Case No: 1401022/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss M Fox**

Respondent: **Virtually There Offices Ltd**

Heard at: **Bristol** **On:** **2 & 3 January 2018**

Before:za **Employment Judge Mulvaney**
Dr C Hole
Mrs P Ray

Representation
Claimant: In person
Respondent: Mr West, Consultant

RESERVED JUDGMENT

1. The claimant's claim of disability discrimination does not succeed and is dismissed;

2. The claimant's claim of unfair dismissal is well founded and will proceed to a remedy hearing.

REASONS

1. The claimant bought claims of disability discrimination and unfair dismissal following the termination of her employment on 7 April 2017.

2. The respondent is a provider of virtual office reception services to small to medium-sized UK businesses. At the time of the claimant's dismissal the respondent employed four employees, two part-time and two full-time. The claimant was employed as one of three Receptionists. Her line manager was Charley Jones, the Operations Manager.

3. The tribunal heard evidence from the claimant and for the respondent from Mr Jack Head, Director; Mr Edgar Thoemmes, Director; Mrs Charley Jones,

Operations Manager; Ms Caroline Emmerson, Receptionist and Business Development Manager; and Mr Bob Head, Director.

4. The issues that the tribunal had to decide were:

Disability Discrimination

4.1. Did the Claimant's condition of depression have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

4.2. If so, was that effect long term? In particular, when did it start and:

4.2.1. Has it lasted for at least 12 months?
4.2.2. Is or was the impairment likely to have lasted at least 12 months or the rest of the Claimant's life, if less than 12 months?

Section 13: Direct discrimination on grounds of disability

4.3. Did the Respondent treat the Claimant less favourably by dismissing her?

4.4. If so, are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her disability?

Section 15: Discrimination arising from disability

4.5. Can the Claimant prove that the Respondent dismissed her because it believed that she would be likely to have increased levels of sickness absence as a consequence of her disability?

4.6. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

4.7. Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

Unfair dismissal

4.8. What was the reason for dismissal? The Respondent asserts that it was a reason related to aredundancy or some other substantial reason, both of which are potentially fair reasons for dismissal under s. 98 (2) of the Employment Rights Act 1996.

4.9. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

4.10. Did the Respondent adopt a fair procedure?

Findings of fact

5. The claimant commenced her employment with the respondent on a 15 hour per week contract on 2 February 2015. In July 2015, the claimant was asked to accept a zero hours contract and she did so. On 4 April 2016, the claimant was moved on to a 30 hour per week contract, as she had requested, which meant that she was eligible for working tax credit.

6. The claimant worked as a virtual receptionist between the hours of 11.30 to 5.30. She was one of three virtual receptionists, the others being Caroline Emmerson who worked between 10.00 and 6.00 and Emma Hiskett who worked from 9.00 – 1.00. Caroline Emmerson had additional responsibilities for business development, on which she reported directly to the Respondent's directors. The three receptionists were line managed by Charley Jones. Ms Jones had responsibility for day to day operations but had no responsibility for staff recruitment or dismissal, which matters were dealt with by the directors. The role of the receptionists was to answer calls for business customers and it was not disputed that it was a key function of the respondent's business to ensure that calls were answered by the receptionists and did not go to answer phone.

Claimant's health

7. It was the claimant's evidence that she had experienced mental health issues for a number of years. She was not formally diagnosed with a mental health condition until 23 March 2017. In July 2015, her medical notes recorded that she had attended her GP describing symptoms of low self-esteem, hopelessness and suicidal thoughts (p88 -89). Her GP advised her to 'read up on Borderline Personality Disorder' and referred her for counselling. In preparation for counselling at that time, she underwent a mental health assessment by means of a questionnaire in which she scored 15/27 on the PHQ9 (p93) the measure for depression, which indicated 'moderately severe depressive symptoms' (p97).

8. Following a six-week counselling course in 2015, the claimant did not receive any further treatment for depression until March 2017. It was the claimant's evidence that she had, throughout that period as well as prior to 2015, suffered mental health symptoms. Her coping strategy for the period between 2015 and early 2017 had been to binge drink alcohol, until that caused other health problems and she stopped drinking alcohol in September 2016. Her evidence was that she then found that her behavior was erratic and affected her working relationships. She had difficulty forming relationships and social interaction caused her anxiety so that she did not have a social life. She found decision making very difficult so that, for example, selecting items at the supermarket was a lengthy and challenging process, and at work writing emails could take a long time. She was excessively sleepy, falling asleep early in the evening and finding it difficult to rouse herself in the morning. We accepted the claimant's evidence as to her mental health symptoms and the difficulties that it caused her in her social interactions and day to day life. It was supported by the medical evidence and by Ms Emmerson's evidence.

9. The claimant's condition appeared to affect her home life more than her working life. She did not take any sick leave as a consequence of her

condition. The respondent found her competent and reliable at her work. She did however find work relationships difficult and perceived a problem in her relationship with Ms Emmerson with whom she disagreed on non work-related matters. Ms Emmerson's evidence was that she did not for her part perceive a problem in her relationship with the claimant. Ms Emmerson was nevertheless concerned about the claimant's mental health having experienced a period of depression herself and it was her evidence that she considered that the claimant had been having mental health difficulties for some time. Ms Jones' evidence was that the claimant did discuss her low mood and family relationship problems at work from time to time but not to the point that Ms Jones understood that the claimant had a mental health condition. The claimant had not been diagnosed with a mental health condition prior to the 23 March 2017 and had not suggested to Ms Jones that she suffered from such a condition.

10. On 23 March 2017 prompted and encouraged by Ms Emmerson, the claimant attended her GP and described symptoms including:

> *'reduced appetite, scared to socialize, feeling anxious around people, sleeping all the time, struggling to do simple things, like care for her appearance or even shower, feels that her head is very heavy and then just wants to lie down doesn't have any friends'.*

The claimant's GP records for the 23 March showed a diagnosis of depression and the claimant was prescribed anti-depressants (p83).

11. Included in the bundle was a letter from the claimant's GP dated 7 September 2017 which stated:

> *'I write to confirm that Maria has attended surgery on many occasions since 23rd of March 2017 with symptoms of depression and menstrual dysphoria that had been going on for a number of years. She was previously seen in 2015 when she reported a long standing history of mood swings, impulsivity, difficulties forming interpersonal relationships, self-criticism and features possible borderline personality disorder.*
>
> *…*
>
> *She experiences mood swings, low self esteem, social anxiety, reduced ability to concentrate impulsivity and difficulties interacting with others and forming relationships and these have all had an impact on her ability to function normally at work and in her personal life.' (p99)*

12. The Tribunal found as a fact that the claimant's condition of depression had a substantial impact on her ability to carry out day-to-day activities including decision-making, social interaction and concentration and this impact had been long-term in that it had been a feature of her life since at least July 2015. Although there was no evidence of medical intervention between July 2015 and March 2017, we accepted the claimant's evidence that she continued to experience the symptoms during that period and we recognized that depression is frequently a recurring condition where the symptoms can reduce for a period and then become more severe once again, which we found was likely to have been the case for the claimant.

Events leading up to claimant's dismissal

13. It was the respondent's evidence that the business, which was set up in April 2012, had failed to make a profit to date. It had no working capital, was in

negative equity and none of the directors had ever taken a salary. In 2017 the business appeared to be improving. There was an increase in the number of clients and consequently in the number of calls to be answered by the receptionists. Call reports for the period January to March 2017 showed that the mornings, between 9.00 and 11.00 were the busiest time for incoming calls (p56-57).

14. At a monthly directors' management meeting held on the 8 February 2017, the directors decided that a full-time member of staff was required to provide additional cover. The note of that meeting records: '*Staff okay. Need more cover? Apprentice or full-timer*.' It was Mr Jack Head's evidence that in order to manage costs the respondent required either a part timer to become full-time or to replace a part-time member of staff with a full timer or an apprentice. No decision was made at that time as to how the additional cover requirement would be met.

15. In 2014 the claimant had taken on a puppy, which became an important part of her life. The place that the claimant's dog held in her life was well known to the claimant's colleagues and to the respondent's directors. She had made clear to Mr Jack Head on her appointment that her hours must not interfere with the need to limit the amount of time the dog was left on its own. Although the claimant would occasionally cover alternative hours when asked, she had not, when asked, ever agreed to increase her hours beyond 30 per week due to her commitment to not leaving her dog for too long on its own. The claimant's evidence was that she could only recall being asked on one occasion to increase her hours by Ms Jones. The respondent's evidence was that she had been asked on a number of occasions to increase her hours to cover colleagues' sickness or holiday absence but had refused on account of her dog. We found as a fact that the claimant had indicated to Ms Jones and to the Directors of the respondent that her hours needed to fit in with her responsibilities as a dog owner and that this was a well-known aspect of the claimant's life. The claimant herself referred to it in an email dated 16 February 2017 (p47).

16. On 15 February 2017, the claimant requested a meeting with Mr Jack Head as a consequence of difficulties that she perceived were arising in her relationship with Ms Emmerson. Email correspondence included in the bundle showed that Mr Jack Head, when he received the claimant's request for a meeting initially believed that she would be asking him for a pay rise and he wrote to his co-director Mr Thoemmes asking for his thoughts on increasing the claimant's hourly rate to £8 as she had improved and was reliable (p45), which Mr Thoemmes agreed.

17. At the meeting between the claimant and Mr Jack Head on the 15 February 2017 the claimant told Mr Head that she was considering leaving work due to the difficulties she was experiencing with Ms Emmerson. However, when Mr Head said that he would speak to Ms Emmerson and believed that matters could be resolved between them and also offered her an increase in pay she indicated that she was happy to stay. An email from the claimant to Mr Head dated 16th of February 2017 showed that the claimant was appreciative of Mr Head's response (p47).

18. It was the respondent's evidence that following Mr Jack Head's intervention the relationship between Ms Emmerson and the claimant improved. There

was no evidence that there were difficulties in the few weeks immediately following that meeting. Included in the bundle were texts between the claimant and Ms Emmerson on the 23 March 2017 which appeared to show a supportive relationship. However, it was the claimant's evidence that she continued to find her relationship with Ms Emmerson difficult and at a meeting between Ms Jones and the claimant on the 3 April 2017, Ms Jones asked the claimant what was to be done about the atmosphere. The claimant's evidence was that her unspoken response was that Ms Emmerson should not work there. From this we concluded that there was still some tension between the claimant and Ms Emmerson.

19. In March 2017, there was discussion between Ms Emmerson, Ms Jones and the claimant about low mood and depression and on 6 March 2017 Ms Emmerson sent a link to Ms Jones and the claimant to an NHS website which contained a depression questionnaire. It was the claimant's evidence that she had a high score on the questionnaire and knew that Ms Jones had a low score. Ms Jones and Ms Emmerson's evidence was that although the link to the questionnaire was sent, they did not know the claimant's score and Ms Jones did not share her score with the claimant. Ms Jones and Ms Emmerson described the office culture as friendly; the claimant and her colleagues worked in an open office with desks quite close together. Ms Jones said that the questionnaires were completed in work time and on balance we found that it was likely that she and the claimant would have shared what scores they achieved. However even if this was the case, we found that knowledge of the claimant's score on an online questionnaire would not have indicated to Ms Jones that the claimant had a condition or that the condition amounted to a disability.

20. On the 20 March 2017, the Directors held a monthly management meeting and it was their evidence that, in view of the need to increase the call cover, they should replace the claimant with a full-time member of staff, possibly an apprentice. The very brief meeting notes (p55) recorded simply '*Apprentice * Replace Maria'*. In their evidence Mr Jack Head and Mr Thoemmes stated that they discussed various options to deal with the need to have more extensive receptionist cover particularly in the mornings. They discussed the fact that the claimant had made clear in the past that she would not be prepared to increase her hours beyond the 30 hours that she worked due to her commitment to her dog. Their evidence was that although they proposed asking her again if she would work full time hours, their assumption was that she would refuse. For reasons we set out below we were not satisfied that Mr Head or Mr Thoemmes gave serious consideration to alternative options to replacing the claimant with a full-time member of staff.

21. Emma Hiskett, the receptionist who worked from 9.00 to 1.00, was due to go on maternity leave in June and the directors were discussing full time cover for the period of her maternity leave. The Directors said that they considered whether it would be possible to take on a part timer to cover the hours in the morning during which the claimant did not work but it was their evidence that it would be very difficult to find a person to work only two to three hours per day at the level of pay being offered and at the work location, which is not easily accessible by public transport.

22. None of the Directors were knowledgeable in the field of employment matters. Mr Jack Head's oral evidence to the Tribunal which was supported by Mr Bob Head's evidence was that all three Directors were under the misapprehension that the claimant was still on a zero hours contract and that there were no employment law implications raised by the termination of her employment. We found as a fact that the respondent reached its decision to terminate the claimant's employment on the 20 March 2017. We found that they did not spend a great deal of time considering whether there were alternative solutions to their need to increase receptionist cover for the business, particularly in the morning, which would not involve dispensing with the claimant's services. Our reason for so concluding is that they were unaware of any need to have addressed their minds to this given their understanding that the claimant was on a zero hours contract so they believed that there was no need for a proper procedure to be followed. This is supported by the fact that despite her two years' service with the respondent, on her dismissal the claimant was only given one week's pay in lieu of notice.

23. The claimant was due to go on leave from the 27 – 31 March 2017, requested on the 8 March 2017. The Directors decided that they would meet with the claimant on her return from leave to inform her of her dismissal so that she could enjoy her holiday. It was the Directors' evidence that they did not inform Ms Jones of their decision to end the claimant's employment despite the fact that she was the claimant's line manager and in charge of the day to day operation of the business. We found this to be very surprising but on balance accepted the Directors' and Ms Jones' evidence on this point. Our reasons for doing so are that Ms Jones in her oral evidence agreed that she had raised with the claimant at a meeting on the 3 April 2017, immediately prior to the meeting with Mr Head at which the claimant was informed of her dismissal, the issue of tension in the office between the claimant and Ms Emmerson. We concluded that Ms Jones would have been unlikely to have introduced that subject had she been aware that the claimant was about to be dismissed.

24. On the 23 March 2017, the claimant attended her GP in connection with her symptoms of her depression. She had been prompted to do so by Ms Emmerson who assisted her by writing a list of symptoms that the claimant was experiencing for her to take with her to the GP. As described in paragraph 10 above the GP at the appointment on the 23 March diagnosed the claimant with depression and prescribed anti-depressants. Ms Emmerson later texted the claimant to enquire how she had got on and the claimant texted her in return "*Thanks Carolina. Your encouragement means a lot. Forced myself to go, have been diagnosed and prescribed…xx*".

25. Ms Emmerson's evidence was that she did not pass on the claimant's message to the Directors. She said that she could not recall whether she had told Ms Jones of the claimant's text. The Directors' and Ms Jones' evidence was that they did not know of the claimant's diagnosis. The claimant's evidence was that she had told Ms Emmerson of her diagnosis in her text of the 23 March 2017. She contended that Ms Emmerson was part of the management team. We found that although Ms Emmerson had a management role, it related only to business development and she had no line management responsibility for the claimant. Her knowledge of the

claimant's diagnosis could not be said to be that of the employer. We did not find that Ms Jones was aware of the claimant's diagnosis of depression at that time. The claimant had not told her of it and even if Ms Emmerson had passed on to Ms Jones the little information contained in the claimant's text of the 23 March 2017, this would not have provided enough to establish knowledge of the condition that had been diagnosed, still less of a disability.

26. On the 24 March 2017, there was a discussion between the receptionists in the office about what their ideal jobs would be. The claimant said that she would like to work as a receptionist at a veterinary clinic. Ms Emmerson sent her a link to a recruitment advert for such a post that same afternoon. The claimant saw this as Ms Emmerson trying to get her to leave her employment with the respondent. Ms Emmerson's evidence was that the claimant had said she wasn't happy in her work and that Ms Emmerson, in sharing an advertisement for the type of job the claimant said appealed to her, was acting as a friend. We found that the claimant was feeling sensitive and unhappy and that this action whilst not designed to push the claimant out, did not show great sensitivity on Ms Emmerson's part.

27. The claimant was on leave from the 27 - 31 March 2017. On the morning of the 3 April before the claimant returned to work the claimant attended a GP appointment. The GP notes recorded that the claimant *'had week off work last week, spent it sleeping, back at work today basic tasks are a struggle doesn't enjoy life at all, except for sleeping, has been able to accept herself the way she is now.'* In her witness statement, the claimant referred to the GP notes and said that the GP had suggested that the claimant accept Ms Emmerson for who she was and that the claimant had *'looked forward to implementing that alternate perspective.*' We concluded that the claimant had misunderstood the GP and the reference to accepting herself the way she is, which was a reference to the claimant and not to Ms Emmerson. This suggested to us that the claimant's health at that time was impacting on her ability to understand and process things that were said to her. The claimant's evidence was that the she had discussed with the GP being signed off work but the GP had encouraged her to keep going into work.

28. On her return to work on the 3 April, the claimant had a meeting with Ms Jones who, after bringing her up to date, asked her what was to be done about the atmosphere in the office. The claimant's evidence was that she said *"due to her recent diagnosis she could take a few weeks sick leave"*. Ms Jones' evidence was that the claimant did not mention a diagnosis but did say that she was feeling a bit emotional and low and wanted to take some more leave. We concluded that the claimant did not mention a diagnosis but did mention taking some more time off due to feeling low. We concluded that she was not clear that this would be sick leave and, in the absence of any doctor's note, Ms Jones assumed she was talking about holiday. Ms Jones said she would raise it with Mr Head and look at whether there was sufficient cover. The claimant had not indicated when she wanted the additional time off. Ms Jones' understanding was that the claimant had not made an urgent request and her evidence was that she did not immediately raise it with Mr Jack Head.

29. Following the meeting between the claimant and Ms Jones, Mr Jack Head asked the claimant to join him in the meeting room. Ms Jones' evidence was that she did not speak to Mr Head before the claimant met with him and we

accepted her evidence; the claimant's evidence being that the meeting with Mr Head followed 'swiftly' on her meeting with Ms Jones.

30. There was a dispute on the evidence as to what was said in the meeting between Mr Jack Head and the claimant on the 3 April 2017. What was not disputed was that Mr Head told the claimant that she was to be dismissed and that it would be with immediate effect. She would be paid one week's notice. There was a discussion about the claimant's entitlement to benefits on her dismissal. There was talk of the dismissal being or being described as for redundancy.

31. The claimant's evidence was that Mr Head had said they were going to call it a day and that it was because of her manner when answering calls. He went on to ask her how best to describe the dismissal to ensure her entitlement to benefits. She suggested that they call it a redundancy as that would not interfere with her entitlement to benefits and he agreed. She said she was tearful and told him that she had been diagnosed with depression.

32. Mr Head's evidence was that he explained the business rationale for the decision to dismiss the claimant which was that they wished to replace the claimant with a full-time employee to cover the additional hours not worked by the claimant. He said that he asked the claimant if she would want to work full time and she said she did not. Mr Head said that the claimant raised the question of her entitlement to benefits, but that he had told her that the reason for her dismissal was redundancy. Mr Head said that the claimant had indicated that she was not happy at work and was happy to leave. He said she seemed as though a weight had been lifted from her shoulders.

33. We did not accept the claimant's evidence that Mr Head had told her that she was being dismissed because of her call answering manner. There was no evidence to support this. Mr Head had indicated in February that he was happy with her performance and given her a pay rise. The claimant had not indicated in her particulars of claim or in any document prior to her witness statement that she had been told that this was the reason for her dismissal.

34. There was a short note in the bundle, which Mr Head said was his note made in advance of the meeting, setting out what he would say. We were not satisfied that the note was of great assistance when deciding what was in fact said at the meeting (p63), because it appeared that at least part of the note had been written after the meeting and it was not possible to tell what had been written before and what later. We found that Mr Head did say to the claimant that the dismissal was for redundancy but we concluded that that was to give it a formal description rather than because that was the reason and that may have been to assist the claimant after the dismissal.

35. We found that if there was any mention of the possibility of the claimant working additional hours, this was only by way of seeking confirmation from the claimant that she would not wish to do so and that it was not done in a way to indicate that the alternative was her dismissal. It was the claimant's evidence that had she been given the option of remaining on full time hours she would have made alternative arrangements for her dog to enable her to do so. We found that there was a possibility that the claimant would have done so if faced with that choice. Although the claimant did not at a later stage inform the respondent that she was prepared to increase her hours, we

found that she had not been given an indication that that would effect the outcome.

36. We found that it was likely that there was some relief shown by the claimant at the meeting, because the evidence from her earlier meeting with Ms Jones showed that she was feeling low and wishing to take some further time off. We concluded that relief shown by the claimant reflected the claimant's wish to not be at work at that time rather than relief at losing her job. We found that the claimant did not mention to Mr Head that she had been diagnosed with depression. The claimant did not in her ET1 or at any time prior to her witness statement state that she had told Mr Head that she had been diagnosed with depression.

37. Following the meeting Mr Head went with the claimant into the main office and said that the claimant was being made redundant and was leaving but that they had parted on good terms.

38. On the 4 April 2017 Mr Head wrote to the claimant confirming that her employment was coming to an end because of redundancy. The letter stated:
'We have taken the decision that it is no longer feasible to offer a part time role Receptionist role (sic) anymore. It is with great sadness that this role will therefore cease to exist going forward.'(p68)

39. Following the claimant's dismissal, Emma Hiskett agreed to increase her hours in the short term prior to her maternity leave and the respondent engaged two temporary full-time members of staff in June who were employed for 3 weeks and 10 weeks respectively, and two full-time apprentices, one of whom started in August 2017 and one in October 2017.

40. The claimant's claim originally included a claim for notice and holiday pay. The respondent has since paid the claimant further sums in respect of those claims and the claimant accepted that no further sums were due.

Conclusions

41. In reaching its conclusions the Tribunal considered the evidence that it had heard and the documents to which it had been referred and which it considered relevant. It also had regard to the submissions of the parties.

Disability

42. The Tribunal considered first the issue of whether the claimant's condition of depression amounted to a disability as defined in the Equality Act 2010 (EqA). S6 EqA provides:
'A person (P) has a disability if –
(a) P has a physical and mental impairment, and
(b) The impairment has a substantial and long term adverse effect on P's ability to carry out day to day activities.'
Schedule 1 EqA provides at s2(1):
'The effect of an impairment is long term if-
(a) It has lasted for at least 12 months
(b) It is likely to last at least 12 months
(c) It is likely to last for the rest of the life of the person affected.'

Schedule 1 s(2) provides:

'If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.'

43. We concluded on the evidence that the claimant's condition of depression was a mental impairment. We concluded that although the claimant had not been formally diagnosed with depression until the 23 March 2017, the evidence showed that the claimant had in fact been suffering with the condition for a considerable time. This was confirmed by her GP records and the letter from her GP dated September 2017. We concluded that the claimant had had the condition for at least 12 months, there being evidence of her having symptoms of depression in July 2015. To the extent that there may have been a reduction in its impact on her between July 2015 and January 2017, we concluded that it was nevertheless a condition that was likely to and did recur.

44. The claimant's evidence, which we accepted, was that the condition had a substantial adverse effect on her ability to carry out day to day activities. Although it appeared that the impact of the condition on the claimant was greater in her home life than in the work environment, it nonetheless did cause her difficulty at work, making her slow to write emails and to make notes and creating difficulties in her working relationships. However, the significant impact of the condition was on the claimant's social interaction. It was the claimant's evidence, which we accepted, that the claimant did not have a social life as she found it too difficult to form social relationships as they caused her great anxiety. This together with other effects such as excessive amounts of sleep, difficulty making decisions, impulsivity and difficulty concentrating led us to conclude that the impact on the claimant's ability to carry out day to day activities was substantial.

45. We concluded that the claimant's condition of depression met the definition of disability under the s6 EqA.

Direct discrimination

46. We then considered whether the reason for the claimant's dismissal was less favourable treatment because of the claimant's disability contrary to s13 EqA.

47. The respondent contended that it had no knowledge of the claimant's disability at the time she was dismissed. If the respondent was unaware that the claimant had a condition which amounted to a disability when it dismissed her then that treatment could not have been because of her disability.

48. On the facts found we concluded that neither Mr Jack Head nor his fellow Directors knew that the claimant suffered from depression which amounted to a disability at the time they made the decision to dismiss the claimant on the 20 March 2017 or when that decision was implemented on the 3 April 2017. They were not told that the claimant suffered from depression or that she had a condition that might amount to a disability. There was no sickness absence or significant work issues that might have alerted them to the claimant having a disability. Although there were some personal difficulties between the claimant and Ms Emmerson, such difficulties are not unusual in the workplace and do not, without more, suggest a mental health issue. The claimant herself

did not know that she had a condition that might amount to a disability prior to 23 March 2017 and did not inform her managers of the diagnosis of depression prior to her dismissal.

49. The claimant contended that Ms Emmerson knew of her disability. Ms Emmerson accepted in her evidence that she suspected that the claimant was depressed. That in our view falls some way short of knowing that someone has a disability. In any event, Ms Emmerson had no line management responsibility for the claimant and was not part of the respondent's management team. Her management responsibilities were limited to a specific area of work and did not extend beyond that. We were satisfied on the evidence that Ms Emmerson had not shared what little knowledge she had with the Directors. We concluded that the respondent had no actual or constructive knowledge of the claimant's disability and therefore its decision to dismiss was not because of the claimant's disability.

50. The claimant's claim of direct discrimination under s13 EqA did not succeed.

Discrimination because of something arising as a consequence of disability

51. We then considered the claim under s15 EqA, that the claimant's dismissal was unfavourable treatment because of the potential sickness absence that might arise as a consequence of her disability.

52. It is a defence to a claim under s15 EqA if the respondent can show that it did not know, and could not reasonably have been expected to know, that the claimant had a disability.

53. We have concluded on the direct discrimination claim that the respondent did not know that the claimant had a disability for the reasons set out. We had to further consider in relation to the s15 EqA claim whether the respondent could reasonably have been expected to know of the claimant's disability.

54. The claimant contended that the respondent ought to have known of her disability because she had told Ms Emmerson of her diagnosis on the 23 March 2017 and that because of Ms Emmerson's knowledge the respondent was fixed with constructive knowledge of her disability. The claimant handed to the Tribunal the case of ***The Department for Work and Pensions v Hall UKEAT/0012/05/DA*** which upheld an Employment Tribunal decision that the DWP employer had constructive knowledge of a disability although the employee, Ms Hall, had not informed it that she was disabled. The facts of that case differed from this one however. In the DWP case, Ms Hall's conduct in the workplace was 'very unusual'; managers were having to deal with her conduct at work on a very frequent basis; Ms Hall's manager had seen the claimant's application for a disabled person's tax credit forwarded from its HR department. All of these factors put the employer in the DWP case on notice of the claimant's disability. In this case however, we found that there was nothing to put the respondent's managers on notice that the claimant had a condition that might amount to a disability. There were no conduct issues, no sickness absences and no other obvious indications of her condition. The claimant herself was unaware of her condition prior to the 23 March 2017. Although Ms Emmerson suspected that the claimant might be suffering from

depression, Ms Emmerson was not medically qualified and had no line management responsibility. Her management responsibilities were limited to those of a specific area of work and did not make her part of the respondent's management team which comprised only of the Directors.

55. We therefore concluded that there was no basis on which we could find that the respondent knew or ought to have known that the claimant had a disability and her discrimination claim under s15 Equality Act also fails.

Unfair dismissal

56. We had to determine what the reason was for the claimant's dismissal. The respondent asserted in its submissions that the reason for the claimant's dismissal was *'its need to extend the claimant's hours and the hours of other staff so that the business had full time workers to cover the range of call-time hours*'.

57. There was limited evidence to support the business rationale behind the claimant's dismissal. A management note from February 2017 was produced which queried whether more staff cover was needed and recorded the options of an apprentice or full-timer, and a management note in March 2017 that stated '*Apprentice*. Replace Maria*'. The respondent produced call records which showed that the busiest time for calls was in the morning between 9 and 11am. We were satisfied that the respondent did have a need for greater receptionist cover between the hours of 9 and 11am. and that it had concluded that it could best achieve that increased cover by replacing the claimant with a full-time receptionist.

58. On the facts found we concluded that addressing this business need was the starting point for the respondent's decision to dismiss the claimant, although we also concluded that there were other factors which influenced its decision to dismiss her rather than consider alternative options to meet its requirements. These included its misapprehension as to the claimant's rights as a permanent employee rather than an employee on a zero hours contract; the claimant's perceived lack of flexibility to work additional hours; and the difficulties that had arisen between the claimant and Ms Emmerson, which was causing tension in the office.

59. The respondent contended in its response that its need to replace the claimant working on part-time hours with an employee working on full-time hours amounted to a redundancy. In the alternative, it contended that the reason for the dismissal amounted to some other substantial reason, both potentially fair reasons for dismissal.

60. S139 Employment Rights Act 1996 (ERA) provides as follows:

Redundancy

(1) *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

(a) …

(b) the fact that the requirements of that business-

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

61. It was submitted by the respondent that part-time work was work of a particular kind and that there was a reduction in the requirement of the business for part-time employees, thus bringing the case within the definition of redundancy. The CA in the case of ***Johnson v Nottinghamshire Combined Police Authority [1974] ICR 170 CA*** rejected the argument that time of hours of work could amount to work of a particular kind such that a change to the time of hours worked would come within the definition of redundancy. In the present case there was a need for an increase in overall hours worked and not a diminution in the requirement for employees to carry out the same work and we concluded that this did not constitute a redundancy.

62. We then considered whether the reason for the dismissal amounted to some other substantial reason such as to justify the dismissal of the claimant holding the position which she held: s98(1)(b) ERA. Case law has established that when considering the business reasons of the employer it is not for the Tribunal to make its own assessment of the advantages to the employer's business of a decision to change employees' working patterns. In the case of ***Kerry Foods Ltd v Lynch [2005] IRLR 680*** the EAT held that the employer need only show that there were 'clear advantages' in introducing a particular change without indicating how great those advantages were, in order to pass the low hurdle of establishing some other substantial reason for dismissal. We considered the other factors that we believed also led to the respondent's decision to dismiss the claimant but we were satisfied that the primary reason was the business need identified. We concluded that the respondent had established some other substantial reason for the dismissal, a potentially fair reason for dismissal.

63. We then had to consider the fairness of the dismissal under 98(4) ERA which provides:

'…..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 in treating it as sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

64. In considering that question the Tribunal reminded itself that it is not for it to stand in the shoes of the employer but to consider whether or not the decision to dismiss for the reason found was within the range of responses of a reasonable employer.

65. We concluded that the decision to dismiss for the reason found in this case was not within the range of responses of a reasonable employer. We were not satisfied on the evidence that the respondent applied its mind to other options that might have been available to it in meeting its requirement for additional receptionist cover. Although it said that it wished to engage full-time employees rather than part-time, it did not place Emma Hisnett under threat of termination although she also worked part-time hours. It did not consult with the claimant or offer her the opportunity of putting forward any solutions of her own to the problem identified. It did not provide any advance warning to the claimant of the reason for the meeting on the 3 April 2017, which would have given her time to gather her thoughts and to find someone to accompany her. It did not ask the claimant whether, as an alternative to dismissal, she would be prepared to increase her hours. The claimant could not therefore have been taken to have refused to comply with the change that the respondent wished to make. It did not offer her any opportunity to appeal the decision. We concluded that the reason that the respondent proceeded in the way that it did was because of the other factors identified above which meant that it was not minded to explore alternatives to the claimant's dismissal.

66. We were mindful of the fact that the respondent is a small business with limited administrative resources. The respondent is nevertheless an employer, and as such has an obligation to familiarize itself with the basics of employment law. The matters identified above, which we concluded rendered the dismissal unfair, would not have been costly or onerous to implement and were within the capabilities and the resources of the respondent.

67. We concluded therefore that the claimant's dismissal was unfair. We have not considered the question of whether, had a fair procedure been followed, the claimant would have been dismissed in any event and if so the percentage likelihood of that outcome and when it might have occurred. This and other matters related to remedy will be addressed at the remedy hearing listed for the 22 February 2018, notification of which will be sent to the parties in due course.

Employment Judge Mulvaney

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Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS