational health providers questions about supporting the claimant and her return, potential return to work date and so on. The claimant had been diagnosed with stress and anxiety which had led to this referral to occupational health.

38. On the 26 October the claimant found out that she was pregnant and she notified Mr Alder and Ms Dexter on the 29 October. As indicated above she appealed her grievance outcome on 31 October and Mr Bartholomew who, was Director of Public Affairs, was appointed to deal with the matter and wrote to the claimant inviting her to a meeting on the 4 November, the meeting being on the 11 November. The claimant continued to be signed off work sick.

39. The claimant had a telephone call with Mr Alder by way of catch up on 13 November where Mr Alder said that he wanted to meet with her. There was some discussion about the progress of her grievance. The claimant met with Mr Bartholomew on 15 November and the tribunal saw notes of that meeting. On 19 November the claimant was sent details of a short term

secondment but the claimant answered that she was '*too ill to consider a short term position*'.

40. Around 15 November the respondent received the occupational health report which states:

> "There are no personal issues, however she does feel that work related issues were impacting on her psychological wellbeing.
>
> **Outlook and recommendations**
>
> These symptoms which are preventing her from returning to work are likely to be ongoing as long as the perceived issues are not addressed. Therefore I would suggest that a meeting is arranged as soon as possible to discuss this and how to address them or arrange an appropriate plan that will resolve her concerns. I have advised her to try and list her concerns so that they can be understood by all parties involved".

A phased return over 2-3 weeks was suggested along with a stress risk assessment. It was suggested that a full recovery was likely and the report concluded that it was unlikely that the condition would be considered to be disability under the Equality Act.

41. The grievance appeal continued with a number of meetings being held by Mr Bartholomew. On 22 November the claimant told Ms Dexter that she had another appointment with her GP and said that the GP had "*suggested that he speaks to you so that he can explain my current health situation*". Ms Dexter replied saying that a capability review was to be organised.

42. Mr Bartholomew met with Ms Bannister on 28 November. She recorded that she was "*really sad*" that things had come to this stage but in essence denied any pressure being brought to bear on the claimant.

43. By letter of 29 November 2013 the claimant was invited to a meeting under the respondent's CAP policy. A copy of that policy was enclosed. It is quite clear that that letter is a standard letter sent in the circumstances. It indicated in the opening paragraph that Mr Alder would "*put in place what assistance I can to help you to return to work on a regular effective basis*". It goes on to say that the company - "*can't continue to support your high absence indefinitely and that your continuing absence may lead to a review of your future employment with Telefonica*". The claimant was told of her right to be accompanied and she could respond to the issues raised in writing if she preferred.

44. Questions were raised at this tribunal hearing as to whether this meeting would be under step 1 or step 2 of the CAP policy; that is whether it was formal or informal. The tribunal's view is that it was to be a formal meeting although we can see why it might also be considered to be an informal meeting. It may well be that step 1 and step 2, in some cases, merge particularly, as in this case, occupational health advice had already been sought. In any event, the matter was not progressed beyond this under CAP.

45. The claimant's evidence was that she was made very upset by this letter. It is not clear that she said so at the time but she sent an email after she

received it around 3 December which says:

> "I have taken my GP's advice and will not be able to attend the meeting on the 9 December. I am not prepared to put my pregnancy and health at risk again."

She reiterated that Ms Dexter was to speak to her GP. She asked for copies of the occupational health report and her sickness absence record. The claimant's evidence is that she had been diagnosed with a depressive episode by the GP around 3 December. This also went along with the existing stress and anxiety and, of course, her pregnancy.

46. Unfortunately, the claimant suffered a miscarriage between 5 and 6 December. On 6 December Ms Dexter spoke to the claimant's GP where the miscarriage was confirmed and her health was otherwise discussed. Ms Dexter recorded what was said in a note which said that she was to make contact with the claimant in the New Year rather than pre-Christmas. In fact, a couple of matters were sent to the claimant before the New Year although it is quite possible that the grievance appeal outcome letter was sent without Mr Bartholomew knowing that the claimant had suffered a miscarriage.

47. On 16 December Ms Dexter wrote to the claimant confirming that she had spoken to the GP and mentioning rescheduling of the meeting in the New Year. Mr Alder had also sent her a note on 20 December about company reorganisation.

48. A capability review meeting had been arranged for 14 January but when the claimant attended at the respondent's offices she became unwell and the meeting was postponed. It was rearranged for 22 January to be held by phone. There is a dispute about what was said in this phone call and in a number of other phone calls and meetings held between and claimant and Mr Alder from now until her resignation. In most cases there is a short note by Mr Alder made immediately after the meeting and there are also notes made by the claimant.

49. We have had some difficulty with the accuracy of the notes taken by the claimant. In some cases they appear to be notes which she may have prepared before the meeting as they do not appear, on the face of it, to be notes which could be taken at the time. Difficulties also arose because her notes of June conversations do not accord with transcripts of recordings which the claimant herself produced. Mr Northall for the respondent referred to the claimant as an "unreliable historian" in his submissions. We accept that in relation to notes that she took of meetings, we have to find that that is the case. It is possible that she has written the notes based on her perception of what she heard rather than what was actually said and it is unclear to the tribunal when precisely the notes were taken. However, to a degree, what was said between the parties is, to a large extent, agreed. The differences appear to be with respect to emphasis or meanings of those words. We do not intend to go through each and every meeting but we will find, where there is a dispute of some significance, what we believe was said.

50. With respect to the meeting on 22 January, the dispute here is whether Mr

Alder told the claimant that her job was "at risk". The note of the conference call taken by Ms Scotland, on behalf of the respondent, records Mr Alder asking the claimant "*Is there anything we can do work wise to cause you less stress?*". With respect to the "at risk" (of redundancy) question the note records that Mr Alder mentioned there being a lot of change and "*tightness on the number of heads*" and reference to options in the area and some redeployment. It is then recorded, and we accept, that the claimant then "*asked if she was at risk*". Ms Scotland went on to tell her that if there were to be more PAs than the number of vacancies then the claimant would be put at risk with the other PAs. It is also recorded there that Mr Alder reminded her of the "Be Supported" service. The claimant's evidence to us is that she found this service to be unhelpful on a previous occasion with respect to a serious matter involving a manager but she did not say that to the respondent.

51. It is the claimant's case that the respondent had begun to put pressure on her with respect to her position and tried to persuade her to leave. For completeness, the tribunal finds that there is nothing in that telephone conversation, or in any of the other conversations, before or after this date, which suggests that at all.

52. There was a follow up conference call on 30 January as agreed. On this occasion there is a transcript of Mr Alder's hand written note and the claimant's note. She recorded "*wants to help me get back to* work" and he recorded "*very difficult to consider any role*". It appears to be the position that no real progress was made at that meeting and that they were to speak later.

53. Following on from that meeting Mr Alder sent a letter to the claimant dated 4 February. It is worth quoting that letter fairly fully.

> "Dear Sandra,
>
> I promised to follow by letter on our call of 22 January and our further conversation on 30 January, so I am writing to confirm the next steps as we agreed. Whilst we understand that you are still not feeling well enough to return to work, we would like to plan all the necessary preparations for your return when you do feel ready.
>
> It is important that we understand any requirements and reasonable adjustments that you may like us to consider to facilitate your return to work as soon as you are able. On this basis we would like you to clarify whether in writing, or by phone if this is easier, the following elements.
>
> ?Your preference on base location and capacity to travel between London and Slough
> ?If a role arises which is wholly based in Air Street office, would you be interested in it?
> ?How many days per week would you be able to base yourself from Air Street?
> ?Your preference on Telefonica employing entity; Telefonica UK, Telefonica Europe or Telefonica Digital? If Telefonica Digital, what areas would you consider working within?
> ?Of the three companies, would you be prepared to work for any of them? If not, please specify which company / companies you would not be prepared to work for.
>
> I know you said it is difficult to make these choices at the moment; I just want to be sure we can respond appropriately when the time arrives. Of course, we may not be able to accommodate all these preferences but we will do our best."

Mr Alder said that he would keep the claimant informed of organisational changes. The claimant indicated that she was too unwell to answer that letter and in view of the fact that a meeting was being arranged for 24 February, a very similar letter was sent on 20 February asking the claimant to get back to him by 28 February. The questions above were repeated but were never answered by the claimant.

54. The claimant remained on sick leave and there was indeed a meeting on 24 February at agreed meeting place of the Marriott Hotel near Slough. Mr Alder sent some meeting notes shortly thereafter to Ms Dexter which start: "*This was a chance for Sandra and me to meet face to face in relaxed surroundings (not the office*)". He said she was making progress but still a long way from being normal. He recorded that the claimant was not in a fit state of mind to properly answer and that she said: "*Whenever a letter arrives from Telefonica it causes her stress*". He recorded that he told the claimant that they had to keep in touch and that "*She said that on a previous call we had mentioned that Telefonica was going through some reorganisations and that there were some redundancies. She wants to know what the options were for her and whether this was a potential solution"*. He said that he answered that there were some potential options and indicated what were discussed; firstly carrying on to try to get her back to work or looking for voluntary redundancy. With respect to that he recorded that he told her "*it was very unusual for a PA to have redundancy and there were also positions available*" but that he could discuss the claimant as a "*special case*". The claimant reiterated that she was not thinking clearly enough to make decisions.

55. The claimant's note suggests a fairly similar discussion although she recorded four options which include staying off sick, her moving departments, voluntary redundancy or resigning. She also recorded that she was not mentally stable to cope with letters/decisions.

56. At a further meeting on 24 March, again at the Marriott Hotel, it was indicated that the claimant was feeling somewhat better. The claimant recorded in her note "*job could be at risk*" whereas Mr Alder's note indicates an improvement in the claimant's health and "*she appears more interested in getting back to work and what might be possible*". He said then she needed to answer the questions (from the letters above) so that they could look into things but that they would discuss all options which will include getting back to Telefonica and potential voluntary redundancy. We find that Mr Alder did not say anything about the claimant's job being at risk but that a possible option might be voluntary redundancy.

57. On 24 March the claimant's GP had sent a letter to Ms Dexter outlining his views on the claimant's ill health. He said that she had felt bullied and *"if she did have a return to work then I do not anticipate any problems as long as the reason for her bullying and harassment is removed*". He said that she was generally in good health and that she would get better if the issues were addressed. He suggested a capability review meeting might be possible or she might find it easier to be by phone.

58. The respondent then sent a letter to the claimant dated 8 April. This is a

standard letter which informed the claimant that her entitlement to full pay would be reduced to half pay on 12 April. There is no mention in that of the income protection provision which is a respondent benefit which might be available after the end of any company sick pay.

59. An occupational health report was prepared after an assessment in April and that suggested that she would be able to return to work on a "*phased approach to hours and duties*" and that the claimant should think about potential return to work and anticipated timescales and the employer needed to think about a phased approach and initially working from home.

60. A follow up meeting with Mr Alder therefore took place on 14 April again at the Marriott Hotel. His note indicated that the claimant was feeling better and makes this comment: "*Not sure if (role could be) in office - few days (a week) build confidence"*. It also recorded that she could not work with Emma. The claimant's note recorded "*will not make me redundant but has prepared a good package = £19K".* Mr Alder accepts that he did say to the claimant in this meeting that it might be possible for there to be a payment of £19,000 if she opted for voluntary redundancy. He recalls that he gave the claimant a piece of paper which detailed the breakdown of that option.

61. By email of 24 April Mr Alder wrote to a colleague in an attempt to find work that the claimant might find acceptable asking whether there was any option for '*admin work, maybe one or two days a week, maybe working from home'*, to which he got no response.

62. The claimant decided on 15 April that she was not prepared to accept the voluntary redundancy offer and she rang Mr Alder to tell him that.

63. On 29 April Mr Alder sent details of a post which she might be interested in as follows '*Nicki has identified a vacancy in O2UK in Ronan's office'*. This was a PA to executive assistance to the CEO and the job description was attached. The claimant decided that the role was not appropriate because she believed that it was an intensive role with long hours. The respondent appeared to agree that it would have been difficult for the claimant to carry out this role. The claimant was still unwell and had begun to feel somewhat worse than at the previous meeting.

64. On 2 May there was another meeting between the claimant and Mr Alder, again at the Marriott Hotel. Again we have seen short notes taken by Mr Alder and the claimant's notes. The claimant talked about her health and that she was "*scared of dealing with Emma*". The claimant's note recorded some similar matters and included "*If I am unable to do any job offered I will be put on capability*" which appears to be a suggestion Mr Alder said that to her. Mr Alder accepted that it was clear that the claimant had had a set back or a relapse. He did not recall whether he had said anything about her pay dropping to zero but denied that he had said anything to do with her losing her job if she could not cope. He understood the position to be that she was considering the exit package.

65. There was then another meeting on 9 May and again we have seen notes from that meeting. Mr Adler's notes recorded "*Need an exit package - made the decision Exit agreement or claim*" and the claimant's note

recorded: "*I will lose my job anyway as I won't cope*" which Mr Alder denies was said. Neither note recorded what is agreed to have been said at that meeting which is that the claimant was offered the sum of £17,500 being the same as the £19,000 offer but without the bonus which had now been paid to the claimant. The claimant was again taken through the calculation.

66. On 13 June there was a telephone call between the claimant and Mr Alder. This is a telephone call which the claimant said later in her claim form was a very important one. Indeed she said it was the "last straw". What she says was said in that meeting is that he repeated the offer made before. It was now £17,500 as a bonus of £1500 had been paid. She said that he added that she could take the offer and move on. In her tribunal claim form she suggested that Mr Alder had told her at that meeting that he would either performance manage her or make her redundant because of her depression. She now accepts that he did not say this but this is what she took his comments to mean. Of course, having now seen a transcript of what was said, it is clear that those words were not said. Indeed the transcript makes it clear that Mr Alder is supportive of the claimant, that he does discuss the possibility of a sum of money but also discussed with her the possibility of her returning to work. He said "A*nd yeah, probably carrying on as you are with Telefonica would not be a great choice and taking the money might not but you have got to decide one way or the other*". He mentioned "*drawing a line*" but also said "*I don't want to make it sound like a threat but you have got to think that, you know it's going to resolve itself somewhere*". The claimant then discussed a return to work and they have a relatively pleasant discussion at the end about the claimant's health.

67. A similar thing applies to another telephone conversation on 30 June. The claimant does not say that this discussion was the "last straw". The transcript shows a number of pleasantries before matters are discussed in a bit more detail. At this point the claimant stated that she was still feeling unwell but that she was rejecting the offer and considering the Tribunal route and has found out that she needed to speak to ACAS first. There was then a fairly lengthy discussion about that, the claimant making it clear that she could not continue working with Telefonica and the matter finished there.

68. The claimant then contacted ACAS under the early conciliation process on the 2 July. By letter of 25 July the respondent wrote to the claimant in the following terms:

> "I am writing in relation to our ongoing dialogue in relation to your continued sickness absence from work and the fact that you have stated that you are unable to return to work at Telefonica Digital".

69. The letter then goes into the medical evidence, the search for part time suitable alternative roles and stated that the respondent "*is keen to facilitate your return to work, prior to considering any other outcome to your period of extended sickness absence*" and therefore offering a number of options. There were then detailed suggestions about mediation giving the claimant options for times and dates for that process. The letter also suggests a further occupational health review and set out, in some detail, the company

sick pay position with the possibility of the income protection provision covered under the pension scheme. With that letter there were a number of documents the claimant would need to look at and forms to complete for income protection. The claimant could not apply until her entitlement to half pay expired which, as we understand it, would be in October.

70. The claimant's view on that letter is put fairly shortly in her witness statement. She believed that it was "*too little too late*". She believed the letter had been prompted by contact with ACAS and that it was a contrived letter. She took no action with respect to it and on the 28 July, having received her early conciliation certificate, she took the decision to resign her employment. By email of 30 July 2014 she said that she was resigning with immediate effect and then set out these reasons:

"A You have not provided the duty of care to me as an employer should resulting in me getting this illness and the stress of this continued situation is making me worse. I have no choice but the leave Telefonica.

B Whilst on long term sick with depression you have told me I would be on capability because of my illness, made redundant or dismissed. All resulting in me losing my job.

C You have discriminated me because of my illness and disability.

D The trust and confidence between employer and employee has been broken".

She made it clear that she was considering application to the Employment Tribunal and a personal injury claim.

71. Mr Alder acknowledged her resignation on the 1 August.

Law and Submissions

72. We are dealing with a constructive unfair dismissal claim and a claim that there was discrimination for something arising out of the claimant's disability. The respondent concedes that the claimant was a person with a disability as defined in the Equality Act from October 2013. As far as the constructive unfair dismissal complaint is concerned, the tribunal must decide whether there has been a dismissal in accordance with Section 95(1) Employment Rights Act 1996 which states

"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….only if)-

a)-
b)-
c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"

This is what has become known as "constructive dismissal". The case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 makes it clear that

the employer's conduct has to amount to a redudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay. The test for whether the conduct is sufficient to undermine trust and confidence is objective and must be that which is calculated or likely to destroy or seriously damage the relationship and without reasonable and proper cause. The case of London Borough of Waltham Forest v Omilaju [2005] IRLR 35 also gives guidance where a claimant states that there was a last straw. The claimant must show acts which cumulatively amount to a breach of the implied term. The last straw itself need not be unreasonable or blameworthy but should not be an "entirely innocuous act".

73. As far as the disability discrimination complaint is concerned, we here apply the relevant section of Equality Act 2010 (EQA). Section 15 says:

"(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".

74. The tribunal should here consider whether there is unfavourable treatment and whether, if there is, it arises because of something arising from the claimant's disability. The unfavourable treatment here is said to be the taking of steps under the CAP policy and the pressure alleged to have put on the claimant, including mentioning redundancy. If there is unfavourable treatment the respondent can seek to justify it if it can show a legitimate aim and that the treatment was a proportionate means of achieving that aim.

75. Both representatives prepared written submissions and took us to cases which they believed would assist us. There is no significant dispute on the legal tests to be applied. Mr Northall, for the respondent, asked us to consider IPC Media Ltd v Miller [2013] IRLR 707 EAT as to the necessity to connect the unfavourable treatment and the "something arising". Mr MacPhail, for the claimant also covered those points, and referred us to, as well as the Omilaju case, to the case of Bashir v Brillo Manufacturing Co[1979] IRLR 295 with respect to the argument that there was a time lag between any repudiatory breach and its acceptance by resignation.

Conclusions

76. Much of what we say by way of conclusion will be clear from our findings of fact. To summarise, and for the purposes of clarity, we cannot find that the respondent pressurised the claimant or that it did anything which could lead to her believing that it wished her to resign. We appreciate that the claimant was unwell at this time and may well have perceived that to be the position,

but there is nothing in how the respondent conducted itself over this time which should have led her to that view. The respondent said, on a number of occasions through Mr Alder and Ms Dexter, that they wanted her to return to her substantive role and they attempted to deal with the difficulty which she perceived with Ms Bannister by considering alternative roles.

77. We now go through the issues and answer them one at a time so that our judgment is clear.

78. Issue. 1.1: "*Has there been a repudiatory breach of the claimant's contract by the respondent, or a course of conduct by the respondent sufficient to amount such a breach*?"

79. The short answer to this is that there was no repudiatory breach or course of conduct. In essence, as we understand it, the claimant raises a number of matters as indicating such a course of conduct. For completeness we answer them one at a time. We do not accept that the claimant was dissuaded from bringing a grievance. She was fully supported. We do not accept that the respondent's early referral to occupational health is conduct which could lead to any breach of contract. If anything, it is a supportive measure which will give the respondent and the claimant an opportunity to consider how to take matters forward. We do not accept that it is the respondent which raised the prospect of an exit package. Our finding makes it clear that it is the claimant who first raised this possibility. We do not accept that the claimant was told that she was put at risk of redundancy but clearly there was a conversation about whether a voluntary redundancy package could be agreed and that there was a possibility of some risk of redundancy in the future when there was a re-organisation. In particular, we do not find that the letter of 25 November, which was a standard letter in capability proceedings, whilst upsetting because it clearly raises the prospect of discussions which might well lead to a "review of her employment", can be criticised. The respondent, like any employer, is entitled to discuss with employees absent on sick leave how to progress matters including how to return to work or, if that is not going to be possible, what alternatives there are. We do not accept that the outcome to the grievance was premeditated. Both the grievance itself and its appeal was carried out with detailed investigation speaking to all relevant people. There was no evidence before those people nor any before us that suggests what the claimant perceived to be happening with respect to Ms Bannister had in fact occurred. To put it shortly, there was no such course of conduct. There was no fundamental breach of the implied term of trust and confidence.

80. As far as issue 1.2 is concerned: "*Did the claimant resign and treat herself as dismissed in relation to any alleged breach of the respondent*?"

We can say that, to some extent at least, the claimant did perceive there to have been poor treatment of her. However, we are also concerned that she may well have believed that a larger sum in settlement might be achieved by the steps that she took. On balance, we accept that she resigned because of her perception of an alleged breach.

81. Turning then to issue 1.3: "*Did the claimant resign in good time following the*

breach of contract?"

Even if there had been a breach we are not convinced that the claimant did resign in good time. There is a delay between what she considered to be the last straw, which was 13 June, and her resigning on 30 July. While some of this might be accounted for by the claimant's misunderstanding of the early conciliation process, we cannot see that it is a reasonable delay in the circumstances. However, it does not matter greatly as there is no breach in any event.

82. As far as issue 1.4 is concerned, we do not need to answer this question as the claimant was not dismissed.

83. As far as issue 1.5 is concerned, as indicated, the respondent is prepared to accept that from October 2013 the claimant's depression did amount to an impairment which caused substantial adverse effect on her ability to carry out normal day to day activities and we do not need to say more than that.

84. Turning then to issue 1.6: "*The allegation of unfavourable treatment as 'something arising in consequence of the claimant's disability' falling within s.39 Equality Act is the respondent's conduct in applying undue pressure on the claimant and putting pressure on the claimant to leave her employment? No comparator is needed*".

We have already answered that in relation to the unfair dismissal. There is nothing particularly separate or different about the pressure here save that it would have to be after the accepted date of disability in October 2013. In any event, we find no undue pressure or pressure put on the claimant to leave her employment.

85. Turning then to issue 1.7: "*Does the claimant prove the respondent treated the claimant as set out in paragraph 1.6 above*?" The answer must be no.

86. Issue 1.8: "*Did the respondent treat the claimant as aforesaid because of something arising in consequence of a disability?"*

87. The answer to this must, of course, be no. For completeness though we look at any possible causal connection here. We have found that there was no course of conduct which amounted to a breach of the implied term of trust and confidence. But, was taking action under the CAP policy connected to the claimant's disability? We do not think that it was entirely so cnnected. The difficulty really here was that the claimant could not work with Ms Bannister and that is not in consequence of her disability. Even on the claimant's case, she suggested that she was well enough to return (and the medical evidence agreed with her on this) as long as the perceived issue was removed. However, again, this is academic and there ahs been no unfavourable treatment.

88. As far as issue 1.9 is concerned: "*Does the respondent show the treatment was a proportionate means of achieving a legitimate aim*?"

Even if we had been wrong about all the conduct as above, we are satisfied

that even, if there was some treatment which was because of something arising in consequence of her disability, we are satisfied that the respondent can show the treatment was a proportionate means of achieving a legitimate aim. The treatment was not undue pressure as set out above but was proper following of the respondent's own procedure under the CAP policy which the claimant was well aware of. Apart from a slight difficulty about whether the respondent followed step 1 or step 2, which we do not think can be significant given that no further progress was made, the claimant was not at any point threatened with dismissal.

89. Finally, issue 1.10: "*Alternatively has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had a disability*?"

    It is argued here that the respondent did not know. We find that, should it be necessary, the respondent did know about the disability from the date in question. The claimant cannot show unfavourable treatment and therefore this answer is also rather academic.

90. In summary then, the claimant's claims for constructive unfair dismissal and disability discrimination must fail and are hereby dismissed.

_____
Employment Judge Manley

Date: ……

Judgment sent to the parties on

.....

.....
For the Tribunal office