



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4122214/2018 Hearing at Inverness on 12, 13 and 14 November 2019

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Employment Judge: M A Macleod
Tribunal Member: K A Murray
Tribunal Member: F Parr

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Paige Busby

Claimant
Represented by
Ms K Dingwall
Solicitor

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Highland Aviation Training Ltd

Respondent
Represented by
Mr W Lane
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 30 October 2018 in which she complained that the respondent had discriminated against her on the grounds of disability.
2. The respondent presented a response to the Tribunal in which they resisted all of the claimant's claims.

3. A hearing on the merits was fixed to take place on 12 to 14 November 2019 in Inverness. The hearing proceeded and concluded within those dates.
4. The claimant attended and was represented by Ms K Dingwall, her solicitor, and the respondent was represented by Mr W Lane, their solicitor.
- 5 5. The parties presented a joint bundle of productions to the Tribunal upon which they each placed reliance during the hearing.
6. The claimant gave evidence on her own account, and the respondent called as witnesses Mr William Roomes and Mr David Barclay, director and former director respectively.
- 10 7. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

- 15 8. The claimant, whose date of birth is 29 July 1995, commenced employment with the respondent on 1 March 2018 as an Operations Assistant and Receptionist.
9. The respondent operates a business as a flying school, based at an office located within the grounds of Inverness Airport. At the time when the claimant was employed by them, they had two directors, namely Mr Will Roomes and Mr David Barclay.
- 20 10. At the outset of her employment the claimant was provided with a copy of the respondent's Employee Handbook (60ff), whose rules she agreed, in evidence, applied to her.
11. Within that handbook were set out a number of provisions relating to aspects of the claimant's employment.
- 25 12. At paragraph 3d (65), it was noted that *"All new staff are subject to a probationary period of 3 months. An initial informal review will take place after 2 months with the manager, with a formal review after 3 months. Your*

appointment will be confirmed on satisfactory completion of the 3 month period...

13. Under the heading “Your Attendance at Work”, at paragraph 3e (65), the respondent stated that it valued good attendance at work and was committed to improving the general wellbeing of its employees to achieve this. It then set out the rules relating to notification of absence at 3e(1):

“The operations manager or a director should be notified as early as possible if absence from work is anticipated for hospitalisation or other medical treatment.

If you are unable to attend work due to sickness or injury, the operations team must be notified by telephone before your normal start time or as soon thereafter as possible on the first day of absence, if possible indicating a likely day of return. Notification should be made by you personally unless impossible due to the nature of the illness where you should arrange for someone else to call on your behalf. During prolonged periods of absence, your manager should be kept informed of progress and an expected date of return.

Any employee who has been absent due to sickness and is found not to have been genuinely ill will be the subject of disciplinary action, which could include dismissal.”

14. Section 4 of the Handbook set out the respondent’s “Valuing Diversity and Dignity at Work” policy (72ff). The policy gave advice to employees on what they should do if they were subject to harassment:

“If you feel you are being harassed you are strongly encouraged to seek early advice/support from management.

You should also keep a written record detailing the incidents of harassment and any requests made to the harasser to stop. This written record should be made as soon as possible after the events giving rise to concern and should include dates, times, places and the circumstances of what happened.

The Company has a formal procedure for dealing with these issues which you can obtain from a Director.”

15. Section 6 dealt with “Leave Arrangements” (77). That section specified that if the employer did a four day week, their entitlement would be 22.4 days’ leave per year. It went on:

“Holidays must be agreed with your manager as early as possible. The Company will where possible try to accommodate individual preferences for holiday dates but the needs of the business may have to take precedence, particularly where short or inadequate notice is given.

- *The holiday year runs from 1st May to 31st April (sic).*
- *Leave for employees joining after the start of the leave year accrues at the rate of one twelfth of the annual entitlement for each complete calendar month of service.*
- *Leave for employees who terminate their employment during the leave year is calculated on the same basis. If, however, the annual leave entitlement has been exceeded, a deduction calculated on the same basis will be deducted from the final salary payment.*
- *Holiday pay in lieu of accrued leave will be paid only on termination of employment and will normally be subject to a maximum of 10 working days.*

Highland Aviation also recognises that the 8 statutory Bank Holidays form part of employees 28-day annual leave entitlement.”

16. The Handbook contained the respondent’s Disciplinary and Grievance Procedure, at chapter 10 (87ff).

17. The procedure for formal investigation was said to be that *“Formal investigations should be carried out by the most appropriate manager who is not directly involved with the incident being investigated. This manager may involve others to assist with the investigation process. All the relevant*

facts should be gathered promptly as soon as is practicable after the incident. Statements should be taken from witnesses at the earliest opportunity. Any physical evidence should be preserved and/or photographed if reasonable to do so.”

5 18. The procedure gave examples of “minor misconduct”, which included absence from work, including going absent during work, without valid reason, notification or authorisation.

19. The grievance procedure was laid out briefly at 92/3.

10 20. The claimant signed and acknowledged her receipt of the Handbook on 19 April 2018 (97). The acknowledgment confirmed that she had received a copy of the Handbook and that she had read and understood its contents; and that she had sought clarification from her manager on any issues on which she was not clear.

15 21. The claimant’s initial application for the role of Operations Assistant and Receptionist was submitted in response to an advertisement by the respondent in late 2017, following which Elspeth McDonald Fitzsimmons was appointed to the position. Approximately 140 applicants had applied for this post. The claimant had impressed the respondent in her application and interview (which was conducted by Skype call), and when another
20 member of staff left shortly afterwards, they invited her to attend a face-to-face meeting in order to be interviewed again for the post.

22. The claimant met with Mr Roomes and Mr Barclay in the respondent’s office on 25 February 2018. The respondent had prepared a list of questions to put to each of the candidates in the competitive interview process and
25 followed that list (105) on that date. Mr Roomes made handwritten notes against the answers given.

23. At the conclusion of that interview, it was noted that the final question was
30 *“Do you have any pre-existing medical conditions that would prevent you from carrying out this role?”* The claimant simply advised that there was none. That note was taken at the time when she answered the question.

The claimant did not mention that she suffered from any medical condition at all and in particular said nothing about having suffered from depression and anxiety. She made no reference to this condition in her CV – perhaps unsurprisingly – but it was not something she told the respondent about during the recruitment process.

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24. Following interview, the claimant was offered the position, in an email by Mr Roomes dated 25 February 2018 (108), to work together with Ms Fitzsimmons. She immediately accepted by email on the same day (107).

10 25. The claimant was provided with, and signed, a contract of employment for the position of Operations Assistant and Receptionist (100ff), on 5 July 2018. The contract confirmed that she would be responsible directly to the Operations Manager, and that she would be working 4 days per week. It said that *“It may be necessary to adjust or exceed these hours in order to ensure that your duties are properly performed. It is expected that you may need to work flexibly in accordance with the needs of the company. Any agreed hours worked in excess of your normal 34 hours per week may be taken as time off in lieu or by special arrangement as an overtime payment.”*

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26. Under “Holidays”, at clause 9, the contract provided:

20 *“Your holiday entitlement is 5.6 weeks paid holiday per year, with the holiday year running from 1st May to the 30th April.*

Due to the nature of the business your leave entitlement includes any Public Holidays.

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You must obtain approval of proposed holiday dates in advance from your Accountable Manager, taking into account the needs of the company.

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You may be required to take part of your holiday entitlement on days notified to you by the Company (such as Christmas/New Year) when the Company facilities may be closed. There may be times during the year when you are not allowed to take leave: this will be due to the varying workloads of the company. These periods will be kept to a minimum. For

your role it is generally preferred that where possible you avoid holidays during the busy summer months.

All holiday is expected to be taken in the year in which it is accrued. Exceptions to this rule will be at the sole discretion of the Company. If an exception is agreed, not more than 5 days may be carried over to the following holiday year.”

27. Following her appointment, the claimant worked alongside Ms Fitzsimmons in order to learn how to carry out her tasks, having had no prior experience of the aviation industry. Mr Roomes met with her from time to time to review her progress, and made notes on each occasion. Those notes were not shared with the claimant at the time but were produced (110ff) and represent a reasonably accurate precis of the conversations which Mr Roomes was having with her.

28. Mr Roomes observed that there were positive characteristics shown by the claimant - when she was on good form, she had a good eye for detail; she was good with social media and confidence with strong opinions – but noted that some problems had been encountered, including that she was slow to take information in, and was leaving the reception desk unattended. He confirmed that on 29 March, in the meeting they had, he had given clarification of the respondent' expectations of her: *“eg leaving the desk unattended, Tidying the kitchen, 5pm cleaning routine, went through the SOP's for opening up, vouchers etc.”*

29. At that date, the respondent remained unaware that the claimant was suffering or had suffered from depression and anxiety.

30. During March 2018, the respondent had additional staff available to assist the claimant, and had two staff in particular (including the claimant) on the desk, to help her understand and carry out the role.

31. In April, Mr Roomes noted that there were further problems encountered (110). He noted that on 7 April he sat with the claimant for much of the day going through her job description, role, responsibilities and expectations,

and identified what had not yet been achieved. He wrote: *“Still do not believe PB can be left alone yet.”*

32. In mid-May, Mr Roomes carried out the claimant’s two month review, as part of her probationary period, and noted the agenda for that meeting (111) which included *“We would expect to be in a position to offer a permanent contract at this point. We are not ready to do this yet, as the probationary period is not yet considered successful.”* It was also noted that at that stage, the claimant had already taken the majority of her holiday entitlement for the year, and that she should be made aware of the remaining holiday entitlement she had.

33. There followed notes of the meeting, taken by Mr Roomes, and a reasonably accurate summary of what was said (111):

“Meeting notes: Knowing that this was going to be a meeting with some difficult truths to convey WR conducted the meeting sitting in his Van so that PB could talk privately and had the chance to smoke throughout.”

PB was quite distressed throughout the meeting on hearing our concerns, and mostly found blame in others for the points raised. Throughout the meeting WR did his best to motivate PB and get her to raise her game moving forward, and come back to prove she was the excellent employee she claimed to be.

PB was informed that her probationary period would be extended for a further month (4 months total), and that if improvements were not forthcoming, she might find her employment terminated.

Due to PB’s emotional state she was allowed to go home early.”

34. Mr Roomes recognised that this was an uncomfortable meeting for both of them, and that he had to “lay it on the line” to the claimant that significant improvement was required from her in the performance of her duties. She was emotional towards the end of the meeting and became tearful. He felt that the claimant did not anticipate receiving negative feedback, and was taken aback when he applied criticisms to her.

35. At this point, the respondent was unaware that the claimant had suffered from or was still suffering from depression and anxiety.

36. Following that meeting, the respondent recruited another assistant, Joss King, and Mr Roomes noted (111) that since he had been employed, both the claimant and Ms Fitzsimmons had had a hand in his initial training: *"This responsibility has boosted PB's attitude and significant improvements throughout have been noted in her performance."*

37. Prior to meeting with the claimant in June, Mr Roomes sought feedback from the other director, Mr Barclay, which he provided on 14 June 2018 in an email (115):

"In light of her approaching appraisal, Paige;

- *Not logged in or out last 3 days.*
- *Not responded to Anna today so she's no idea if she's needed and at what time tomorrow.*
- *Not checking accounts and letting customers leave when due £100s on account.*
- *Abrupt and confrontational at times. She doesn't think it's her job to make coffee for instance – that would be my job apparently! Just think she need (sic) talked down from her perch a bit."*

38. Mr Roomes noted (112) that while concerns remained, significant improvements had been made, and therefore he took the decision to offer the claimant a permanent contract during the appraisal meeting, in July.

39. It was at the July appraisal meeting that the claimant was provided with a permanent contract (100ff) which she signed on 5 July 2018. Mr Roomes noted (112) that the meeting was kept positive and encouraging throughout, and wrote that *"I felt this went well, and hope PB will go from strength to strength now. Contract signed and back-dated to 1st July."*

40. The discussion at the appraisal meeting was conducted using an appraisal form which the claimant completed in advance of the meeting, and Mr Roomes completed for his part at the meeting (118f). It was noted that the meeting took place on 6 July 2018. It was noted that the claimant on occasion gave herself a lower rating than that which Mr Roomes applied, after discussion with her.

41. The claimant described her “general wellbeing and happiness at work” as *“Overall – good, happy. A lot of the time I feel frustrated by particular tasks/people but I feel like I can deal with these and carry on the with the rest of my day/work.”*

42. When asked to identify the parts of her work which she found challenging, she said: *“Dealing with workload → I usually work on my own + sometimes tasks are impossible (Quick books). I also find it challenging rectifying others mistakes (I know this is part of learning but when that persons knows their mistakes + continues I find it frustrating.”*

43. Mr Roomes noted (122) that this was a very positive start for the claimant. He concluded by making suggestions for improvements in her performance, such as starting work on time, wearing professional dress/uniform, and being cheery and hospitable to customers.

44. At no point during the review meeting did the claimant mention to Mr Roomes that she was, or had been, suffering from depression and anxiety.

45. The claimant also felt that this meeting went well and was pleased to have been offered a permanent contract, and thereby taken off probation.

46. Towards the end of June, Ms Fitzsimmons emailed the respondent (123) to advise that she was struggling with stress due to office and home responsibilities, and therefore faced with the choice either of reducing her hours or resigning in order to care for family members. Mr Roomes suggested that the matter would be better discussed in person.

47. Ms Fitzsimmons subsequently emailed on 9 July to confirm that she did not envisage being able to return to work. As a result, the respondent was left with an unexpected reduction in the number of staff available, and accordingly Mr Roomes spoke on 9 July with the claimant and Mr King to agree a cover schedule in the meantime. Following that conversation he emailed the claimant and Mr King in the following terms (127):

“Dear Paige & Joss,

Further to our conversation we have agreed to the following work schedule:

JULY:

Mon 9th – Wed 11th: Joss

Thurs 12th – Mon 16th: Paige

Tues 17th – Mon 23rd: Joss

Tues 24th – Fri 27th: Paige

Sat 28th – Sun 29th: Joss & Paige

Mon 30th – Tues 31st: Joss

AUGUST:

Wed 1st – Fri 10th: Paige (we will try to find cover for Mon 6th to give you a break)

Sat 11th – Sun 12th: Joss..

Please let me know if anything changes, many thanks.

Will Roomes”

48. The claimant replied the following day (127):

“Hi Will, thanks for that. I am happy, however, please remember I have time booked off 5th-8th August. My flight times are:

1420 on Sunday 5th from Inverness to Bristol (Can work until approx. 12:00)

12:55 on Wednesday 8th from Bristol to Inverness (Can work from approx.. 14:00)

If you like I can come in or we can meet up to discuss the next few months.

5 *Paige”*

49. Mr Roomes was surprised to receive this email as he had no record of the claimant having applied for annual leave on the dates in question, nor having raised this matter during the discussion about cover. He replied to say that Mr King was to be on holiday from 1 to 10 August, and said “*I have*
10 *no applications from you for that time?”*

50. The claimant emailed again (126): “*Hey Will, oh dear – I definitely had you sign it off... There is only one for the Sunday as Mon-weds were my usual days off.*”

51. Mr Roomes replied: “*Nope, I don’t have one on the wall, and nothing on the*
15 *wall calendar or PC calendar.*”

52. The claimant then emailed again to Mr Roomes to say: “*Hmm. I definitely discussed it with you – I think I remember us talking about me just leaving earlier on the Sunday and making up the hours elsewhere rather than taking a holiday day? That would account for the missing form?”*

20 53. The next time the claimant was in the office, Mr Roomes spoke to her and asked her to submit a leave request form if she still wished the leave. She did not submit such a form to the respondent.

54. The respondent operated a system whereby an employee seeking to apply for leave would complete and submit an Employee Leave Request Form (examples of which were produced at 309ff) in which the dates and number of days requested would be set out, and if approved, the form would be signed by Mr Roomes. It would then be pinned up on the office wall, and marked on a year planner kept in that office (315). The claimant submitted 8
25 forms requesting leave, which were all granted by the respondent, so that

by the end of July she had taken 16 days' leave out of a total entitlement of 22.5. No form was ever found to have been submitted by the claimant in respect of 5 to 8 August. The claimant accepted, in cross examination, that she did not have annual leave booked off for 5 to 8 August at the time when she had this exchange with Mr Roomes.

55. The claimant did not, as Mr Roomes had suggested she should, submit a leave request in writing to allow the respondent to see if cover could be secured for her during these dates.

56. On 3 August 2018, the claimant endured a very difficult and stressful day. Mr Roomes was having a rare day off from work to celebrate a birthday. Mr Barclay was in the office, when the claimant entered and asked if she could go home early. Mr Barclay agreed to this. She said that she was not coping very well, at which Mr Barclay was concerned, and a short conversation followed in which the claimant said that she was struggling with the workload, and having a "meltdown". Mr Barclay was not particularly surprised that the claimant was struggling on what was a very busy day, during which she was asked to carry out tasks with which she was not very familiar, such as lodging a flight plan with the Civil Aviation Authority. He told her that this was a stressful job, which may not be the right one for her. He also said to her "You're not doing an Elspeth, are you?", by which he meant that the respondent had been very concerned when Ms Fitzsimmons had absented herself from the workplace due to stress but had not communicated with the business, giving rise to concerns about her wellbeing. He wanted to know whether or not she would be fit to return to work the following day.

57. Mr Barclay was unaware on that day of any depression and anxiety suffered previously by the claimant, and he did not interpret her presentation to him as indicative of someone suffering from a depressive illness. He felt that she was unhappy about the way that the day had gone, but that it was now over and she could leave for the day.

58. The claimant maintained that two people were needed to operate the reception desk, but the respondent's position was that until the claimant started, one person had been sufficient, and that a second person had been required to sit with her while she was training. However, as a matter of routine, this was a desk requiring only one member of staff rather than two.

59. After the claimant left to go home, Mr Barclay contacted Mr Roomes by telephone, a call which was noted in the notes kept by Mr Roomes throughout (113). He noted that *"DB reported that PB had come into his office and had a 'meltdown'. She was stressed out about the apparent workload and said she couldn't cope. She believed there should be 2 members of staff on at all times rather than one, and went off on a complaining session about all parts of the operations systems. DB bluntly told her that we have only every (sic) had member of staff covering reception during the weekdays and introducing 2 people at the weekends was new from the time she was employed to make life easier for the staff. There was no need to have 2 people during the weekdays as well. DB quizzed PB but asked her if she thought this was really the right job for her? Apparently PB was argumentative, then became emotional and left."*

60. At 1829 on 3 August, the claimant emailed the respondent (131):

20 *"Dear Will and David,*

I just want to let you both know that I will likely not be in tomorrow as I have not been very well today and don't see myself being much better tomorrow or Sunday. Therefore, for the sake of my physical and mental health, I will be back in for my next shift on Wednesday afternoon."

61. Mr Roomes was unimpressed by this email, on the basis that, in accordance with the Staff Handbook, notifying absence was required to be done by telephone so as to ensure that the message was received by management who could then make alternative arrangements. He replied to say that *"If it is your intention to be absent, you need to speak one of the Directors to discuss it. Sending an email or text is an unacceptable form of notification as you can not guarantee that it has been received."*

Please speak to one of us if it still your intention to be absent tomorrow.”

62. The claimant did call Mr Roomes on receipt of that email. Mr Roomes noted (113):

5 *“PB calls WR to say ‘I’m not up for coming in over the weekend.’ By this I was to assume she was unwell. The call last around 30 minutes but can be summarised as follows: On further enquiry PB informs WR that this is because of a discussion she had with DB that afternoon. It appears that PB had a stressful day dealing with issues outside her current experience, and had gone to DB at the end of the day to state her concerns. DB has been*
10 *abrupt with her and asked her if she believed she was really up to the job? WR points out that over the last 10 days there has been a very significant decline and says that it is a valid question. The discussion continues to explore managing workload, managing stress at work, what to do if you are feeling overwhelmed by a situation, and why you shouldn’t allow yourself to be stressed by everyday occurrences. WR points out that we gave PB a*
15 *vote of confidence by giving her a full-time contract, but of late she was again not living up to expectations. PB tells WR that she believes she needs to take sick leave for her mental wellbeing. WR encourages PB to pick herself up and get back to the positive attitude she had after her appraisal, and not to let one day spoil it. WR says if you are sick you must stay at home but he looks forward to seeing PB tomorrow morning.”*

63. The claimant said nothing to Mr Roomes about her intention to take a flight on 5 August, and she did not tell him that she was suffering from depression and anxiety.

25 64. The claimant did not attend work on 4 August 2018, and made no further contact with the respondent on that day.

65. On 5 August 2018, the claimant was seen by airport staff departing on a flight. Mr Barclay became aware of this. A photograph was taken by a member of the respondent’s staff showing the claimant and her partner sitting at a table in the departure lounge (134).
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66. On 6 and 7 August 2018, the claimant was absent from work, and made no contact with the respondent on those dates.

67. On 8 August 2018, the claimant returned to the office at 3.15pm, after disembarking from her return flight from Bristol. Mr Roomes asked her to come into the office in order to conduct a return to work interview, and also invited Mr Barclay to attend the interview. The claimant agreed. Notes of that interview were taken by Mr Roomes (132).

68. It was put to the claimant by Mr Barclay that she was too sick for work, but well enough to “go on holiday”. She responded that she did not deny that she took a flight, but said that she went to visit family.

69. The notes continue:

- *“DB summarises that ‘yes you are getting too stressed, but you are taking holiday whilst on sick leave’.*
- *PB states she needed a routine. It was then highlighted that the routine was only broken due to her and JK’s holidays.*
- *PB says she realised that all holiday had to be applied for.*
- *DB confirms that the process for taking sick leave, and to send a message was not good enough.*
- *DB discussed PB being seen in departures and that lay people did not suspect that PB was unwell in any way.*
- *DB suggests that airlines require to know if people are unwell on a flight.*
- *PB says she wasn’t that unwell.*
- *DB says therefore you were well enough to come to work?*
- *WR discusses examples of what unwell enough not to come to work might look like.”*

70. The meeting ended at 4.15pm, and the claimant was asked to wait in reception. Following that, the directors had a discussion, of which brief notes appear at 132. They concluded:

- *“We have lost faith in PB.*
- 5 • *It is definitely a breach of trust.*
- *Primarily for claiming sick leave then taking an unauthorised holiday.”*

71. That meeting ended at 4.35pm.

72. The claimant was then invited to attend a disciplinary meeting, which started at 4.50pm (1330). The claimant was invited to bring a representative into the
10 meeting but declined. Mr Roomes explained that there had been a loss of faith and a breach of trust due to taking unauthorised holiday while on sick leave, and explained why they considered it to be so. He advised her of the appeal process contained within the Employee Handbook.

73. The claimant said that she knew she would be dismissed the previous
15 Friday. It was confirmed that a letter of termination would be put sent to her.

74. The claimant sought to wait in reception for a letter of dismissal, but eventually left at 5.45, very unhappy.

75. A letter of dismissal was then emailed to the claimant on 10 August 2018
20 (135/6). The letter said:

“Further to your return to work interview and subsequent disciplinary meeting on 8th August 2018, I am writing to confirm that your employment at Highland Aviation has been terminated.

25 *As discussed during the disciplinary meeting your termination is due to a breach of trust, which we consider to be gross misconduct. Specifically, for taking an unauthorised holiday while claiming sick leave.*

You have the right to appeal this decision and should refer to the appropriate section within the Employee's Handbook (attached). You should direct any such appeal to David Barclay (Director)."

76. The claimant submitted an appeal to Mr Barclay on 14 August 2018 (137ff).
5 She set out a number of appeal points in her letter.

77. She stated that she was off sick with "stress and anxiety" on Saturday and Sunday 4 and 5 August 2018, the first sickness absence recorded during her service with the respondent, and notified both Mr Barclay and Mr Roomes by email, and Mr Roomes by telephone. She said that she
10 considered that this was reasonable and allowed sufficient notification that the claimant would be unable to attend work on those dates.

78. She referred to the increased workload she had to take on when Ms Fitzsimmons left, culminating in the events of 3 August 2018. She said that her family live in Bristol and that she had arranged her work shifts in
15 order to make a "pre-booked visit to see them". She insisted that given the impact which her working environment had had upon her mental health in the previous month it was even more important that she went, because she felt at breaking point. She said, therefore, that her absence and the reason for it were genuine and reasonable.

79. The claimant went on: *"I would like to point that as you are aware or are reasonably aware I suffer from depression; anxiety; migraines; vitamin D deficiency and I suffer muscular and back pain. The impact of my conditions on my ability to carry out day to day tasks is severe as I battle with fatigue; pain; low mood; impact on my confidence; self-esteem; panic attacks; insomnia; memory and concentration; sweating and difficulty visual disturbances/thoughts. I take medication and the impact of ceasing the same would be severe. I am due to start therapy soon also."*
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80. The claimant then went on to set out the sequence of events which led to her dismissal, and reverted to the events of 3 August in seeking to explain her position. She then said:
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“17. I consider that I have been wrongfully dismissed due to there being a clear breach of contract on your part not least by not following company procedures and intimating that I would not be paid in lieu of notice as per my contractual right.

5 *18. I strongly refute that I breached the mutuality of trust and obligation. I work near the airport – I did not try to hide the fact that I was going to see family in any way – you were both aware so to comment on how I looked or to ask the airport staff how I appeared I consider both breached my right to a private life and also was discriminatory. It was in my view unreasonable*
10 *not to take into account my health conditions; the impact of the same and the therapeutic benefits of going ahead with my trip to see my family given my breakdown at work on the Friday.*

15 *19. I consider moreover that during my employment there was a failure to make reasonable adjustments and that my dismissal was unlawfully discriminatory in addition; that having time off when sick is a statutory right; that there is a further statutory right in regards to the general duty of care towards my health and safety at work in regards to stress – which further was not adhered to and that I suffered as detailed above comments which could constitute harassment as per the Equality Act (2010) in that I consider*
20 *some of those referenced above were degrading; offensive; humiliating and created an intimidating and hostile environment.*

25 *20. I would note that the second reason for dismissal states that I took an unauthorised holiday whilst claiming sick leave. I did not take any unauthorised holiday. I was visiting family and no days from my annual leave were taken.*

21. I further consider it to be wholly out with the band of reasonable responses that a back to work interview was changed to an investigatory meeting whilst in progress and then changed with a half hour break to a disciplinary and dismissal meeting.”

30 81. On 20 August 2018, Mr Barclay wrote to the claimant in response to the appeal letter (142).

82. In that letter, Mr Barclay said:

“Whilst we disagree with much of your account of the events over the time you spent with the company, it has no bearing on the reason for your dismissal. Only paragraph 20 is relevant.

5 *You did not seek permission in line with our company practices for leave. Whether the holiday you took was for visiting family or sitting on a beach, it is irrelevant, it is still holiday. Sunday was a normal working day for you from 9am to 5.30pm, and you took a flight around 2pm. This is unauthorised leave.*

10 *You claimed you were too unwell to come to work, but were perfectly well enough to fly. We continue to find that unacceptable...*

It is our conclusion that you therefore never intended to seek permission for this leave, and instead called in sick.

15 *Further to your account, we note in paragraph 6 that you admit a number of pre-existing physical and mental health conditions that affected your performance at work. During your initial interview you were asked a number of standard interview questions including ‘Do you have any medical conditions that would prevent you from carrying out this role?’, to which you replied ‘No’. You did not make us aware of this list and hence your special requirements for additional support. We now understand you lied to us in order to be offered the job.”*

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83. Following the claimant’s dismissal and the dismissal of her appeal, she sought to obtain alternative employment.

25 84. It is appropriate to note at this stage that the respondent confirmed that it does not seek to argue that the claimant failed to take reasonable steps to mitigate her losses following dismissal.

85. The claimant set out her financial losses at 148ff in her Schedule of Loss, including reference to the income she obtained through self-employment (making and selling, for example, Christmas cards) following her dismissal.

She applied for universal credit and received this from 15 March 2019 until May 2019. She obtained part time employment and accordingly seeks compensation for ongoing loss of income.

5 86. She visited her GP on a regular basis both before and after her dismissal. She was referred to the Community Mental Health team, and also to New Craigs Hospital for psychiatric assessments under Dr Gupta, Consultant Psychiatrist, who diagnosed her as having Emotionally Unstable Personality Disorder), a condition he told her she had suffered from for a number of years but which had gone undiagnosed. She attended Community Health
10 therapy sessions as well.

87. The claimant describes the impact of the dismissal upon her as “really negative” and said that the decision caused her to have more frequent panic attacks, migraines and nausea. Her self-esteem plummeted.

Submissions

15 88. For the claimant, Ms Dingwall presented a written submission, whose terms are summarised briefly below.

89. Ms Dingwall submitted that the claimant suffered from a disability, namely anxiety and depression, from the start of her employment, and that the respondent was aware of that disability from the outset. The claimant's
20 evidence was that she made this clear in the interview, and that she answered the question “Do you have any pre-existing medical conditions that would prevent you from carrying out this role” by saying that she did have a medical condition, but that she did not think that it would prevent her from doing the role.

25 90. Accordingly, Ms Dingwall argued that that answer, noted as “No” in the notes, was consistent with the claimant having told the respondent about her condition at the time. The notes cannot be considered to be a full and accurate record of the interview. Mr Roomes was aware of the claimant using a “medipen” to treat her anxiety as he had permitted her to use it in

the office, and Mr Barclay had asked her about her medication box when she had it with her in the workplace.

5 91. Both directors also witnessed the claimant suffering from the symptoms of a panic attack at work, in particular on 3 August when Mr Barclay accepted that she had a “meltdown”. It is reasonable in these circumstances to expect that the employer knew of the claimant’s condition.

10 92. The claimant then argues that she suffered harassment on the grounds of disability throughout her employment at the hands of Mr Barclay. He asked her about her medication in front of others, which had the effect of humiliating her in the workplace; and also that he made offensive comments to her about her disability on 3 August when he said that this was a stressful job, and “maybe it’s not the right one for you”. Telling her, after she had had a panic attack, that she should come in the following day with a smile on her face was humiliating.

15 93. The respondent, said Ms Dingwall, failed to make reasonable adjustments under section 20(3) in terms of the claimant’s disability. The practice of dismissing the claimant following one instance of absence solely on the basis of having been seen to board a plane following that absence amounts to indirect discrimination as the practice unreasonably affects those with mental health issues, and therefore amounts to a PCP under section 19 of
20 the 2010 Act. The respondent failed to consider alternatives to dismissal. Further they failed to make reasonable adjustments to the claimant’s working conditions, including the addition of proper resources, further training and support and additional staffing to reduce the workload.

25 94. The respondent failed to assess the situation and consider making adjustments and therefore discriminated against the claimant on the grounds of her disability.

30 95. Ms Dingwall then submitted that the respondent discriminated against the claimant because of something arising in consequence of her disability, namely that she was dismissed following her absence from 4 and 5 August and that sickness absence arose from her disability.

96. That treatment was not proportionate to achieve a legitimate aim, she argued. She submitted that the two days of absence were days when the claimant was not ordinarily expected to be at work, and that Mr Roomes told her that alternative cover had been arranged for those dates. Dismissal was disproportionate; a formal or verbal warning would have been proportionate, if there was an unauthorised absence. The respondent failed to consider more proportionate means of addressing their concerns, without severely impacting on the respondent's business. Reasonable adjustments could have been made in order to prevent the impact of workload upon the claimant's condition, and thus avoid any further instances of absence. The severity of the impact of the claimant's absence is not immediately clear in this case.

97. Ms Dingwall then invited the Tribunal to uphold the claimant's claims and award her the appropriate sums set out in the schedule of loss.

98. For the respondent, Mr Lane submitted a written submission, and again this is briefly summarised below.

99. He submitted that the respondent did not, nor could they reasonably be expected to, know that the claimant had a disability, that she was likely to be placed at a substantial disadvantage. He referred to the evidence of Mr Roomes and Mr Barclay, to the lack of any contemporaneous written evidence of this knowledge and to the claimant not having had any absence until August 2018 other than annual leave.

100. The respondent would have dismissed a non-disabled employee for the same actions and accordingly there was no direct discrimination on the grounds of disability.

101. The respondent accepted that by dismissing the claimant without notice on 8 August 2018 they treated her unfavourably. They did so because of a period of unauthorised absence, which she inaccurately presented as sickness absence. She decided to use flights she had already booked, and not to attend work on days when she was scheduled to be attending and present the reason for her non-attendance as sickness.

102. The claimant was invited by Mr Roomes to submit a leave request but she did not do so, which is consistent with the actions of someone who was not intending to attend on those dates. This was not something which arose in consequence of the claimant's disability.

5 103. Mr Lane submitted that the respondent did not fail to make reasonable adjustments. The claimant's dismissal did not fall within the scope of a PCP. In any event, he said, the respondent provided the claimant with training, support and a sustainable workload, had no realistic opportunity to make further reasonable adjustments after 3 August and did
10 not fail to make reasonable adjustments during the dismissal process.

104. He argued that the respondent did not engage in unwanted conduct related to disability with a prohibited purpose or effect.

105. Mr Lane therefore invited the Tribunal to dismiss the claimant's claims.

15 106. It was noted at the start of the third day of the hearing that parties had reached an agreement whereby the claimant would not pursue her claim in respect of unlawful deductions from wages, and the respondent would not pursue their Employer's Contract Claim. Those claims are therefore both treated as having been withdrawn, and are both dismissed by
20 the Tribunal.

The Relevant Law

107. Section 6(1) of the Equality Act 2010 ("the 2010 Act") provides:

"A person (P) has a disability if –

- 25 *i. P has a physical or mental impairment, and*
ii. The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

108. Section 13(1) of the Equality Act 2010 ("the 2010 Act") provides:

“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.”

5 109. Section 15(1) of the 2010 Act provides,

“A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B’s disability; and

10 *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”*

110. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (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.”*

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111. Section 21 of the 2010 Act provides as follows:

25 *“(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...”

30 112. The Tribunal also had reference to section 26(1) of the 2010 Act:

“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..."

5 113. The Tribunal also took account of the authorities to which the parties referred us in submissions.

Observations on the Evidence

10 114. There were some important differences between the parties on the evidence, and accordingly, the Tribunal must consider the credibility and reliability of the witnesses who gave evidence before us.

15 115. The claimant presented, generally, as a calm and straightforward witness, but we found that her evidence was contradicted by that of Mr Roomes, in particular, to such a significant extent that it was impossible to accept that both were being entirely accurate in what they said. The claimant's evidence was impaired by her tendency only to see matters from her own perspective, and on a number of occasions we were not satisfied that we could accept her evidence in its entirety. We deal with this in more detail below.

20 116. Mr Roomes was a very good witness, in our judgment. He was consistently honest and straightforward, and in our view was reasonably sympathetic to the claimant. He emerged as a manager who sought to encourage the claimant in the early stages of her employment, and remained optimistic about her ability to improve her performance over time. The fact that he was prepared to grant her a permanent contract in the
25 summer of 2018 suggested that he was giving her the benefit of the doubt which he felt at the time.

117. In assessing the differences between their evidence, we considered the following examples to be significant.

30 118. Firstly, at the interview, the claimant was noted by Mr Roomes to have replied "No" to the question whether she was suffering from any

condition which might have an impact upon her ability to carry out her duties. The claimant said that she did raise the fact that she suffered from depression and anxiety, and that there was a conversation about this, but that Mr Roomes wrote “no” because she had reassured him that her condition would not have an impact upon her work. Mr Roomes’ evidence, however, was that he noted that because that was what the claimant said, and that she did not declare a condition but then qualify it in that way. He remained adamant that the claimant did not raise her condition of depression and anxiety until the letter of appeal, after her dismissal. We found Mr Roomes’ denial to be convincing, and found that if the claimant had said she suffered from depression and anxiety, Mr Roomes would have noted that and taken it into account subsequently.

119. Secondly, the claimant said that she referred to her disability throughout her employment, in such a way that her employer could have been in no doubt that she suffered from depression and anxiety. We do not accept this. Mr Roomes was clear and consistent that she did not make this clear at all, and he was not challenged about this in cross examination.

120. Thirdly, and perhaps of greatest significance, the claimant said in evidence that she had had a conversation with Mr Roomes in which he had reassured her that he had obtained cover for the absent days in August when she was away visiting family in Bristol. This was not referred to her in her ET1, nor, significantly, in her appeal letter, and Mr Roomes did not accept that this was the case. In our judgment, there was no basis for finding that Mr Roomes was either incorrect or untruthful on this point. Had that conversation taken place, it is inconceivable that the appeal letter would not have relied upon it. The appeal letter gives the appearance of a letter written with the benefit of some skilled advice, and runs to several detailed pages. That it makes no reference to a crucial point – that her absence was in fact authorised by Mr Roomes – undermines the claimant’s credibility and is consistent with Mr Roomes’ evidence rather than her own.

121. We should say that we do not find that the claimant was deliberately seeking to mislead the Tribunal by lying. Our conclusion is that she has

allowed her sense of injustice at the events which led to her dismissal to cloud both her memory and her judgement, and as a result, to persuade her that this was the case, when in fact it was not.

122. It is our conclusion, therefore, that where there was a divergence
5 between the evidence of the claimant and Mr Roomes, we preferred the evidence of Mr Roomes.

123. The evidence of Mr Barclay was, both in its content and the manner
of its presentation, very curious. Very few questions were put to him by
either side. The implication was that both sides wished, for reasons entirely
10 unclear to us, to treat Mr Barclay with great caution. The effect, however, was that his evidence added very little to the Tribunal's knowledge in this matter, and we have been unable to draw any significant conclusions from it.

Discussion and Decision

124. The parties helpfully provided to the Tribunal a List of Issues in this
15 case, and the Tribunal considered it appropriate to follow the structure of that list in setting out its determination in this case.

(A) Direct Disability Discrimination: section 13 of the Equality Act 2010 (the "EqA")

20 **1. Did the respondent, because of a protected characteristic, treat the claimant less favourably than it treats or would treat others?**

a. The claimant contends that the respondent did so by:

25 **i. Dismissing the claimant on 8 August 2018 without notice.**

2. The claimant relies on the following comparators:

a. The claimant relies on a hypothetical comparator.

125. The claimant's case is simply that the respondent, by dismissing her, treated her less favourably than it would have treated a hypothetical
5 comparator, who did not share the protected characteristic of disability, because of that protected characteristic.

126. It is necessary, firstly, to consider the reason for dismissal, and the circumstances which gave rise to that decision by the respondent.

127. The respondent's position is that the reason for the claimant's
10 dismissal, as we analyse it, was that she took unauthorised absence while claiming to be on sick leave, on 5 to 8 August 2018.

128. The respondent did not consider that the claimant was properly taking sick leave, but that she was taking time off which she had planned for some time before, due to having booked flights to and from Bristol on 5 and
15 8 August. The claimant's position is that she was genuinely ill on 4 August and thereafter following the events of 3 August, which she had found extremely stressful and which had caused her to have a "meltdown", in the words of the respondent.

129. Before us, there is no doubt that neither the claimant nor the
20 respondent retained much trust in the word of the other. The claimant felt, it is clear, that she had been badly let down by her former employers, and that they had failed to take into account her illness which, she claimed, they knew about from the start of her employment. The respondent considered that the claimant had resolved at an early stage to take time off on these
25 dates and decided to go through with it regardless of their requirements as her employer, and did not believe that she was unwell. Further, they maintain that they did not know she was suffering from an illness which could amount to a disability at that time as she had not told them that at any stage prior to dismissal.

130. In our judgment, the claimant's actions were capable of amounting to gross misconduct. We found the claimant's position on her absence to be difficult to understand. The exchange of emails which she had with the respondent on 9 and 10 July (126-128) was not capable of bearing the interpretation which the claimant wished us to place upon them. It is clear that following a conversation with the claimant and Mr King, Mr Roomes advised that there was an agreement to a work schedule which included the claimant covering the desk from 1 to 10 August inclusive, with the proviso that cover would be found, if possible, for 6 August to allow her to have a day off. That was an agreement that we accepted the claimant had entered into in that discussion, and we did not understand the claimant to dispute that.

131. This makes it all the more unusual that the claimant would then seek to remind the respondent in a response that she had time booked off from 5 to 8 August, a substantial period in the middle of that 10 day stretch, when it would appear that she did not mention it in the course of the discussion. Mr Roomes made clear in subsequent correspondence that he was unaware of the booking or the claimant's intention to take that time off, and in our judgment that is consistent with the email he issued on 9 July with the work schedule.

132. The exchange culminated in a conversation in which Mr Roomes told the claimant to apply formally for leave in the normal way, in which case they would seek to find cover for her. The claimant disputes this, but we accepted Mr Roomes' evidence about this. There was no subsequent application for leave, and the claimant does not dispute this. As a result, in our judgment, the respondent had a legitimate expectation, regardless of the terms of those emails, that the claimant would attend for work from 1 to 10 August inclusive, apart, possibly, from 6 August if cover could be secured.

133. The claimant's position is that she was off sick on 4 and 5 August. Her explanation for the remainder of that period of absence is somewhat unclear. She seems to rely on the point that she would not normally be

working on the Monday or the Tuesday, and that it was by arrangement that she would be absent on the morning of the Wednesday 8 August. This is simply not an accurate reflection of the reality. Under normal circumstances, it may have been the case that the claimant would not expect to have been working on those days: but these were not normal circumstances, as they were covered by the agreement which they had reached, that she would in fact be working on those days, apart possibly from the Monday 6 August. This leaves no explanation on the part of the claimant for her absence on 7 and 8 August, and in our view, it is disingenuous of the claimant to suggest that she did not require to seek annual leave for those dates because she would not normally be working on them.

134. The reality is that she was expected to work from 4 to 8 August, and did not, for reasons which the respondent did not accept related to illness. There was no medical certificate produced to support her assertion that she was unwell, and indeed the evidence clearly showed that she was fit enough to take a flight to Bristol and back. The fact that the respondent referred to this as “holiday” clearly offended the claimant, but there was no basis for her to be so offended by this. A reference to holiday, whether spent seeing family or going abroad, simply demonstrates how the parties seek to categorise an absence from work.

135. In our judgment, therefore, the claimant’s absence was unauthorised, at the very least for 7 and 8 August, on the basis that she had not obtained the respondent’s permission to take that time off. There was no evidence that she was provided with cover for 6 August in the arrangement made, and therefore it must be taken that her absence on that date was also unauthorised. In our judgment, the respondent was entitled to consider that her absence on 4 and 5 August was not properly authorised either, and was not related to her state of health. The respondent’s conclusion that she was not being candid about her absence, and that she did not seek to apply for annual leave for those dates because she simply intended to take the time off anyway, was one which was justifiable in all of the circumstances. She did not have proper authority for her time off, and accordingly the respondent was entitled to conclude that she had been dishonest with them.

136. We have rejected the claimant's assertion that the respondent knew from the start of her employment that she was suffering from a mental impairment which was capable of being seen as a disability; and further we reject the claimant's allegation that she reached a verbal agreement with Mr Roomes confirming that the respondent had obtained cover for these dates and therefore could allow her the time off. This was a baseless suggestion, and we were very unimpressed by it. It was not supported by the terms of the ET1 nor, importantly, by the detailed submission which she made in her letter of appeal against dismissal.

137. We then considered whether an employee who acted in the same way would have been treated differently had they not had the same protected characteristic as the claimant. We found it relatively straightforward to conclude that another employee would have been treated in exactly the same way as the claimant. The respondent was clear that the reason why they took such a strong view of the claimant's actions was that they felt she was being dishonest with them, and that that undermined the trust and confidence which an employer must have in their employee.

138. Having considered the matter fully, it is our judgment that the reason for the claimant's dismissal was unrelated to her disability, and was in fact related to her conduct, which amounted to gross misconduct due to the nature of the dishonesty she demonstrated towards her employer. There was no evidence before us which would justify her actions due to her illness, and accordingly we were unable to draw any connection between that illness and her actions.

139. As a result, we have concluded that the claimant's claim of direct discrimination on the grounds of disability must fail, and be dismissed.

(B) Discrimination arising from disability: section 15 of the EqA

3. Did the respondent treat the claimant unfavourably?

a. The claimant contends that the respondent did so by:

i. Dismissing the claimant without notice on 8 August 2018

5 **4. If the respondent treated the claimant unfavourably, why did it do so?**

a. The claimant contends that the respondent did so because of her sickness absence which arose due to her disability.

10 **b. The respondent contends that it did so because the claimant committed gross misconduct by taking unauthorised absence.**

5. Did the factors referred to at paragraph 4 arise in consequence of the claimant's disability?

15 **6. Can the respondent show that any such unfavourable treatment was a proportionate means of achieving a legitimate aim?**

20 **7. Can the respondent show that it did not know, and could not reasonably be expected to know, that the claimant had the disability?**

140. The respondent accepted that in dismissing the claimant they treated her unfavourably. However, they did not accept that they did so for a reason arising in consequence of her disability.

25 141. In our judgment, the reason for the unfavourable treatment, that is, the dismissal of the claimant, was the claimant's actions in taking unauthorised absence in circumstances outlined above. We agreed with the respondent that this was capable of amounting to gross misconduct, as an act of dishonesty, and that the respondent was entitled, in all the circumstances, to reach the conclusion that the claimant had deliberately

sought to take time off when she was aware, or must properly have been aware, that she did not have permission to do so. Her explanations to the respondent upon her return, and before us, were so unconvincing that we well understood why the respondent rejected them.

5 142. We did not conclude that the unfavourable treatment arose in consequence of the claimant's disability. It arose because of the claimant's gross misconduct.

10 143. As a result, it is not necessary for us to consider whether it amounted to a proportionate means of achieving a legitimate aim, but had we been so minded, we would have concluded that it was proportionate to dismiss the claimant in order to enforce its own disciplinary rules and maintain those rules of conduct for the understanding both of the claimant and other employees; and to deal with what amounted to an act of dishonesty by an employee towards them.

15 144. We have not concluded that the respondent knew, or might reasonably be taken to have known, that the claimant was suffering from a disability at the time of her dismissal. We do not accept that the claimant told the respondent at any stage of her employment or before it that she was suffering from depression and anxiety. That she had medication on the desk before her does not provide sufficient basis upon which an employer could reasonably be taken to know that that meant she was suffering from a disability. There is no clear evidence to show what exactly she told the respondent about her medication, and we have not made any findings of fact about this. In addition, her use of a medipen could, as the respondent said, have related to a number of different uses, and again we were unable to make any firm findings about the meaning of this to the respondent. Without express knowledge, and given that the claimant had a bad day on 3 August (as appears to have been accepted by all concerned), there is insufficient evidence for the Tribunal to conclude that the respondent knew or ought reasonably to have known that the claimant was suffering from a medical condition of such seriousness that it amounted to a disability.

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145. Accordingly, it is our judgment that the claimant's claim under section 15 of the EqA fails and must be dismissed.

(C) Failure to make reasonable adjustments: sections 20 and 21 of the EqA

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8. Did the respondent apply a PCP as follows?

a. Dismissing the claimant for gross misconduct following two days' sickness absence.

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9. If so, did that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

10. If so, did the respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

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a. The claimant contends that the respondent should have taken the following steps:

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i. Provide training, additional support or additional staff to reduce the workload of the claimant in light of her disability following her request to Mr Barclay on 3 August 2018. The claimant advised Mr Barclay of the impact the workload was having on her disability and requested that the respondent provide her with training and support and a replacement for Ms McDonald-Fitzsimmons. No action was taken or considered by the respondent following this request.

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5 ii. **Accounted for the nature of the claimant's disability during the dismissal process, namely that the impact on the claimant's health as caused by her disability is not always visual and adjusting the process to recognise her disability. It is the claimant's submission that had the respondent made the necessary adjustment she would not have been dismissed.**

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11. In any event, is it the case that the respondent did not know, and could not reasonably have been expected to know, that:

15 **a. The claimant had a disability; and**

b. The claimant was likely to be placed at the disadvantage referred to at paragraph 9?

146. In our judgment, there are a number of difficulties for the claimant in the manner in which this claim is advanced. Fundamentally, the Tribunal has found that the respondent did not know that the claimant had a disability during the course of her employment, nor could they reasonably have been expected to know that from the information which they had available to them at the time. As a result, it is impossible for the Tribunal to conclude that the respondent failed to make reasonable adjustments in respect of a disability of which they were not, or could not be imputed to have been, aware.

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147. However, there is a further difficulty for the claimant. The PCP identified appears to us not to be a PCP within the meaning of the EqA, as the respondent submitted. It is in fact the identification of an act which took place in relation to the claimant herself. However, on the basis that it was a PCP – that the respondent would dismiss any employee for two days' sickness absence – we do not find that it was one which was applied to the

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claimant in this case. She was not dismissed for two days' sickness absence, but for four days' unauthorised absence. It was not properly established that the reason for her absence from 4 to 8 August throughout was in fact sickness, and the claimant's own evidence on this was, at best, equivocal. Her letter of appeal only refers to 4 and 5 August as sickness absence, and the remaining days she appears to think can be regarded as days off in the normal course, an explanation we have rejected above.

148. In any event, the claimant has failed to establish that the respondent knew or ought reasonably to have been aware that the claimant would be put at a substantial disadvantage due to her disability, partly because they were unaware of her disability, and partly because, in our judgment, another employee conducting themselves in the same way would have been treated no differently, and therefore there is no evidence of any disadvantage accruing to the claimant as a result of being disabled. The fundamental difficulty here was not her sickness absence, but her dishonesty about her absence and her failure to secure proper authorisation for it.

149. Accordingly, it is our conclusion that the claimant's claim that the respondent failed to make reasonable adjustments in relation to the substantial disadvantage to which the PCP put her must fail, and it is therefore dismissed.

(D) Harassment related to disability: section 26 of the EqA

12. Did the respondent engage in unwanted conduct related to disability that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

a. The claimant contends that the respondent did so by:

i. Within the first few months of the claimant's employment Mr Barclay

5 handled the claimant's medication box in the workplace and asked her to disclose what her medication was in front of customers and staff. He then stated: "Do you take those because you work here?" This had the effect of creating a degrading and humiliating environment for the claimant.

10 ii. On 3 August 2018 Mr Barclay made several degrading comments regarding the claimant's disability after she sought support, as set out in paragraph 7(iv) of the ET1.

15 iii. On 8 August 2018, Mr Roomes referred to the claimant's sickness absence as a "holiday" which had the effect of creating a degrading and humiliating environment for the claimant.

20 iv. On 8 August 2018 Mr Barclay stated to the claimant: "if you were too mentally unstable, you shouldn't have got on a plane." This had the effect of creating a degrading, hostile and humiliating environment for the claimant.

25 150. The claimant gave no evidence about the allegation that Mr Barclay handled her medication box and asked her in front of customers and staff "Do you take these because you work here?" In the absence of any evidence from the claimant about this, the Tribunal has made no finding in fact to this effect. As a result, this allegation is unproved.

30 151. The matter was raised in cross-examination with Mr Barclay by Ms Dingwall, very briefly. She put to him that he had asked her in front of

colleagues about her medication box and what medication she was taking, to which he replied that he did ask her. He then confirmed that the claimant had told him what medication she was taking. That was as far as the matter was put to Mr Barclay.

5 152. In our judgment, the claimant has failed to prove that the alleged harassment under paragraph (i) took place.

153. So far as the allegation that Mr Barclay made degrading comments to the claimant on 3 August 2018 (referring back to the terms of paragraph 7(iv) of the ET1, apparently an error which should refer to paragraph 8(iv)),
10 Mr Barclay accepted that he said to the claimant that this was a stressful job, and that it may not be the right one for her; and also asked her if she was “not going to do an Elspeth, are you?”. His position was that these comments were made as a result of her having reacted to a day of high stress, and he wanted to convey to her the concern he had had when her
15 colleague had been absent from work without contacting the business.

154. The only comment which was put to Mr Barclay in cross-examination was the one relating to Elspeth. The others were not put to Mr Barclay. We were unclear why not but it would be grossly unfair to Mr Barclay to draw any conclusions about alleged comments he made if he has not been
20 offered the opportunity to accept or deny that they were made.

155. In our judgment, the conversation with Mr Barclay on 3 August 2018 did not amount to harassment on the grounds of disability. At that stage, Mr Barclay did not know, nor could he reasonably have been taken to know, that the claimant was suffering from a disability under the EqA. It was clear
25 that the claimant was unhappy at the end of the day, and Mr Barclay did describe her as having had a meltdown. However, he also denied that from his point of view she had had a panic attack in front of him, suggesting that on another occasion he had called an ambulance when a colleague had had a panic attack in his presence.

30 156. Our conclusion was that the evidence about this conversation demonstrated that it was fraught, frustrating for both parties and

unsatisfactory in its outcome, but that the manner in which the evidence was presented was so unclear as to prevent us reaching any firm findings in fact as to what exactly was said between them. We have therefore found that the claimant has not made out her allegations in the ET1 about harassment on 3 August 2018, and accordingly we cannot sustain this aspect of the claim.

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157. The claimant alleged that when Mr Roomes referred to the claimant's sickness absences as a holiday, this amounted to harassment. We do not accept this. The claimant's own position is that the whole of that absence was not sickness absence (though her position has changed over time about this), but that part of it simply represented time off she was due anyway. It was entirely reasonable for Mr Roomes to speak about her time off as a holiday – it is not an unfair interpretation for an employer to place upon a few days spent in Bristol with her family, when this has been planned for some weeks – and the claimant's reaction, which in our view was somewhat disingenuous, does not persuade us that that comment amounted to harassment. Mr Roomes was simply raising with the claimant her time off, about which he wanted to have a discussion. That was entirely understandable and we do not sustain the claimant's complaint in this regard.

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158. Finally, under this heading, the claimant suggested that Mr Barclay said to the claimant "If you were too mentally unstable, you shouldn't have got on a plane". The claimant did not say in evidence that Mr Barclay said that to her, nor was it put to Mr Barclay in cross-examination. The claimant did give evidence that Mr Roomes had asked her what would have happened if the plane had had to make an emergency landing because she was unwell, but that is not the basis of the allegation of harassment, made specifically against Mr Barclay. In any event, we do not consider the evidence given by Mr Roomes to demonstrate that he was creating a degrading, hostile and humiliating environment for the claimant. The claimant has failed to prove this allegation.

159. Accordingly, it is our conclusion that the claimant has not proved that the respondent acted against her in such a way as to amount to harassment on the grounds of disability.

160. The final issue for the Tribunal to deal with was that of remedy, and whether the respondent should be ordered to pay compensation to the claimant. That issue does not arise, on the basis that the claimant's claims have not succeeded.

161. Accordingly, the claimant's claims do not succeed, and are therefore dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Murdo Macleod
10 January 2020
14 January 2020

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