



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Pavandeep Hundal

**Respondent:** South Gloucestershire Council

**Heard at:** Bristol Employment Tribunal

**On:** 5, 6, 7, 8 December 2022

**Before:** Employment Judge Millard  
Mrs S Maidment  
Mr H Adam

## Representation

Claimant: Mr Downey, Counsel  
Respondent: Mr Leach, Counsel

## JUDGMENT

1. The Respondent discriminated against the Claimant because of her sickness absence record arising from her disability, by treating her less favourably in terminating her contract on 22 November 2019, under s.13 Equality Act 2010.
2. The Respondent discriminated against the Claimant because of her disability by treating the Claimant unfavourably in terminating her agency placement, under s.15 Equality Act 2010.

The following claims are not well founded and are dismissed:

3. The claim of less favourable treatment because of her sex in terminating her contract on 22 November 2019, brought under s.13 Equality Act 2010.
4. The claim of less favourable treatment because of her disability in preventing her return to work after a period of illness, brought under s.13 Equality Act 2010.
5. The claim of less favourable treatment because of her sex by not progressing an offer of a permanent role, brought under s.13 Equality Act 2010.

6. The claim of unfavourable treatment because of her disability by ceasing efforts to find a permanent position for her as originally agreed, brought under s.15 Equality Act 2010.
7. The claim of failing to take steps to find her alternative work when notice on termination of the contract was given in October 2019, brought under s.15 Equality Act 2010.
8. The claim that the Respondent had Provisions, Criteria and Practices that placed the Claimant at a disadvantage, brought under ss.20 & 21 Equality Act 2010.

## **REASONS**

### **Hearing**

1. The hearing was held at Bristol Employment Tribunal on 5, 6, 7, 8 December 2022. The hearing was conducted with the parties attending in person.
2. The Tribunal had sight of a bundle of documents comprising sections A1-104, B1-26, C1-76, D1-177, which was produced by the Respondent.
3. The Claimant gave evidence on the first day and the morning of the second day. The Respondent called three witnesses, Mr Joe Scrase, Mr Petros Careswell and Mrs Caryn Desmond. Mr Scrase gave his evidence in person at the hearing. Mr Careswell and Ms Desmond gave evidence by video. The Respondent's witnesses gave evidence on the afternoon of the second day and the morning of the third day.
4. The Tribunal heard submissions from the representatives on the afternoon of the third day.
5. The Tribunal's judgment and reasons were given orally at the hearing on the fourth afternoon. These written reasons are provided at the request of both the Claimant and the Respondent.
6. Further directions were made in relation to remedy and a remedy hearing was listed for Wednesday 5 April 2023.

### **Claim**

7. The Claimant presented a claim by way of a claim form dated 16 April 2020, the Claimant had brought complaints of unfair dismissal, detriment and/or dismissal on the grounds of having made a public interest disclosure and discrimination on the grounds of disability.

8. The Respondent sought further particulars of the complaints and the Claimant submitted redrafted Grounds of Claim on 7 October 2020 which included details of her complaint under s.20 of the Equality Act 2010. She also explained that she wished to add two new causes of action under ss.15 and 26, discrimination arising from disability and harassment. A further redrafted Grounds of Claim was provided by counsel instructed on the Claimant's behalf on 1 February 2021.
9. An initial Case Management Preliminary Hearing was conducted by Employment Judge Christensen on 2 February 2021.
10. By an email of 13 May 2022 the Respondent conceded that, "*...for the purposes of this claim the Respondent accepts that the Claimant was disabled by reason of endometriosis.*"

### **List of Issues**

11. The list of issues were agreed by the parties at the Case Management hearing before Employment Judge Livesey on 17 June 2022. They are as follows;

1. **Disability and knowledge of disability**

- 1.1. The Respondent accepts that the Claimant was disabled at the material time.
- 1.2. While knowledge of the fact of endometriosis is accepted, was there actual or constructive knowledge that it amounted to a disability and/or, under Schedule 8, paragraph 20, whether the condition caused the Claimant a substantial disadvantage?
- 1.3. Was there actual or construction knowledge of a "congenital spinal condition", and/or that it amounted to a disability and/or, under Schedule 8, paragraph 20, whether the condition caused the Claimant a substantial disadvantage?

2. **Direct disability and/or sex discrimination (Equality Act 2010 section 13)**

- 2.1. Did the Respondent do the following things:
  - 2.1.1. Terminated her contract on 22 November 2019 (disability and/or sex);
  - 2.1.2. Mr Careswell prevented her from returning to work after a period of illness absence (disability);
  - 2.1.3. Not progressing an offer of a permanent role (sex).

2.2. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than David Parker and/or a hypothetical non-disabled comparator and/or man.

2.3. If so, was it because of disability and/or sex?

2.4. Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

**3. Discrimination arising from disability (Equality Act 2010 section 15)**

3.1. Did the Respondent treat the Claimant unfavourably by:

3.1.1. Terminating her agency placement.

3.1.2. Ceasing efforts to find a permanent position for her as originally agreed in May 2019 with Mr Scrase; and/or

3.1.3. Failing to take steps to find the Claimant alternative work whilst she was engaged by Eden Brown Synergy in October 2019 when notice on termination of the contract was given through to November 2019 when the contract ceased.

3.2. Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that her illness absences arose from her disability.

3.3. Was the unfavourable treatment because of any of that thing?

3.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was the efficient management of the service.

3.5. The Tribunal will decide in particular:

3.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2. Could something less discriminatory have been done instead;

3.5.3. How should the needs of the Claimant and the Respondent be balanced?

**4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)**

4.1. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

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- 4.1.1. A requirement that the Claimant or agency staff should at all times be physically fit and able to perform in their roles and her substantive role as a Social Worker;
- 4.1.2. The Claimant and agency staff were expected by the Respondent to always be in the office environment;
- 4.1.3. Allocating new cases to staff including the Claimant following a return to work (having been absent).

For the avoidance of doubt, the Respondent denies the existence of the PCPs as such.

4.2. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that;

- 4.2.1. In relation to 4.1.1, she could not comply with the PCP because of her disability it and she was rendered unemployable by the Respondent;
- 4.2.2. In relation to 4.1.2, this substantially disadvantaged the Claimant because there were occasions when she felt too unwell to attend the office to work, but well enough to carry out her duties from home;
- 4.2.3. In relation to 4.1.3, the Claimant was expected to catch up on the work missed during the absence and take on new work. This created unnecessary stressful working conditions.

4.3. What steps (the "adjustments") could have been taken to avoid the disadvantage? The Claimant suggests:

- 4.3.1. In relation to 4.1.1, the Claimant contends that it would have been reasonable for the Respondent to have accommodated the effects of her disability and provided her support and flexibility. The Respondent ought to have adopted a more sympathetic and accommodating approach that would have included;
  - (i) accepting and accommodating the Claimant's level of absence; and/or
  - (ii) agreeing with her a flexible working arrangement that would have given her some self-control over the start and finish times and where she worked.
- 4.3.2. In relation to 4.1.2, it would have been reasonable for the Respondent to have made an adjustment to allow her to work at home when suffering the effects of her disability;
- 4.3.3. In relation to 4.1.3;
  - (i) avoid allocating new cases to the Claimant for a short period whilst she caught up; or
  - (ii) if it was reasonably necessary for the Claimant to take on a new case, to consult with her and re-allocate other work;
  - (iii) take on an active role in consulting the Claimant over her workload and managing it sensibly;

- (iv) avoiding allocating additional responsibilities for a short time following a return to work including unplanned meetings, contact/family time supervision and covering other workers responsibilities which could either have been rescheduled for a few days later or allocated to a colleague.

4.4. Was it reasonable for the Respondent to have to take those steps and when?

4.5. Did the Respondent fail to take those steps.

## **The Law**

### **Direct disability and sex discrimination (Equality Act 2010 section 13)**

12. Direct discrimination is set out in s.13 Equality Act 2010. This states,

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*(2) ...*

13. Both disability and sex are protected characteristics.

### **Disability Discrimination (Equality Act 2010 section 15)**

14. Disability discrimination is set out in s.15 Equality Act 2010. This states,

*(1) A person (A) discriminates against a disabled person (B) if-*

- a. A treats B unfavourably because of something arising in consequence of B's disability, and*
- b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (a) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

#### *Knowledge of disability*

15. Actual or constructive knowledge of a condition is insufficient: what is required is actual or constructive knowledge that it amounted to a disability (A Ltd v Z [2020] ICR 199 (EAT)). The Respondent must show that it could not reasonably have been expected to know that the Claimant not only had a relevant impairment, but that the impairment met the necessary statutory conditions for constituting a disability.

**Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)**

16. The duty to make reasonable adjustments with regard to provision, criterion or practice is set out in s.20 Equality Act 2010. This states,

**20 Duty to make adjustments**

*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable schedule apply: and for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) The duty comprises the following three requirements.*

*(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

*(4) ...*

17. A one-off act in respect of an individual employee is not capable of constituting a valid PCP.

18. Any such disadvantage need only be more than minor or trivial (s.212 EqA 2010).

**Findings of Fact**

19. The Claimant was diagnosed with endometriosis on 6 May 2015. The pain she experiences ranges from mild to severe. In 2019 the pain pattern was both cyclical and non-cyclical. During her menstrual cycle she would experience the associated bleeding, but also discharge that is the lining of her womb being excreted. The secondary symptoms included, diarrhea, urological issues such as burning, an increased urgency to urinate, bloating, fever, hot flushes, fatigue, insomnia, feeling unusually cold, sinus congestion causing painful headaches, nausea and muscle aches. Around May 2019, at the time of her employment with South Gloucestershire Council (SGC), she was experiencing some of these symptoms daily with only a few days a month with no symptoms.

20. The Claimant worked as a social worker for Bristol City Council. In April 2019 she approached Joe Scrase at South Gloucestershire Council about social worker posts. Mr Scrase is an experienced Recruitment Advisor for SGC.

21. Mr Scrase had an initial telephone conversation with the Claimant where the possibility of her working a four day week was discussed, with her using the additional days to complete a qualification. This qualification was later paused by the Claimant. During that conversation the Claimant asked if it was possible

for her to be employed initially on an agency basis and Mr Scrase informed her that this was not possible.

22. SGC's preference was to employ permanent social workers due to the additional costs of agency staff and the need to deliver a consistent quality of service for families and children.
23. Mr Scrase then arranged for the Claimant to speak to Caryn Desmond, the Social Care Locality Service Manager for SGC, about a potential role. Mr Scrase emailed Mrs Desmond on 15 April 2019 (D-79), stating that the Claimant was looking to initially start as an agency worker, later switching to a permanent position. Mr Scrase expressed his view that he didn't believe this would be possible as conversion from agency to a permanent position rarely happens. There are also increased costs for SGC with employing agency staff.
24. Mrs Desmond replied to say that they should get the Claimant in for an interview, that she had heard positive things about the Claimant and was keen to try and secure her to a permanent post. She also noted that there was a benefit in the Claimant starting as an agency worker as SGC would get to see what she was like before offering her a permanent post.
25. Mrs Desmond and the Claimant spoke on the telephone on 1 May 2019 for about an hour. During that conversation the Claimant raised her health conditions. The Claimant says that she discussed in detail her endometriosis, while Mrs Desmond states that the Claimant told her that she had some health issues which might require her to attend medical appointments. Mrs Desmond emailed Mr Scrase on 1 May 2019 to say that she was happy for the Claimant to start as an agency worker, noting in that email that the Claimant has a few health issues and is awaiting an appointment, but that the health issues were nothing major (D-82). The health issues themselves are not stated in the email, however, for an experienced manager such as Mrs Desmond to have recorded them as being nothing major, she must have first enquired of the Claimant as to what those conditions were and therefore been informed by the Claimant of her endometriosis.
26. Therefore, by the 1 May 2019 and prior to the commencement of her employment at SGC, the Respondent was aware that the Claimant had health problems, in particular endometriosis and that she was awaiting medical appointments. The Respondent did not take any steps to better understand these health conditions, nor make further enquiries of the Claimant as to the extent of these health difficulties and any adjustments that may be required. It is quite clear that the Respondent was keen to get an experienced social worker recruited as soon as possible following a second negative OFSTED inspection for SGC.



27. A role was identified for the Claimant in the Kingswood office and both the Respondent and Claimant proceeded on the basis that the Claimant would take up the role in Kingswood.
28. As the Claimant had approached SGC directly and it had been agreed that she would commence employment on an agency basis, Mr Scrase contacted an agency, Eden Brown Synergy, to facilitate her agency employment. On 3 May 2019, Mr Scrase emailed Kelly Stock at Eden Brown Synergy to ask for a waiver, that should the Claimant convert to a permanent member of staff before 13 weeks, there would be no agency fee paid. Mr Scrase wrote, “...and have agreed with her that we will bring her in on an agency assignment initially and convert to perm once she’s happy and we are happy with how things have gone.”
29. Ms Stock replied by email later the same day, to confirm the agreement that no fee would apply as the Claimant, “*will go perm at any given point...*” (D-86). The reason for his agreement, was that although the agency were facilitating the agency placement, they had not played any part in recruiting the Claimant to the role and SGC did not want to be liable for a fee if the Claimant converted to a permanent employee.
30. It is quite clear from the correspondence that the Claimant was employed as an agency worker, however, it was the expectation of both the Claimant and the Respondent that she would at some point become a permanent member of staff, subject to the agreement of both parties. As Mrs Desmond noted in her email to Mr Scrase of 1 May 2019, by initially employing the Claimant on an agency basis, SGC could review her performance and decide whether to offer her a permanent role. For the Claimant, she received a higher salary on an agency basis, whilst she also assessed the suitability of the role. No salary or terms and conditions were discussed or agreed for a transition from agency to a permanent role, and therefore it could not be an automatic transfer and the transition was subject to both parties agreeing to it. It would not be sufficient for the Claimant to decide that she wanted to become permanent from a specific date, SGC would also have to agree and the contract of employment would need to be agreed.
31. On 29 May 2015, the Claimant contacted Mr Scrase by email (D-87), to say that she had trialed the journey to Kingswood and that there was a lot of traffic. As a result, she asked if there were any vacancies in either the Patchway or Yate offices, which were both more convenient to her.
32. The Kingswood vacancy was subsequently filled, and the Claimant was offered a role in the Yate office.
33. The Claimant spoke to the manager of the Yate office, Mr Petros Careswell, over the telephone and subsequently accepted the role in Yate.

34. The Claimant commenced work in the Yate office on Monday 8 July 2019. On the commencement of her employment, she had a face-to-face meeting with Mr Careswell that lasted between 25-45 minutes. At that meeting the Claimant raised her health difficulties with Mr Careswell. The Claimant states that she raised her endometriosis and the effect that it had on her. Mr Careswell states that she informed him only that at times she experienced poor physical health and that it was an ongoing issue, but she was able to manage it with flexible working.
35. Two weeks after starting the Claimant went off sick on 22 July informing Mr Careswell by text message that she had been nauseous over the weekend. (D-44). This period of absence was for one day and Mr Careswell made arrangements for her work to be covered. The nauseousness related to the Claimant's endometriosis.
36. The Claimant went off sick again on 29 - 30 July 2019, texting Mr Careswell to say that she had a cold, headache, earache, cold sore and felt lethargic. Whilst, these symptoms could be mistaken for a common cold, as per the Claimant's presentation to her GP on 31 July 2019 (C-27), and her witness statement at para 2.29, these symptoms related to her endometriosis, "...I would have these kinds of episodes with my condition."
37. On 5 August 2019, the Claimant and Mr Careswell had a supervision meeting, where it is recorded that, "*Poppy feeling settled and that she is enjoying the team. Discussion over health – Poppy has some health treatment upcoming on the 7/8 – she is hopeful about this improving things for her as she has been awaiting this treatment for some time.*" Again, Mr Careswell, confirms his awareness of the Claimant's health difficulties and that she had upcoming health treatments which she was hopeful would improve things. The Claimant would not be having health treatment for a common cold. As the Claimant had only had two periods of sickness absence at this point, lasting one day and two days respectively, both must have related to her endometriosis, hence the reference in the supervision notes to the health treatment improving things; the Claimant having had two absence of three days total at that time.
38. On 13 August, Mr Careswell had a supervision meeting with his manager Mrs Desmond, where it is recorded that the Claimant was doing ok and that she had a few health issues that had caused her to have time off work but that it was not an issue at present. It further records that she was "*very experienced, very reflective but can over think things at times however has picked up some complex cases and is working these well.*" It also notes that she is considering going permanent with SGC.
39. On 14 August 2019 the Claimant sent Mr Careswell a text message saying that she was struggling that day and had decided to rest that morning. The

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Claimant had awoken that morning feeling unwell from her endometriosis symptoms. These symptoms worsened into the 15 August 2019 and the Claimant requested to work from home that day, which was approved by Mr Careswell.

40. On 19 August 2019 the Claimant sent Mr Careswell a text message to say that her back had deteriorated, along with her endometriosis symptoms and all she could do was lie down with the pain making her lethargic. She said that she thought she may also have a UTI. Mr Careswell allowed the Claimant to do some work from home and the Claimant completed 3 hours work at home.
41. On 3 September 2019 the Claimant and Mr Careswell had a supervision meeting (D-108). The record of that meeting records, "*Discussion in respect of Poppy's health. Prior to her recent holiday Poppy had a few days off work because of some longstanding health needs. Poppy has returned from holiday with a common cold.*" Whilst there is reference to the Claimant returning from holiday with a cold, the reference to her longstanding health needs can only be a reference to the Claimant's endometriosis. Whilst not recorded specifically in the supervision notes, the conversation around her health needs must have involved a discussion of the Claimant's endometriosis. It is not credible to suggest that at a supervision meeting, where her longstanding health needs are discussed, the actual condition was not mentioned. Having been employed for less than 2 months at this point, the Claimant had, had 4 periods of sickness absence stemming from her endometriosis symptoms, albeit that on two occasions she had managed to undertake some work from home whilst unwell.
42. On 6 September 2019, Mr Scrase extended the agency booking with Eden Brown Synergy, noting that the Claimant has had some sick leave. Ms Stock replied to say that the Claimant "*...has occasional health issues due to a re occurring illness*", and that normal healthy living and down time will deal with it. Again the reoccurring illness is the Claimant's endometriosis although this is not specifically referenced. Ms Stock offers to speak to the Claimant, but Mr Scrase replies that there is no need as "*All is ok this end, no need to speak with her and potentially increase any concerns she has.*"
43. It is quite clear from the extension of the contract and the supervision meeting notes that the Claimant's performance was not an issue and the Respondent was satisfied with her performance. Indeed Mr Scrase notes in the email to Eden Brown Synergy that, "*All is ok this end,...*". As an experienced Recruitment Advisor for SGC, Mr Scrase would not have replied to the agency to confirm that everything was okay with the Claimant's performance, unless he had first checked with her manager and he was clearly aware that the Claimant had taken some sick leave.

44. On 12 September 2019, there was a further supervision meeting, between the Claimant and Mr Careswell and the record of that meeting specifically refers to the Claimant's endometriosis. The record states, *"Discussion around Poppy and her Endometriosis and other health difficulties. Poppy is going to consider over the next week and monitor her own health and if a 4 day working week – spread over 5 days might work."*
45. In his evidence to the Tribunal, Mr Careswell accepted that he was informed by the Claimant of her Endometriosis in a conversation prior to the 12 September supervision meeting. This is likely to have been at the latest by the previous supervision meeting on 3 September 2019, where Mr Careswell has recorded the Claimant as having some longstanding health needs. Whilst it is possible that Mr Careswell was aware earlier than the 3 September 2019 of the Claimant's endometriosis, he was certainly aware by that point to record it in the supervision record as long-standing health needs. In any event, Mr Careswell was aware of the impact that the endometriosis symptoms were having on the Claimant, in view of the fact that the Claimant had, had 3 periods of sickness absence by this point and Mr Careswell had permitted her to work from home on two occasions to assist her. It had also formed part of the discussion at their supervision meetings. Consequently, Mr Careswell took further steps to assist the Claimant by offering her the opportunity to spread her 4 day working week over 5 days.
46. Mr Careswell accepted that upon finding out the exact details of the Claimant's health condition he did not seek further advice and input from either his manager, Mrs Desmond, nor HR or Occupational Health. Mrs Desmond told the Tribunal that SGC did not undertake Occupational Health referrals for agency workers, despite the stated desire of SGC to make the Claimant's appointment permanent and Mrs Desmond being informed by the Claimant prior to her appointment of her endometriosis.
47. By the 12 September 2019, the Respondent was aware that the Claimant had a disability which was impacting her ability to work and requiring her to take time off as well as to also work from home on occasions.
48. The Claimant had further absences between 12 September and 16 October 2019. Mr Careswell did not insist that the Claimant remain off work during this period, but instead suggested that they should plan for her being off work for a longer period and that she should set her out of office accordingly.
49. On 13 September, Mr Careswell had a further supervision meeting with Mrs Desmond where it is recorded that the Claimant is doing okay and that her work quality is good. There is no reference to any difficulties with her attendance and ill health. Again, there is no issue raised by Mr Careswell with the Claimant's performance.

50. On 3 October (D-118), the Claimant had another supervision meeting with Mr Careswell. The record of this meeting records that the Claimant *“continues to experience on-going difficulties with her health and feels that this is impacting on her emotional well-being. However, Poppy is feeling good about a consistent period of being in work.”* Again, the reference to ongoing difficulties with her health is a reference to her endometriosis. There is no reference to her health affecting the quality of her work, but that it is having an impact on her emotional wellbeing is recorded. Had her absences been affecting her work, then the Tribunal would have expected a reference to a discussion about this to have been recorded in the supervision notes.
51. The Claimant was unable to work again due to her endometriosis symptoms from Thursday 10 October to Tuesday 15 October. This period of four working days, was also her longest period of sickness absence.
52. Two days later, on 17 October (D-125), Mr Careswell had a supervision meeting with Mrs Desmond. This is just over a month after Mr Careswell’s last supervision meeting with Mrs Desmond where it was recorded that the Claimant is doing okay and that her work quality is good. It is also only two weeks after the Claimant’s last supervision meeting with Mr Careswell where it is noted that she has had a consistent period at work. In that period of just over a month the Claimant had only the one period of sickness lasting four days. The record of the meeting on 17 October records a significant change from the previous month’s supervision with regard to the Claimant. The meeting record states,
- “...continues to have sporadic sickness which is a significant issue due to impact on children and families and on colleagues and Petros. She can be high maintenance but does have skills in working and engaging with families, she presents as very competent however files do not reflect this as she is behind in her paperwork. Families really like her, however, she is a locum who is not currently able fully fulfil her role. Petros is meeting with her tomorrow and will discuss that this is not sustainable and will give her a timeframe in which to complete all her paperwork and outstanding tasks as she is behind with these. As we have permanent worker starting Petros will now look to give Poppy her notice as position will no longer be available.”*
53. The Claimant is made aware of this on 21 and 23 October 2019 when there were further supervision meetings with the Claimant and Mr Careswell, where it is noted that a new member of staff will start on 22 November and that the Claimant’s contract with SGC will end on 22 November.
54. In her evidence to the Tribunal, Mrs Desmond states that the decision to terminate the Claimant’s contract was her decision and made in the

supervision meeting of 17 October with the Claimant's manager Mr Careswell. Mrs Desmond said the following at paragraph 8 of her witness statement,

*“The decision to terminate Poppy's contract was made in the Supervision meeting I had with Petros on 17 October. As I was Poppy's line manager's manager I had little direct contact with her. The AYSE whose post Poppy was covering was shortly to start work and we no longer needed Poppy to cover the post. There were two other locums in the team at the time, one of whom had been working with the Council for several years entirely satisfactorily, and the other, although recruited at a similar time to Poppy had proven more reliable. One locum was no longer needed because of the arrival of the AYSE and there was no reason to terminate one of the other locums rather than Poppy. Even had Poppy's absences not caused problems her contract would still have been terminated. Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good. The decision was reached in discussion with Petros but at the end of the day it was my decision as the Head of the Service.”*

55. In this evidence, Mrs Desmond sets out her reasons for terminating the Claimant's contract. She explains that the decision was taken as there was a permanent member of staff joining the Yate office and it was this role that the Claimant was covering, *“The AYSE whose post Poppy was covering was shortly to start work and we no longer needed Poppy to cover the post.”* She goes on to say, *“Even had Poppy's absences not caused problems her contract would still have been terminated.”* However, this is not correct as it was not the case that the Claimant was covering a specific post that had now been filled. At the outset of the Claimant's employment, Mrs Desmond had been keen to secure the Claimant to a permanent post. Mr Scrase had also agreed with the agency to waive their fee if she converted to a permanent role, writing, *“...and have agreed with her that we will bring her in on an agency assignment initially and convert to perm once she's happy and we are happy with how things have gone.”*

56. As Mrs Desmond goes on to explain, there were three locum's in the Yate office, *“One locum was no longer needed because of the arrival of the AYSE...”* The Respondent had a choice as to whose contract to terminate and Mrs Desmond selected the Claimant.

57. Mrs Desmond sets out her reasons for selecting the Claimant over the other two locums. She states that the Claimant was a good social worker but not exceptional, *“Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good.”* This shows a clear acceptance by Mrs Desmond that the Claimant was a good social worker and there is no suggestion by her that the other two locums were

exceptional social workers. One locum had been with SGC for several years and their performance is described as satisfactory, it is not described as exceptional. Mrs Desmond states, "...one of whom had been working with the Council for several years entirely satisfactorily..." Therefore, the difference between this locum and the Claimant was that they had been with SGC for a number of years. Mrs Desmond states that the other locum had started at a similar time to the Claimant. There is no suggestion that this social worker was an exceptional social worker, only that they were more reliable than the Claimant in terms of their attendance. Therefore, the only difference between this locum social worker and the Claimant, was that the Claimant had periods of absence due to her endometriosis.

58. The reason why the Claimant was selected as opposed to the other two locums is quite clear in paragraph 8 of Mrs Desmond's statement, it was because of the Claimant's sickness absence. It was not, as Mrs Desmond tries to assert, because the role the Claimant was covering had been filled with a full time member of staff. Mrs Desmond had initially wanted to secure the Claimant to a full time post, as set out in her email to Mr Scrase of 15 April 2019, "*I have heard some positive things about her, so would be keen to try and secure her to a perm post.*" (D-79). The Claimant had opted to work as a locum and the only change between the 15 April 2019 and 17 October 2019, was the Claimant's sickness absences stemming from her endometriosis. Mrs Desmond explains that the first locum had been with SGC for several years entirely satisfactorily. The second locum was recruited at a similar time to the Claimant, although in her statement Mrs Desmond does not say 'before the Claimant', and the difference she identifies with the Claimant is that they had proven to be more reliable. Therefore, the only difference between the Claimant and the second locum was the Claimant's sickness absence. The decision to terminate the Claimant's contract as opposed to the second locum, was taken solely in relation to her sickness absences.

## **Findings on the List of Issues**

### *Disability and knowledge of disability*

59. The Respondent accepts that the Claimant was disabled at the material time by endometriosis. Further, in the Respondent's Particulars of Response dated 15 July 2020, the Respondent admits that, "...early in the course of the Claimant's assignment, Mr Careswell became aware of the Claimant's endometriosis." (A-22).

60. The Respondent had constructive knowledge that the endometriosis amounted to a disability, in that the Claimant's manager Mr Careswell was aware by the 12 September 2019 supervision meeting that the Claimant had endometriosis. SGC having been aware before this date and prior to the commencement of her contract, in the conversations that Mr Scrase and Mrs

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Desmond had with the Claimant that she had underlying health difficulties. There was no further probing at that time into the Claimant's health difficulties, the impact it had upon her and what steps SGC could take to assist her. The impression was that SGC were keen to get an experienced social worker into their team following a poor OFSTED report.

61. The Claimant was an experienced social worker who the Respondent recognised was good at her job. During her time with SGC, the increasing frequency, length and unpredictability of her ill health should have made the Respondent aware that the endometriosis amounted to a disability if they were not already aware. The Respondent further recognised that her disability caused the Claimant a substantial disadvantage as Mr Careswell allowed the Claimant to work from home on at least two occasions when her symptoms were bad and he also suggested that she spread her 4 day working week across 5 days.
62. Accordingly, even if not actually aware that the endometriosis was a disability, there was cause to show that it was and Mr Careswell suggested an adjustment to her working pattern as a result of it and allowed the Claimant to work from home.
63. The Tribunal did not find evidence that the Respondent was aware that the Claimant had a congenital spinal condition. The Respondent was aware from Mr Careswell's supervision meetings with the Claimant that she had back pain, but the focus around the discussions on her health from the Claimant related to her endometriosis. Accordingly, the Respondent did not have constructive knowledge of the congenital spinal condition, nor that it amounted to a disability. The Claimant's congenital spinal condition did not cause her a substantial disadvantage.

*Direct disability and/or sex discrimination (Equality Act 2010 section 13)*

64. The Tribunal found that the Respondent did the following thing,
  - a. The Respondent terminated the Claimant's contract on 22 November 2019.
65. The Tribunal found that the Respondent did **not** do the following things,
  - a. Prevent the Claimant from returning to work after a period of illness absence. Mr Careswell in fact allowed the Claimant to work from home to assist her recovery.
  - b. Not progressing an offer of a permanent role. Whilst the Respondent had at the outset expressed a desire for the Claimant to be a permanent employee, the Claimant had chosen to start as an agency



worker/locum. That was her choice. There was no agreement in place to find her a permanent position from which to transition her from agency to a permanent role. For example, there was no agreement as to what salary or benefits the Claimant would receive on becoming a permanent member of staff. Therefore, there was no offer in place of a permanent role.

66. The termination of the Claimant's contract on 22 November 2019 was less favourable treatment. There were three locums including the Claimant, working in the Yate office. It was not the case that the newly recruited full time social worker was specifically recruited to the role that the Claimant was fulfilling. There was no difference in the role that any of the three locums were doing and the newly recruited social worker could have taken any of the locum roles. The decision to terminate the Claimant's contract as opposed to the other two locums was taken by Mrs Desmond. Mrs Desmond does not suggest that any of the three locums were exceptional. One locum had been with the Respondent for a number of years and their performance is described by Mrs Desmond as being "*entirely satisfactory*". Their longer service and satisfactory performance were the reasons given by Mrs Desmond for not selecting this locum to have their contract terminated. The other locum had started at around the same time as the Claimant. This locum is a direct comparator to the Claimant, having started at the same time, but without a disability as well as being male. Mrs Desmond describes the Claimant as a good social worker and there is no suggestion that the comparator locum is anything other than a good social worker – he is not referred to as being exceptional, which is the grounds that Mrs Desmond suggests would have warranted finding the Claimant a new role, "*Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good.*"

67. Mrs Desmond explains in paragraph 8 of her statement exactly why the Claimant was selected over this comparator,

*"There were two other locums in the team at the time, one of whom had been working with the Council for several years entirely satisfactorily, **and the other, although recruited at a similar time to Poppy had proven more reliable.**"*

***[Emphasis added]***

68. This was less favourable treatment by the Respondent of the Claimant, who was treated worse than the comparator whose circumstances were the same as the Claimant save for the Claimant's disability.

69. This less favourable treatment was because of the Claimant's disability. There is no evidence that it was because of the Claimant's sex. Mrs Desmond decided to terminate the Claimant's contract because the Claimant was less

reliable than the comparator. This was a direct reference to her sickness absence record, which was due to her disability, of which the Respondent was aware.

70. The Respondent has not proved that this less favourable treatment occurred for a non-discriminatory reason not connected to the Claimant's disability. The Respondent submitted that the treatment was a proportionate means of achieving a legitimate aim, specifically the efficient management of the service. However, such a reason is not supported by the evidence of Mrs Desmond, who stated in her witness statement that she took the decision to terminate the Claimant's contract because the role was no longer available, "*Even had Poppy's absences not caused problems her contract would still have been terminated.*"
71. As discussed above, whilst the decision to terminate flowed from the appointment of a permanent social worker, the Claimant's contract was terminated as opposed to other agency social workers due solely to her disability and the absences that flowed from it, as confirmed by the evidence of both Mr Careswell and Mrs Desmond as well as the supervision notes.
72. Whilst the Respondent needs to manage the service provided to families and children, the Claimant was an experienced social worker who was liked by the families she worked with. Mr Careswell noted in the supervision meeting notes of 13 August that the Claimant was, "*very experienced, very reflective but can over think things at times however has picked up some complex cases and is working these well.*" Mrs Desmond also notes in her supervision meeting of 17 October with Mr Careswell, that the Claimant, "*...does have skills in working and engaging with families, she presents as very competent...Families really like her...*". Despite the positive comments about the Claimant's competency, Mrs Desmond chose to terminate her contract due to her sickness absence record, recording in the supervision notes of 17 October, "*...continues to have sporadic sickness which is a significant issue due to impact on children and families and on colleagues and Petros.*" However, as Mr Careswell had noted, the Claimant was managing complex cases well, despite her disability. Mr Careswell had also suggested some adjustments to manage the Claimant's disability, such as working from home and spreading her 4 day week over 5 days. Despite this, Mrs Desmond, who was not the Claimant's line manager, took the decision to terminate her contract based on her sickness absences, caused by her disability. Mrs Desmond having been made aware by the Claimant, prior to her appointment, that she had health issues including endometriosis. Yet, having been aware and keen to get the Claimant onboard as an experienced social worker, did not make the Claimant's line manager, Mr Careswell, aware, nor take steps to understand the health issues and assist the Claimant.

73. The Respondent did not investigate whether further adjustments could have been made to assist the Claimant in her absences and simply stated that they did not refer agency workers to occupational health, despite their earlier stated desire that the Claimant take up a permanent post and the Respondent being aware on her appointment that the Claimant had health issues, specifically endometriosis.

74. Accordingly, the Respondent has not proved that the reason for the unfavourable treatment was a non-discriminatory reason not connected to disability.

*Discrimination arising from disability (Equality Act 2010 section 15)*

75. The Respondent treated the Claimant unfavourably by,

- a. Terminating her agency placement.

76. The Respondent did **not** treat the Claimant unfavourably by,

- a. Ceasing efforts to find a permanent position for her. Whilst the Respondent had at the outset expressed a desire for the Claimant to be a permanent employee, the Claimant had chosen to start as an agency worker. That was her choice. There was no agreement in place to find her a permanent position from which to transition her from agency to employed.
- b. Failing to take steps to find alternative work when her contract was terminated. The Respondent was under no obligation to do so.

77. The Claimant's illness absences arose from her disability, namely her endometriosis.

78. For the reasons set out above in relation to direct disability discrimination under s.13 EQA 2010, the unfavourable treatment, in terminating the Claimant's agency placement was because of her illness absences arising from her disability.

79. For the reasons set out above in relation to S.13 EQA 2010, the treatment was not a proportionate means of achieving a legitimate aim, such as stated by the Respondent for the efficient management of the service.

80. The Respondent was aware of her disability and the absences that flowed from it. Whilst the decision to terminate flowed from the appointment of a permanent social worker, the Claimant's contract was terminated as opposed to other agency social workers due solely to her disability and the absences that stemmed from it. The Claimant was an experienced social worker who had

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picked up complex cases which she was managing well. She was really liked by the families she worked with. Her manager, Mr Careswell had started to make adjustments to assist the Claimant, such as allowing the Claimant to work from home and suggesting that she spread her 4 day week over 5 days. The Respondent was aware that the Claimant had health issues from before the commencement of her employment as the Claimant had informed them of these. The Respondent wanted to get the Claimant onboard as she was an experienced social worker who was well respected. Despite being aware of her health issues, the Respondent decided not to refer the Claimant to Occupational Health or HR for additional support.

81. Terminating the Claimant's agency placement because of her sickness absences, without considering what additional support could be provided to the Claimant was not an appropriate and reasonably necessary way to achieve the aim of the efficient management of the service. The Respondent had after all been keen to get the Claimant in as a permanent member of staff, and that even as an agency worker, that she would convert to permanent within 13 weeks.
82. As stated above, the Respondent could have referred the Claimant to Occupational Health for additional support as well as considering reasonable adjustments to her work pattern, such as allowing her to reduce her hours or spread her 4 day week over 5 days.

*Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)*

83. The Respondent did **not** have the following PCPs,
- a. A requirement that the Claimant or agency staff should at all times be physically fit and able to perform in their roles and her substantive role as a social worker.
  - b. The Claimant and agency staff were expected by the Respondent to always be in the office environment.
  - c. Allocating new cases to staff including the Claimant following a return to work (having been absent).
84. It is perfectly normal for workers who are unwell and unable to complete their work to be off work through sickness absence. Equally, it is perfectly normal for workers to be working and fulfilling their contract when they are well enough to do so. This was the practice of the Respondent and does not give rise to a PCP.
85. Both Mr Careswell's and the Claimant's evidence was that she was allowed to work from home.

86. It is perfectly normal and acceptable practice for workers to be allocated cases when they are at work, subject to their current caseloads.

## **Conclusions**

9. For the reasons set out above, The Respondent discriminated against the Claimant, because of her sickness absence arising from her disability by treating her less favourably in terminating her contract on 22 November 2019, under s.13 Equality Act 2010.
10. The Respondent also discriminated against the Claimant because of her disability by treating her unfavourably in terminating her agency placement, under s.15 Equality Act 2010.

Employment Judge Millard  
Date: 8 March 2023

Sent to the Parties: 21 March 2023

For the Tribunal