# EMPLOYMENT TRIBUNALS

**Claimant**
Ms D M Norgate

**Respondent**
Mr Stephen Force & Mr David Force t/a Force & Sons Estate Agents

**Heard at:** Exeter

**On:** 6 February 2018

**Before:** Employment Judge E Fowell
Ms M Corrick
Mr J Howard

**Appearances**

Claimant: Unrepresented
Respondent: Ms S Hornblower of Counsel, instructed by Endorse HR Limited

# JUDGMENT

1. The claimant's complaints of unfair dismissal are dismissed.
2. The claimant's complaints of discrimination on grounds of disability, including direct discrimination, discrimination arising from disability, failure to make reasonable adjustments and of harassment are dismissed.
3. The claimant's complaints of direct sex discrimination are dismissed.

# REASONS

## Background

1. The various claims in this case mainly arise from the claimant's dismissal on 31 January 2017, having been absent from work since the previous February following a diagnosis of breast cancer. The reason given for her dismissal was capability, more particularly the length of her absence and the fact that it was not clear when she would be able to return.

2. She claims that the dismissal was unfair, in particular because she should have been allowed longer absence in which to recover. By the time of her dismissal she had had a mastectomy and completed courses of chemotherapy and radiotherapy, but she still needed to have breast

reconstruction surgery. There was no date fixed for this, and she might have needed a further period of up to three months in which to recuperate. The respondent says that was too long.

3. She also brings claims of discrimination arising out of her dismissal. There is no dispute that her cancer amounts to a disability. Firstly, she claims that this was direct discrimination on grounds of her disability. Alternatively, it was discrimination arising from a disability, i.e. her disability led to her absence, she was dismissed because of her absence and the respondent cannot show that her dismissal was justified. That is the usual way in which claims relating to long-term absence are brought. As a further alternative she says that there was a failure to make reasonable adjustments, i.e. to allow her longer for recuperation. The final aspect of the discrimination she alleges on grounds of her cancer is that she was subject to harassment during her absence in being pestered to attend meetings and respond to correspondence.

4. She also claims that her dismissal was an act of discrimination on grounds of sex. This relates to the fact that the additional time she needed was for breast reconstruction surgery, which would only apply to a woman. The respondent says that she has not explained clearly who is her hypothetical comparator, and that the correct comparator would be a man who had been off work for the same length of time and who also needed reconstruction surgery.

5. There are also claims of disability discrimination relating to the claimant's diagnosis with fibromyalgia, which long predated her dismissal. She claims that she suffered harassment as a result of this during her employment in 2013 or 2014, and also that this was one of the reasons for her dismissal. As a result she also presents claims of direct discrimination, discrimination arising from her disability and failure to make reasonable adjustments in connection with this condition too. The respondent accepts that fibromyalgia is also a disability but contends that all such claims are out of time.

6. We heard evidence from the claimant herself and from two supporting witnesses: her son Nathan Stone and a friend of hers, Mr Nigel Sanders. The supporting evidence was largely to confirm her upset at her treatment during her absence from work. From the respondent we heard evidence from the two partners of the firm, Stephen Force and David Force. We are also assisted by a bundle of 126 pages. Having considered this evidence we make the following findings of fact.

## Findings

7. The claimant joined the respondent on 18 September 2012 as a receptionist/administrator. The respondent is a small firm of estate agents. It is a family firm, which has been practising in Exeter and Dawlish for over 200 years. Stephen Force runs the Exeter branch and David Force the Dawlish branch. There are about eight employees in total, divided between work on residential sales and lettings. The claimant joined the small Exeter office.

8. Shortly after she started work she was diagnosed with rheumatoid arthritis, and then later with fibromyalgia. This has a variety of symptoms including cognitive problems, affecting memory and the ability to concentrate.

9. This led to some difficulties at work. She began to make mistakes in typing documents and other small lapses which drew comment. Quite when these comments were made, and when her colleagues found out about her diagnosis was the subject of dispute, but in August 2013 she wrote a letter to Stephen Force (page 4) providing information from her consultant and general information about the problems caused by fibromyalgia. She explained that this was why she had made mistakes, had speech difficulties, trouble remembering or learning things and problems with concentration. The letter asked him to make sure that other members of staff were aware of this, and ended with appreciative comments about the way she had been treated by the firm so far.

10. During the course of the hearing Ms Norgate produced a screenshot from her Facebook account in 11 December 2014 in which she complained to friends about the behaviour of her colleagues, in particular "the way they ridicule me over my symptoms of fibromyalgia" mentioning Stephen Force in particular who she alleges called her "thick", as did another colleague, Anne Conibere. (Ms Conibere was in fact an accountant and friend of the partners who was helping them voluntarily)

11. The claimant's account at this hearing was that the incident with Anne Conibere and Stephen Force occurred before the letter of August 2013, and was part of the reason for writing it, although she accepted that her memory of events was not particularly clear. The Facebook page was only located after she had finished her evidence. We accept that it is an authentic record of the way she was feeling in December 2014, and it is clear from the context of her Facebook post that she was talking about an event that had occurred relatively recently, and so sometime after her letter of August 2013. Stephen Force had no recollection of any such event and no complaint was made about it to him or to any of Ms Norgate's colleagues at the time.

12. In explaining our view of this incident it may be helpful to set out the impression we gained from the different witnesses. It was an emotional experience for Ms Norgate to give evidence and argue her because over these three days and emotions overcame her at various points. It appeared to us from this, and from the open and expressive correspondence in her emails, that she is unlikely to bottle up her feelings and may well have been sensitive to any slight or criticism at work. At the same time, both Stephen and David Force appeared measured and considerate. They showed genuine sympathy for Ms Norgate and reached the decision to dismiss with obvious reluctance. Significantly, they were both at pains to explain that they had wanted her to return to work if that was manageable. We were perfectly satisfied that this was their genuine view. Stephen Force was keen to apologise if any offence had been caused by remarks about typographical errors and the like, although he did not accept ever using "thick" towards her. We accept that evidence from him. It is difficult at this lapse of time to form any view as to what was said on a particular occasion, and there was no real clarity as to when this occurred, whether before

August 2013 is the claimant initially suggested, or closer to December 2014 as a Facebook post indicates. It seems to us more likely that Ms Norgate was using some hyperbole in her very personal Facebook post among her friends in late 2014 and that although on various occasions comments may have been made about lapses on her behalf, comments which she found upsetting, this was either unintentional or not so serious as to amount to harassment as defined in the Equality Act 2010.

13. Another incident which occurred at or around the period in question was a reduction in Ms Norgate's working hours. They reduced to 21 hours per week, from 9 am to 1 pm on Tuesdays to Fridays and 9 am to 2 pm on Saturdays. The claimant suggests that this may have been linked to her fibromyalgia because of a comment made in the course of the appeal hearing by David Force, but there was no mention of this at the time. In July 2015 however a member of staff left and she returned to 36 hours per week.

14. It was in early March 2016 that Ms Norgate was diagnosed with breast cancer. She had a mastectomy on 10 March and kept Stephen Force informed by email of the situation. He responded on 19 March. Although that email and others show genuine concern about her health, he did mention that another colleague, Sarah was likely to be away for some time since she had a forthcoming operation, and asking for an indication of how long Ms Norgate was likely to be away. She took considerable exception to this, coming so soon after her operation, and at a time when she had no certainty that she would be able to make a recovery at all. That at least is how she put matters at the hearing. The response at the time is set out in two lengthy emails on 21 March going into considerable detail about her treatment and emotions. In the first of these she explained that she was crying as she wrote. The second email, two hours later, thanked Stephen Force for the beautiful flowers which had arrived in the interim, and although it explained that it was impossible for her to give any clear indication of a return date she ended by thanking him for his understanding and patience, saying that it was very much appreciated.

15. This second email also appeared during the course of the hearing and so Ms Norgate was not cross-examined about this difference in emphasis. We accept that she may have been put out to be asked such questions at such an early stage but her response is not just a diplomatic one to maintain good relations with her employer. It is quite effusive and we conclude that Ms Norgate's view of this incident has been coloured by later events and the perception she developed that she was being pestered to return to work. Certainly, at that stage there were good relations between her and Mr Force.

16. Mr Force was however alive to the difficulty of having an employee away from work for a long period of time. He wrote to Mr Green, of Endorse HR, on 11 April 2016 explaining the position, that Ms Norgate was on long-term sick due to breast cancer and faced months of chemotherapy, asking how long the job should remain open for. He was advised that he would need to get a medical assessment and to consider any reasonable adjustments. Communications continued by email with Ms Norgate who had an aggressive form of cancer and had also had to have her lymph nodes

removed. Mr Force made the point in an email on 12 April 2016 that the lady who was covering for her could do part-time work until the summer holidays and that if she thought she was still likely to be away after that they would look to find another person to cover for her. He also suggested that she might want to return to work in the meantime in some sort of part-time role. Again, Ms Norgate felt that this was pushing her to return too quickly and was inappropriate, but we concluded that at the time it was not meant as such and was not seen as harassment.

17. The cover was in fact being provided by someone called Davina, whose surname we did not learn, who came in on an ad-hoc basis to begin with. She had childcare commitments and so could not work during the summer holidays. At first the firm would ring her on a day-to-day basis asking her to come in the next day as they required. Over time this developed into a more settled arrangement with her coming in for 10 hours in one week and then 15 hours on the following week.

18. One point emphasised by Mr David Force was that Ms Norgate got on well with his father Arthur, who was still in the business when she went off sick. He had occupied a large room on the ground floor. As a result, the lettings side of the business operated from upstairs with a separate entrance and the residential sales took place downstairs. Once Mr Arthur Force retired, his office was knocked through so that an open plan area was formed on the ground floor, which meant that customers did not need to go up to the first floor. This in turn affected the firm's requirement for a receptionist. We had some difficulty working out what difference this change did make. On one view it made the role of receptionist more important.

19. In June Stephen Force wrote to Ms Norgate suggesting an occupational health appointment to get more clarity about when she would be able to return. His views at the time are made clear in an email to Mr Green on 17 June (page 20) when he explained that Ms Norgate's SSP was finishing in August and that her treatment would probably be ongoing for the rest of the year. He added "we have been struggling to cope and have had various part-time staff assisting but we really need to have a full-time replacement."

20. However, following the Brexit referendum on 23 June 2016 the view of the respondent was that business was badly affected, and the idea of a full-time role or replacement was gradually abandoned. They continued to manage with the limited hours offered by Davina.

21. On 18 June Ms Norgate responded to say that she would be unable to come back to work on any sort of basis during the school holidays because she was still undergoing chemotherapy. By and she was becoming unhappy at the pressure to return before she had recovered, mentioning in an email on 27 June (page 23) that this was beginning to make her feel pressured and stressed and was hindering her recovery. Mr Force responded that it had been busy at work and they had been struggling with staffing and covering the holidays but he did not want to create extra stress. The summer months are busier for estate agents.

22. There was an informal meeting on 7 July 2016. The claimant attended with a friend and a note taker was present with Stephen Force. Ms Norgate

explained that the chemotherapy would finish in August or September and there would need to be several weeks of radiotherapy. They also discussed how the firm was managing in her absence and Mr Force explained that Davina was covering, setting out her working arrangement, and also setting out his revised view that the housing market had been badly affected post-Brexit so he did not think that she would be able to return on her former 36 hour week. No definite proposals were made or discussed but Mr Force's position was that when she returned he would not be able to offer her 36 hours but he was not saying that they could only offer her the 15 hours per week worked by Davina.

23. After that meeting the email exchanges became less frequent. Her SSP did cease in August and in early September she was invited to an occupational health assessment. The referral form was completed by Mr Force and in response to the question "What is known by the company about the employee's health issue/ welfare reasons for their absence at present, and how long has it been apparent?" he inserted - "Ongoing treatment for breast cancer. Also suffers from fibromyalgia which was diagnosed in August 2013." Ms Norgate took exception to the inclusion of any reference to fibromyalgia, which she took as an indication that Mr Force was trying to influence the doctor to a negative view of her prospects of recovery.

24. The subsequent report set out the background to her treatment and explained that she was also suffering from some liver problems following the chemotherapy. Further, she was going to require reconstructive surgery which she hoped would be undertaken in the summer, in which case she could be phased back to work in January 2017 (i.e. she would return to work before the reconstructive surgery). At that stage no date had been given to her for the surgery. The doctor estimated that she should be fit to return to work in early January 2017 providing she did not require any additional treatment for her liver problem. He recommended a phased return over four weeks.

25. Mr Force had a further meeting with Ms Norgate on 2 December 2016 to discuss this report. Events had moved on somewhat since then, in that she had been given a date for surgery of 15 January 2017 with a recovery time estimated to be three months. As a result, her estimated return to work date was now 15 April 2017. That was the date provided by Ms Norgate. Mr Force also mentioned in his letter of 9 December, summarising that meeting, that since she had been absent for 10 months there had been a downturn in business and the high proportion of her previous work had been absorbed by other staff.

26. Following that meeting, Stephen Force sent a further, formal letter dated 18 January 2017, inviting Ms Norgate to what was described as "a disciplinary interview on grounds of medical capability". This was to take place 25 January. It explained that it may not operationally be possible to continue with her employment contract given the length of her absence. It also referred to the downturn in business and stated that at the meeting they would also discuss whether this represented a redundancy situation.

27. Ms Norgate attended the meeting accompanied by her son; Mr Force was accompanied by Mr Michael Green of Endorse HR. It was a short meeting,

lasting only 15 minutes. Almost at the outset Mr Force explained that they may not be able to offer her more than 15 hours if and when she was able to return to work, to which Ms Norgate responded that she could not survive on 15 hours and would have to get another job. It was only then the discussion moved on to her current situation. She explained that her operation had been cancelled. (This was because of concerns over her liver.) There was no date for a further operation. Ms Norgate's view at that stage was that she could not come back before she had recovered properly, which might take three months. There was no discussion or suggestion on either part that she could return to work *before* that operation, as had been canvassed in the occupational health report. The position was essentially that she would not be able to return until after that operation, on an unknown future date with an unknown period of recuperation, which may well be three months, and in any event she could not return to work on 15 hours a week. Ms Norgate took exception to the fact that it was only her hours that the firm was proposing to cut rather than that of the other member of staff, all of whom were sales or lettings negotiators. She compared herself in particular to a colleague called Kiera, who had started with her as a receptionist working mainly upstairs.

28. On those facts Mr Force decided to dismiss her. The main reason relied on was the uncertainty over when she would be able to return and the disruptive effect this was having on the business. He explained in his dismissal letter that Kiera was now spending most of her time in the lettings department, no longer doing reception or admin work, and so their roles were no longer comparable.

29. That in turn led to an appeal and the appeal hearing was held by Mr David Force on 20 February 2017. The claimant felt that it was unfair because she was asked to return her keys to the office during the meeting. She contended that she could have been fit to return to work in April and at that stage raised events going back to 2013 or 2014 concerning her fibromyalgia and comments made to her at the time. Although we understand that this was an emotional and difficult episode for Ms Northgate, coming on top of the shock of her diagnosis and the trauma of her treatment and recovery, combined with a period of financial hardship when she was only on receipt of SSP or other benefits, some of her comments on the appeal meeting appears to us to overstate the case. Realistically, she was not "in sight of a return to work", as she suggested. Given the way matters had been left at the dismissal hearing, there was no clear end in sight. She suggested for example that her return would have taken place within nine weeks but we can see no real basis for that suggestion. Again, no date had been fixed for the reconstruction surgery, and indeed it has not yet taken place. Ms Norgate explained that she put this on hold following her dismissal in order to be able to concentrate on pursuing this claim.

30. The appeal was in the form of a review, and David Force concluded on the basis of what he had heard that there was no reason to overturn his brother's decision. In reality, as this was a small firm and they are brothers, this had naturally been the subject of discussion between them, and they shared the view that the business could not continue with this indefinite absence, and makeshift arrangements for covering reception.

31. Ms Norgate was dismissed on notice, but in addition she was offered an ex-gratia payment of £2300. This was calculated on the basis of her statutory redundancy payment and two months' notice at 15 hours per week. Ms Norgate did not cash the cheque and in due course it was cancelled.

32. We turn from these findings to the applicable law, starting with the claim of unfair dismissal.

**Applicable Law – Unfair Dismissal**

33. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either [conduct] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

34. The essential question in cases of long-term medical absence is whether the employer can be expected to wait longer for the employee to return: *Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT*. In that context, the size and resources of the employer is very relevant.

35. The next question is whether a fair procedure was followed balancing all the relevant factors, such as whether other staff were available to carry out the absent employee's work, the likely length of the absence, the continuing cost of continuing to employ the employee, (again) the size of the organisation and "the unsatisfactory situation of having an employee on very lengthy sick leave": *S v Dundee City Council 2014 IRLR 131*

**Conclusions – Unfair Dismissal**

36. The starting point is to establish the reason for dismissal. Although apparently clear-cut given that the process followed and the reasons given for dismissal were relating to Ms Norgate's absence, redundancy was mentioned in the invitation letter, at the disciplinary hearing, and dismissal was followed by an offer of compensation based on redundancy payment. It

is clear that at the time of the dismissal meeting, the difficulty in negotiating suitable hours on which to return was very much a live consideration. The statutory test requires us to establish the reason or principal reason for the dismissal, and we conclude in this case that the principal reason was her absence, and hence that it falls within the capability bracket in section 98 ERA. No doubt, had there been a viable date in the reasonably near future for Ms Norgate's return, redundancy would have been the next issue to address, but we see the two competing reasons in that order. Mr Force may also have considered that it would be artificial to put the question of hours of work out of consideration altogether, since it may have been offering some false hope of a return to Ms Norgate, and so it made sense to deal with both issues in the course of the same meeting.

37. Having found that the main reason was related to her absence it is not necessary to consider further whether the procedure followed in relation to the proposed reduction in hours was appropriate. In the event, it was academic. We record however that despite earlier indications that they needed a full-time replacement, for at least six months prior to the dismissal Ms Norgate's role had been covered by Davina working at or near 15 hours per week, and that this therefore represented a realistic estimate of the firm's requirement at the time.

38. Equally, no issues were raised over the fairness of the procedure adopted in relation to her dismissal on capability grounds. The firm obtained appropriate HR advice about the need to obtain an Occupational Health report and to consider reasonable adjustments; they invited Ms Norgate to discuss the findings; as matters continued she was invited to a hearing to consider whether the firm could continue to accommodate her absence, and had a right of appeal. Although small criticisms were made of such matters as the reference to fibromyalgia in the Occupational Health form, the procedure generally was entirely appropriate.

39. The next question is the reasonableness of the dismissal. Applying the other guidance above on the approach to absence-related dismissals, the small size of the firm is a particularly important aspect of the present claim, particularly the fact that there were only four staff apart from Mr Stephen Force in the Exeter office. Ms Norgate was the only receptionist, although others could receive customers as they came through the door, but this would be at a cost in time and distraction to their own work. There was no particular cost to her absence after her SSP came to an end but there was a continuing disruption. Davina was unable to work Saturdays, which again posed an additional burden on other members of staff and there were particular difficulties during the school holiday periods. A further consideration was the makeshift nature of the arrangement with Davina. We weighed these various factors with some care. It might equally be argued that Ms Norgate had been absent for a considerable period of time and treatment for chemotherapy and radiotherapy was concluded. She still needed treatment or recovery time for her resulting liver damage, which was for an unknown period, and then the breast reconstruction operation, which again was on an unknown date. That would depend on her liver and the availability of NHS time. Although it might have been possible for her to return to work before that operation, she was signed off sick until April at the time of her dismissal and gave no indication that in practice she felt able to

return earlier. We also take into account that both Stephen and David Force had been hopeful throughout that she would be able to recover and return to them, and we do not consider that the decision to dismiss was in any way an attempt to forestall her return.

40. We remind ourselves that it is not for us to substitute our view as to whether or not we would have dismissed Ms Norgate in the same circumstances. In *Iceland Frozen Foods Ltd v Jones [1983] ICR 17* it was held that:

> "…in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> …the function of the [Employment Tribunal] … is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

41. This approach applies to dismissals generally and not simply in the case of misconduct. Overall therefore we conclude that the decision to dismiss was within the range of reasonable responses in the circumstances, and so was fair. This "range of reasonable responses" test also applies to each step in the dismissal process, and reinforces our view that the procedure followed was fair.

42. The next question is whether or not the dismissal or any previous conduct towards the claimant could be regarded as discriminatory.

**Applicable Law - Discrimination**

43. Ms Norgate brings her claims in a number of different ways, and the relevant statutory provisions are as follows:

> **13. Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> **15. Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> **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. …

**21. Failure to comply with duty**

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

**26. Harassment**

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

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

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

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

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

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

…

(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.

**120. Jurisdiction**

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work); …

**123. Time limits**

(1) Subject to … proceedings on a complaint within section 120 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.

**136. Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

## Conclusions – Discrimination

44. We will deal first with the less central aspects of the claims. The claim of direct sex discrimination requires there to be an appropriate comparator, in this case a hypothetical comparator as there is no actual individual with whom to compare her. In comparing the situation of Ms Norgate and this hypothetical comparator, all of the relevant circumstances apart from the protected characteristic – in this case, sex – have to be taken into consideration. That means the comparator is a man who had been absent from work for the same period of about 10 months at the time of the dismissal, had a need for reconstructive surgery after cancer treatment, which was delayed because of damage to his liver. The fact that the surgery in Ms Norgate's case was breast reconstruction, something specific to women, is not to the point. A man might also need such surgery, perhaps as a result of facial disfigurement, which would equally be regarded as an integral part of the treatment. Viewed in that light, we could see no basis to conclude that the decision was in any way discriminatory.

45. The next issue is the series of claims arising from fibromyalgia, and here there is a time-limit issue. The normal time limit for presenting a complaint of discrimination is three months after the last act of discrimination. On occasion, there may be a discriminatory practice or state of affairs, continuing over a period of time, which it is possible to describe as a continuing act, so that claims may be brought long after the practice began. But that is not the case here. Any harassment caused by comments over her fibromyalgia ceased long before her dismissal, and she has not suggested that any continued after December 2014. She also raised concerns that because fibromyalgia was mentioned in the Occupational Health referral form, and there was a reference by David Force in the appeal meeting to her reduction in hours in 2014, a reference which may have appeared to suggest that this was linked to her fibromyalgia. As to the Occupational Health form, we were unable to understand how that could amount to harassment, or any form of discrimination, given that the information was accurate, and was supplied in response to a direct question on the form as to her existing health conditions. This would be relevant to any assessment of her likely return to work. As to the appeal meeting comment, if there had been a link between her condition, the mistakes she was making in 2014 and the reduction in hours, this state of affairs came to

an end in 2015 when she resumed full-time hours.

46. Alternatively, the time limit may be extended, under section 123 Equality Act, where it is "just and equitable" to do so. That many encompass a situation where someone finds out later that they had been discriminated against. The question of what is just and equitable involves a consideration of what is just and equitable for both parties, not just the claimant, and must take account of the effect of the lapse of time on their ability to present evidence to defend any such late claims. Here, the length of time between the fibromyalgia incidents and the presentation of the claim in 2017 is so great that it can be simply stated. As is often the case, no explanation was provided for the delay, and why Ms Norgate did not bring claims of harassment or discrimination at the time, but the natural inference is that she did not regard them as sufficiently serious. In order to find that it would be just and equitable to extend time, some more substantial explanation is necessary, and so we conclude that the claims of harassment, relating to her fibromyalgia are out of time.

47. As to the suggestion that her reduction in hours may be related to fibromyalgia, we accept that it would be just and equitable to extend time to consider this, since it only came to her attention at the appeal hearing. However, we see nothing substantial in the remark made at the appeal hearing to justify the conclusion that her reduction in hours was related to fibromyalgia, rather than the needs of the business. When another member of staff left in 2015 she resumed her full time hours, rather than replace that person, which shows that they had full confidence in her, and indeed at this hearing she was referred to by Mr David Force as an excellent receptionist. We do not therefore accept that on this issue the initial burden of proof, as set out in section 136 Equality Act 2010, has been discharged by Ms Norgate.

48. The evidence relating to fibromyalgia and events in 2013 and 2014 was potentially relevant to the dismissal, since it may be that if a negative view had been taken of Ms Norgate's work this might have affected the firm's willingness to hold her job open for her any longer, but having considered this aspect we were satisfied that that was not the case and they were hoping that she would be able to return.

49. We turn to the allegations of discrimination arising out of Ms Norgate's cancer. In considering these claims, the burden of proof provisions at section 136 Equality Act 2010 are important. They were considered recently by the Court of Appeal in ***Ayodele v CityLink Limited [2017] EWCA Civ 1913,*** which reasserted the view that it was necessary for the claimant first to prove facts from which the Tribunal *could* conclude, in the absence of an explanation from the respondent, that the dismissal had been tainted by discrimination. It is not enough for the claimant to show that she has a protected characteristic and was dismissed - "something more" is required; ***Madarrassy v Nomura [2007] ICR 867.***

50. Starting with the claim of direct discrimination, the unfavourable treatment in question is her dismissal, so this amounts to a claim that she was dismissed because of her cancer. Given that she had already been absent for 10 months at the time of her dismissal, this would be an unusual conclusion.

The comparator here is someone who had been absent for 10 months with a medical condition which did not amount to a disability, and we can see no basis to conclude that such a person would have been treated any differently.

51. As already noted, the more usual way in which such claims are brought is under section 15 – discrimination arising from her disability. To succeed on this aspect, section 15 requires firstly that there be unfavourable treatment because of something arising from the disability (in this case dismissal and her absence) and that the respondent cannot show that the dismissal was a proportionate means of achieving a legitimate aim. We approach this question mindful of our earlier conclusion that the dismissal was fair. It is certainly a legitimate aim to ensure that the firm has a workforce able to carry out the required duties. Hence the question becomes one of whether the dismissal was a proportionate means of achieving that aim. That is very much the same question as whether the dismissal was fair, although arguably a decision within the range of reasonable responses may be a less exacting standard. In any event, the same considerations apply, including the length of absence, cost, likely future absence, extent of disruption and the size of the organisation. Again, balancing all those factors we are satisfied that the decision in this case was proportionate to that aim, notwithstanding the very considerable impact which the decision had on Ms Norgate. The main points here are again the small size of the firm and the uncertainty over the length of the absence.

52. The final way in which the claim of discrimination is put is a failure to make reasonable adjustments, in this case to allow a longer period of absence. This is in fact something of a misconception, since a reasonable adjustment is intended to overcome a disadvantage suffered by a disabled person, not to allow a longer period of absence. In the same way, a reasonable adjustment may involve the provision of some equipment such as an adaptive keyboard, to enable the disabled person to meet the required standard of work. It is not a reasonable adjustment simply to accept a lower standard of work or, as the case may be, of attendance. But in any event, and although no provision, criterion or practice was identified which put Ms Norgate at a substantial disadvantage, as required by section 20 Equality Act 2010, ultimately the test is one of reasonableness, and this is no different in practice from the test of proportionality under section 15, considered above.

53. The final aspect is the claim of harassment during the process. This related to the number of meetings and correspondence, but there were only four meetings: the first an informal meeting in July 2016, then a meeting to consider the Occupational Health report on 2 December 2016, and then the dismissal and appeal meetings. The last two are inescapable. The previous meeting was an integral part of a fair process in such cases. And the first meeting appeared to us entirely appropriate in the context of maintain contact with Ms Norgate after several months absence. We can understand that these first two meetings were not particularly welcome to her, but this falls far short of the test of harassment under section 26 Equality Act 2010.

54. Her main concerns related in fact to the email queries about when she would be able to return. These began as early as April 2016, but as already

noted this did not cause any real offence at the time. To some extent this query stemmed from a misunderstanding on the part of Mr Stephen Force that she would be able to return to work when her sickness certificate expired, but we cannot say that it had the effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. At all times there was a genuine degree of concern for Ms Norgate, something she appeared to recognise during the early months of her absence. The later meetings, particularly following the Occupational Health report, were perhaps more clearly part of a process which might result in her dismissal, and so for that reason were less and less welcome, but ultimately this sort of procedure is required as part of a fair dismissal and it would be a rare case in which it could also be regarded as disability discrimination.

55. Accordingly, and for all the reasons given above, the claims must all be dismissed.

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Employment Judge Fowell

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Date 21 February 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE