EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms R Coombes	**AND**	Knexus EMEA Ltd
Held at: London Central	**ON:**	19 and 20 June 2017 (and 20 July 2017 in Chambers)

Employment Judge: Ms A Stewart

Members: Mrs J Griffiths
Ms S Boyce

Representation

For the Claimant: Mr J Bryan of Counsel
For the Respondent: Mr G Foux, CEO

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimant's complaints that she suffered unlawful disability discrimination within the meaning of sections 13, 15 and 21 of the Equality Act 2010 are not well-founded and fail.

2. The Claimant's complaint that the Respondent made unlawful deductions from her wages in respect of the non-payment of statutory sick pay for the period 2 to 9 November 2016 is dismissed upon withdrawal by the Claimant.

3. Accordingly, the provisional Remedy hearing listed for 8 September 2017 is hereby vacated.

Employment Judge A Stewart
28 August 2017

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REASONS

Introduction

1 The Claimant, Ms Robin Coombes, brings the following complaints before the Tribunal;
(i) That she was treated less favourably, within the meaning of **section 13 of the Equality Act 2010**, because of her disability (bi-polar disorder) in that: a) she was dismissed and/or b) the Respondent failed to pay her statutory sick pay for the period 2 to 9 November 2016.
(ii) That she was treated unfavourably, within the meaning of **section 15 of the Act**, because of something arising in consequence of her disability, namely the inability to work with the intensity and rigour associated with a start-up company in the technology industry, in that she was dismissed.
(iii) That the Respondent failed to make reasonable adjustments for the Claimant's disability, within the meaning of **sections 20 and 21 of the Act**. The working practices/requirements alleged to have put the Claimant at a substantial disadvantage are: a) writing 2 blogs a week; b) meeting daily deadlines for social media content; c) taking individual responsibility for seeing tasks were done on time and d) meeting challenges in meetings.
(iv) The Claimant withdrew her complaint that the Respondent had made unauthorised deduction from her wages in not having paid her statutory sick pay relating to the period 2 to 9 November 2016, during this Hearing.

2 The Respondent denies any act of disability discrimination against the Claimant and asserts that she was dismissed during her probationary period because during the first 4 weeks of her employment it became clear that she was unable satisfactorily to fulfil the requirements of the role. The Respondent disputed that any statutory sick pay was owing to the Claimant.

3 The Tribunal heard evidence from the Claimant and from Mr Graeme Foux, CEO of the Respondent.

The Issues

4 The Respondent, who was not legally represented, conceded, at lunchtime on day one of the Hearing, that the Claimant was disabled for the purposes of **section 6 of the Equality Act 2010** by virtue of her bipolar disorder because, as Mr Foux said: "I would not know what to say to dispute it – that's above my pay grade."

5 The Claimant accepted on day two of the Hearing that this Tribunal does not have jurisdiction to determine whether or not an employee is entitled to statutory sick pay, where this is disputed, and therefore withdrew her wages act claim in this regard. Non payment of sick pay remains part of the Claimant's discrimination allegation.

6 Therefore, the issues which this Tribunal has had to determine were as follows:

(i) Are there facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent treated the Claimant less favourably than a real or hypothetical comparator because of her disability by dismissing her and/or failing to pay statutory sick pay for the period 2 to 9 November 2016? The Claimant relies on an hypothetical comparator who is an employee of the Respondent who did not have bipolar disorder and who informed the Respondent that she/he found the workload to be unrealistic and/or who was on sick leave.

(ii) If so, has the Respondent satisfied the Tribunal, on a balance of probabilities, that it did not do so?

(iii) Are there facts from which the Tribunal could decide that the Respondent treated the Claimant unfavourably by dismissing her because she was unsuited to the intensity and rigour associated with a start-up company in the technology industry?

(iv) If so, did the Claimant's unsuitability arise in consequence of her bipolar disorder?

(v) If so, can the Respondent show that her dismissal was a proportionate means of achieving a legitimate aim?

(vi) Did the Respondent's alleged working practices/requirements, as set out in paragraph 1 (iii) a) to d) above, put the Claimant at a substantial disadvantage in relation to employment by the Respondent, in comparison with persons who are not disabled?

(vii) If so, did the Respondent take such steps as it is reasonable to have to take to avoid that disadvantage?

Conduct of the Hearing

7 On day two of the Hearing it came to the Respondent's attention that the latter portion of the Response was missing from the ET3 before the Tribunal. This had not been noticed before, despite there having been a Preliminary Hearing (Case Management) on 10 March 2017. After an adjournment, the Respondent was able to produce the full text of the Response which he asserted had been presented to the

Tribunal online, including the final 10 paragraphs which seem to have been omitted from the Form before the Tribunal and that served on the Claimant. The Claimant, after consideration, took a pragmatic view that the omitted material contained nothing substantively new and no new allegations requiring additional evidence or addressing by the Claimant. The Claimant accepted that the omitted material was consistent with the remainder of the Response before the Tribunal and took no objection to the admission of the hitherto missing final 10 paragraphs of the Response. Accordingly, the missing material was then placed before the Tribunal.

The Facts

8 The Respondent is a start up technology company specialising in data driven content personalisation, having developed proprietary algorithms which help companies automatically deliver the best content experience for customers in digital channels such as ecommerce, websites or mobile apps. The Respondent promotes its technology using a very limited marketing budget focused almost exclusively on 'content marketing', ie. Creating very focused content in the company's area of expertise and then promoting the content to generate interest from prospective customers, particularly via the website. The Respondent's current annual turnover is £100,000 and at the material time it had 3 employees in the UK, namely; Mr Foux, the Claimant and Gustaf Stenlund, Digital Marketing Manager, who has since left the company and moved abroad.

9 The Claimant was employed by the Respondent as Digital Marketing Executive after a rigorous selection process in which the Claimant came second out of 220 applicants. The candidate who came first was subsequently rejected after his references transpired to be unsatisfactory and the Claimant was then offered the job.

10 The Claimant's role was to plan, research and produce content for the Respondent's presence on social media and its website, including daily social media updates, weekly email campaigns and producing 2 blog articles a week. The Respondent told the Tribunal that this role had been carried out by the Claimant's immediate predecessor for a period of about 10 months and that the detailed requirements of the job had been explained to the Claimant during the protracted recruitment and selection process, including a visit to the Respondent's small offices.

11 Her contract of employment provided for a basic salary of £22,000 plus a target bonus of 10% and eventual participation in a share option scheme. There was a 3 month probationary period.

12 The Claimant started work on 11 October 2016, reporting to Mr Stenlund as her line manager. She had a day's leave for medical reasons on 25 October and did not come to work on 26 October because her grandfather was gravely ill. He sadly died on 31 October 2016 and the Claimant arranged to have 4 November off to attend his funeral. In the event, the Claimant worked only 14 days in 22 working days of employment.

13 On 21 October 2016 the Claimant made a suggestion for a blog article to Mr Foux, cc'd to Mr Stenlund. Mr Foux's reply included "Not sure if you misunderstood or if we have crossed wires." On 28 October, the Claimant developed 2 pieces and sent them to Mr Foux to review on editorial content. His reply included that he was confused by the content …that if the blog was just sales collateral for a particular named client

the Respondent would lose all credibility and it would not work … that a 3 way discussion was needed "to get the fundamentals right in terms of editorial tone, positioning, objectives. At the moment we lack a clarity of identity and purpose (which is going to waste a lot of time and also damage the brand)."

14 The evidence showed that the Claimant often ran her work past Mr Stenlund, who was generally supportive and said it was good, before offering it to Mr Foux, who was more critical and questioning both on style, content and also timing. It was clear, however, that Mr Foux was in charge of editorial, as ultimately responsible CEO in a team of 3, particularly since Mr Stenlund, 25 years old, with a background in analytics and measurement and in his first role in the technology field, simply did not have the necessary experience. This disparity in experience may not have been made explicit to the Claimant at the time, but the Tribunal was satisfied that the Claimant did know that Mr Foux was in charge of editorial, even though Mr Stenlund was her line manager.

15 The Claimant told the Tribunal that she was working hard and long hours as well as taking work home with her. She accepted that she was not meeting deadlines. The Respondent's evidence was that it quickly became apparent that the Claimant was struggling both with the role and with grasping the way in which the company operated, in a variety of ways namely: lack of understanding of the business, writing to the appropriate style, meeting deadlines, general inability to cover the required scope and volume of the work as her predecessor had done and her attitude both to taking responsibility and in interpreting their extensive support and coaching as humiliating feedback. The Claimant told the Tribunal that she found criticism very hard to take in general, due to her disability, and particularly from Mr Foux, after Mr Stenlund had said that her work was good. The Tribunal concluded on all the evidence before it that the Claimant was struggling in her role and that this probably impacted upon her confidence.

16 On 2 November Mr Foux convened a Google Hangout Meeting via Skype with the Claimant and Mr Stenlund, following an email request from the Claimant seeking a review of some work. Mr Foux stated that this call, which began shortly after 4.30pm, was for the purpose of assisting the Claimant. Mr Foux was at one location and the Claimant and Mr Stenlund were in the office. The parties could see each other, head and shoulders, on screen. The Claimant's evidence was that Mr Foux was aggressive and intimidating towards her during the call and that his tone became increasingly confrontational, threatening and humiliating; that she was berated for wasting his time and told that she should use her common sense; that she should make it crystal clear the parts of the document which she wanted him to review as he was not a mind reader. She stated that as the call continued Mr Foux's attack on her became more personal. When asked what she meant by this, the Claimant stated that Mr Foux had said that she was an intelligent woman and should know better than to waste his time, that he was a very busy man and that she should use her common sense. She said that it was his raised voice and overbearing manner and threatening body language, perhaps rather than the language used, which made her feel this and she could see this from Mr Foux's face and hand gestures, which were visible on the screen.

17 Mr Foux denied conducting himself in an aggressive or intimidating manner during the call and stated that he did not shout at staff. He stated that he would most probably have said 'lets try to be focussed so we don't waste anybody's time' and that he probably would have said 'use your common sense.' He described the call as direct

and businesslike, in keeping with their culture; a typical call with nothing odd about the tone.

18 The Claimant stated that she began to find it difficult to speak and to breathe during this call, that as part of her illness she finds criticism very difficult to deal with and that "Mr Foux's direct attack on me made me feel very unwell". The Claimant stated that she experienced a debilitating panic attack and, without saying anything, left the room and retired to the toilet weeping uncontrollably, to recover herself. She stated that she then returned to the call to apologise to Mr Foux and remind him that her Grandfather had died only some 48 hours before and that work stress was making her unwell. Mr Foux categorically denied that the Claimant ever returned to the Skype call after having left the room and stated that he himself ended the call with Mr Stenlund soon after the Claimant left, as he was preparing for a very important business call to the USA at 8pm that evening and their call had, after all, been convened for the Claimant's benefit.

19 Faced with this dispute as to what had actually occurred regarding this Skype call, the Tribunal carefully considered all of the evidence before it and concluded that the Claimant did not return to the call because she was clearly in no fit state to do so for some time and the panic attack may well have flawed her memory in this regard. Also, Mr Foux, a very busy man, would not have hung about for long on a call convened for the purpose of giving feedback to the Claimant, once she had left the room. There was nothing to discuss with Mr Stenlund, since neither men knew at that point why the Claimant had suddenly left the room. The Tribunal also concluded, on a balance of probabilities, that although Mr Foux was probably feeling rather impatient, frustrated and exasperated at what he probably regarded as a rather unproductive waste of his time, he did not shout at the Claimant. The Tribunal, on all the evidence before it, including observation of Mr Foux's demeanour throughout the hearing, formed the view that his style was functional and product-orientated rather than intimidating and that the Claimant was perhaps unduly sensitive to what Mr Foux had, by her own account, said to her on the call, in regarding it as a direct or personal attack on her. Further, the Tribunal could not see how the Claimant could reasonably feel threatened in the circumstances of a head and shoulders only Skype call when Mr Foux was in another location and the Claimant was in the presence of her line manager, whom she experienced as very supportive.

20 The Claimant then met with Mr Stenlund in the corridor and told him that she had had a panic attack. They discussed the pressure and stress she felt under at work and also her grandfather's recent death and he suggested lightening the workload, perhaps reducing the number of blogs to one a week rather than two, which she welcomed. There was no suggestion at any time that this work reduction should be regarded as temporary in order to enable the Claimant to get over her grandfather's death. The Tribunal concluded that the Claimant also made it clear to Mr Stenlund that she would much prefer to deal with himself regarding her work than with Mr Foux. He then told the Claimant to take some time to feel better and to go for a coffee, which she did. Mr Stenlund then informed Mr Foux by Instant Messaging that the Claimant had had a panic attack and Mr Foux told him, as line manager, to get control of the situation and said that they would discuss fully during their daily catch up Skype call at 7pm. Mr Foux was still preparing for the important USA call at this point. The Tribunal accepted Mr Foux's evidence that there was no further discussion of the Claimant in this exchange of Instant Messaging.

21 At 5.49pm Mr Stenlund texted the Claimant as follows: "Hi Robin, I hope you're OK and start to feel better! Just so you know, I've spoken to (Mr Foux) and I've decided that we'll be doing one blog post per week instead of two. That should mean that we'll have more time to research and get quality in what we output, but also more time for proofing and planning!..."

22 By 7pm Mr Foux had done the necessary preparation for his 8pm US call and he and Mr Stenlund got together for their Skype catch up call, which lasted about half an hour to 40 minutes. Mr Stenlund told him the detail of his conversation with the Claimant and that he had decided to cut the weekly blogs from 2 to 1. He also said that the Claimant was basically saying that she did not want to work directly with Mr Foux but wished to work instead via Mr Stenlund. Mr Foux asked Mr Stenlund how this was going to work, in their small team of 3, and expressed the view that 1 blog a week was insufficient online material to enable them to generate sufficient business leads, there being no additional funding to pay an outsider to generate additional material. Mr Foux told the Tribunal that he saw the proposed situation as unworkable and that his detailed discussion of the practicalities helped Mr Stenlund to 'join the dots', since Mr Stenlund had clearly not had time to think things through. Mr Stenlund then acknowledged that with his background in analytics and lack of tech industry editorial experience, he would be unable to manage the editorial decision making himself. Mr Foux also told the Tribunal that Mr Stenlund himself was in a huge panic about meeting deadlines since they had not been keeping up with the work for the previous 3 weeks, although as a line manager he had been very supportive to the Claimant.

23 The Tribunal concluded unanimously, on all the evidence before it, that by the time the call ended at about 7.50pm on 2 November 2016, the decision had been made to dismiss the Claimant after a full discussion weighing the desirability of keeping a costly new hire against the fundamental need to get the work done, that this was not happening and that the proposed situation moving forward with the Claimant was not feasible. Mr Foux stated that the decision was that of the line manager, with his support. Whilst technically it was Mr Stenlund's decision, the Tribunal concluded that the mind behind the decision was that of Mr Foux, with which Mr Stenlund concurred after their conversation in which the realities had been starkly put by Mr Foux and fully explored . The Tribunal was satisfied that the reasons for dismissal in Mr Foux's mind were: the shock of the Claimant walking out of the Skype call, which from Mr Foux's point of view was no different to any normal work meeting; the Claimant not wanting to work directly with himself and her apparent inability to accept intended constructive feedback on her work in a robust and constructive way which was normal in this business sector; the reduction to 1 blog a week when 2 were necessary for the business, in Mr Foux's view, especially since he was aware that the Claimant's predecessor had been dealing effectively with the higher workload for the 8 months in which he had been carrying out the same role as the Claimant. All of this was against the background of missed deadlines. The Tribunal was satisfied that the balance was tipped and the decision made that the situation was not feasible and that the Claimant's employment should be terminated. The intention was to inform the Claimant in person on the following day.

24 However, at 8.15 am on Thursday 3 November 2016 the Claimant texted Mr Stenlund that she was still feeling unwell and would not be coming to work but would send an email explaining everything.

25 At 8.43 am the Claimant sent an email to Mr Foux and Mr Stenlund explaining that she had had a panic attack, citing her grandfather's funeral the following day 'and the stress from work is giving me migraines, culminating in a panic attack yesterday.' … 'What I haven't explained is that I suffer from bipolar disorder, I am medicated and this hasn't affected my work at previous companies. I have become increasingly more depressed working at Knexus because the oppressive atmosphere, regular humiliating feedback, unrealistic workload and lack of praise which has impacted my health.' The Claimant proposed returning to work the following Wednesday 9 November to allow her to recover and to grieve after the funeral and said that going forward feedback should be relayed to her through Mr Stenlund 'who has a less combative conversational style' and agreed the reduction in workload is a good idea.

26 At 10.27 am on 3 November, Mr Stenlund replied to the Claimant's email saying how sorry they were about her grandfather. 'However, we do feel that a high pressure start up environment in the ultra fast changing technology industry is not going to be the right working environment for you. On that basis we are terminating your employment contract with immediate effect. Please accept this as your written notice. …your final day will be Wed 9 November … your current time off is being treated as unpaid leave as you have exceeded your holiday allocation.'

27 On 4 November the Claimant emailed Mr Foux alleging blatant disability discrimination in that his response to her notification that she had bipolar disorder was to terminate her employment. On 8 November the Claimant emailed Mr Foux again asking why he had told colleagues that she had resigned 'when the truth is that you dismissed me because of my bipolar condition'. Mr Foux replied later that day denying having told anyone she had resigned or discussing her employment status in any way and saying: "the decision to terminate your employment had nothing to do with whether you are bipolar or not. The decision was made based on clear evidence that you are not suited to the intensity and rigour associated with a start up in the tech industry."

28 The Claimant presented her complaints to the Tribunal on 19 December 2016.

The Law

29 As to the law, the Tribunal directed itself as follows:

(i) **Section 13 (1) of the Equality Act 2010** provides that "a person (A) discriminates against another (B) if, because of a protected characteristic (including disability) A treats B less favourably than A treats or would treat others".

(ii) **Section 15 of the Equality Act 2010** provides that "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." **Sub-section (2)** of this section provides that **sub-section (1)** does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

(iii) **Section 20 (3) of the Equality Act 2010** provides that 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, there is

a duty upon A to take such steps as it is reasonable to have to take to avoid the disadvantage.

(vi) **Para 20 (1)(b) of Schedule 8 to the Equality Act 2010** provides that A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know … that the person has a disability and is likely to be placed at the substantial disadvantage referred to in **section 20 (3).**

(vii) **Section 21 of the Act** provides that "a person discriminates against a disabled person if they fail to comply with a duty to make reasonable adjustments".

(viii) **Section 39 (2) and (4)** provide that an employer A must not discriminate against an employee of his, B, … by dismissing B or subjecting B to any other detriment".

(ix) **Section 136 (2) of the Equality Act 2010** provides that "if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred … **(3)** but this does not apply if A shows that A did not contravene the provision".

(x) The Tribunal reminded itself that discrimination may not be deliberate and may consist of unconsciously operative assumptions on the part of the employer. It is therefore incumbent upon the Tribunal to examine indicators from the surrounding circumstances and events, both prior and subsequent to the acts complained of, in order to assist it in determining whether or not particular acts were discriminatory (**Anya v University of Oxford [2001] IRLR 337).**

(xi) Inferences of unlawful discrimination may not properly be drawn solely from the fact that the Claimant has been unreasonably treated, although they may properly be drawn from the absence of any explanation for such unreasonable treatment. (**Bahl v The Law Society [2004 IRLR 799).**

(xii) The Tribunal had regard to the cases of **Igen v Wong [2005] ICR 931** and **Madarassey v Nomura International Plc [2007] IRLR 246** in setting about its task, as well as to the cases of **Shamoon v Chief Constable of the RUC 2003 ICR 337 HL** and **Laing v Manchester City Council 2006 ICR 1519 EAT.**

Conclusions

30 It is common ground that the crucial factual finding to be determined by this Tribunal was whether or not the Respondent decided to dismiss the Claimant before or after receiving the email disclosing her bipolar condition at 8.43 on the morning of 3 November 2016. The Claimant does not contend that the Respondent knew or ought to have known of her condition prior to that time. The Respondent contends that the decision was made during the 7pm Skype call between Mr Foux and Mr Stenlund on the evening of 2 November, although the dismissal communication was not sent to the Claimant until 10.27am on the morning of 3 November because the intention was to tell the Claimant in person until she informed them by text at 8.15 am on 3 November that she would not be coming in to work for 6 days and would send an email 'explaining everything' and they communicated the dismissal by email, after she had done so.

31 The Claimant contends that the Respondent decided to dismiss her upon learning of her bipolar condition and that it has fabricated an alternative version of events in order to obscure the truth because: (i) Mr Stenlund's text at 5.49pm on 2 November, reducing the blogs to one per week, evinces an intention to continue the Claimant's employment; (ii) there was no mention of the decision to dismiss being taken on 2 November in the Response form lodged on 18 January 2017, a most obvious point to make, and indeed it was not raised until further and better particulars on 7 April 2017; (iii) Why was Mr Stenlund not called to give evidence for the Respondent? (iv) the dismissal email says that the tech start up industry "is not going to be the right working environment for you". This is in the future tense, tending to contradict that a decision had already been made on the previous day.

32 The Tribunal considered very carefully all of the evidence and contentions on this most important factual issue and concluded unanimously that the dismissal decision was made on the evening of 2 November, as set out in paragraphs 22 and 23 of these Reasons because:

(i) The Tribunal found the evidence of Mr Foux, under testing cross examination and questioning by the Tribunal, to be convincing and credible on this issue.

(ii) The Respondent was unrepresented and the Tribunal found that Mr Foux had demonstrated a remarkable level of naivete about employment law in general and the significance and repercussions of responding to and handling a Tribunal claim in particular. For example; his concession regarding the issue of whether or not the Claimant was disabled for the purposes of the **Equality Act 2010** (paragraph 4 of these Reasons); his failure to realise that 10 paragraphs of the Response form were missing until after he had been cross-examined on the second day of this Hearing. The Tribunal also noted that the Employment Judge conducting the PH (Case Management) on 10 March 2017, in noting herself that the Respondent was unrepresented and discussing disclosure, the bundle and how to prepare a witness statement, explained that unrepresented parties sometimes come to observe a tribunal hearing prior, so as to familiarise themselves with the procedure.

(iii) The Tribunal formed the view that Mr Foux found himself in a very alien world, entirely different from his own business sphere, failed to obtain advice regarding the claim against the Respondent and therefore failed to engage with and appreciate the significance of the potentially telling chronology of sending a dismissal email less than 2 hours after having been told that the Claimant had a potential disability and in pleading and/or presenting his case to the fullest extent available to him. The Tribunal accepted that Mr Stenlund was now abroad and was unavailable to give evidence. The Tribunal was satisfied that Mr Stenlund's decision to reduce the blogs to one per week was taken of his own initiative (hence "I've decided" in his text) and without consultation with Mr Foux, and that nothing turned on the particular phrasing of the dismissal email.

(iv) The situation facing Mr Foux, from his perspective, during the 7pm Skype call with Mr Stenlund on 2 November 2016 was as follows: 3 weeks into the Claimant's employment, still on 3 months probation, she was not meeting crucial deadlines, appeared not to grasp fully what was required of her, had walked out of a normal business meeting Skype call without saying anything that afternoon and he had just been informed by Mr Stenlund that he had proposed to the Claimant (which the Tribunal accepted had been done without consultation with himself) that there would only be 1 blog a week going forward and that the Claimant didn't want to work with himself, but via Mr Stenlund, who did not have the necessary editorial experience. Mr Foux was a busy man, trying to drum up business to make the company succeed in a very fast-paced environment with very tight daily and weekly deadlines and with only himself, Mr Stenlund and the Claimant to cover the ground. Mr Foux decided, quite

reasonably, in the Tribunal's view, that the situation was unworkable, particularly given the Claimant's refusal to work with himself. The Tribunal was unanimously satisfied that at this point the balance tipped in Mr Foux's mind from the Claimant as a potential new-hire asset to a liability and that he decided that he had to cut the losses of a mistaken hire and end the Claimant's employment forthwith. This decision was made on the evening of 2 November, with the Claimant to be informed in person on the following day. When she said that she would not be returning to work for 6 days, that dismissal was communicated by email. The Tribunal believed Mr Foux's evidence and concluded that the Claimant's bipolar disorder played no part in the decision to dismiss.

33 **Section 13 of the Equality Act 2010**: The fact that the Respondent sent a dismissal email to the Claimant less that 2 hours after she had revealed that she had bipolar disorder, now conceded by the Respondent as a disability within the meaning of **section 6 of the Act**, is a fact from which the Tribunal could decide, in the absence of any other explanation, that the dismissal was an act of direct disability discrimination within the meaning of **section 13**.

34 The Tribunal therefore looked to the Respondent for an explanation and to satisfy the Tribunal, on a balance of probabilities, that no such act of discrimination had occurred. The Tribunal was unanimously so satisfied because, on the facts as found by the Tribunal, as set out above, the decision to dismiss was taken the day before the Respondent had any knowledge of the Claimant's disability, because Mr Foux concluded that the situation, 3 weeks into the Claimant's probation period, had become untenable. Accordingly, the Tribunal was satisfied that the Claimant's disability played no part whatever in the decision to dismiss.

35 The Respondent's decision not to pay sick pay was because it did not accept that any sick pay was due because the Claimant's absence was not due to certified or self-certified sickness, but was, according to the Claimant's email of 3 November, "giving me time to recover (presumably from the panic attack) and allowing me to grieve after the funeral". The Claimant did not produce before the Tribunal any evidence that sick pay was due. The Tribunal was satisfied that the Respondent genuinely did not believe that sick pay was due and that the Claimant's bipolar disorder played no part in the decision.

36 The Claimant's complaints under **section 13 of the Act** must therefore fail.

37 **Section 15 of the Equality Act 2010:** The Respondent accepts that the Claimant was dismissed because she was not up to the intensity and rigour associated with a start up company in the technology industry. This is a fact from which the Tribunal could decide, in the absence of any other explanation, that the Claimant was treated unfavourably because of something arising in consequence of her disability, subject to paragraph 38 below.

38 However, there was no evidence before the Tribunal that the Claimant's unsuitability for the role arose as a consequence of her bipolar disorder, other than her own assertion, for example in her Disability Impact Statement that "I find it very difficult to handle criticism since I dwell on it. I cannot maintain my mood when people shout at me. I break down in tears. … That is why I am often eager to please based on the need to receive compliments." The only medical evidence before the Tribunal was her GP's letter confirming a diagnosis of bipolar disorder. No evidence was advanced before the Tribunal that hyper sensitivity to criticism, a tendency to panic attacks during

business meetings, the inability to keep to deadlines or to understand the parameters and requirements of written content at work arose as a result of bipolar disorder in general, or in the particular case of the Claimant, as opposed, for example, to these traits being the result of natural variance in human temperament or personality.

39 The Claimant's evidence was that she had achieved and progressed well in her career with no mention of previous issues of sensitivity to criticism or panic attacks at work. In fact, the Claimant said in her email of 3 November to the Respondent that her condition had not affected her work at previous companies. The Tribunal did not find the overall atmosphere at the Respondent's to be unduly oppressive or indeed threatening, despite the Claimant's perceptions. Mr Stenlund, her line manager, showed himself to have been very supportive of the Claimant. It was a small start-up team in a very highly pressured and fast paced industry, which, as Mr Foux told the Tribunal, is not suited to everyone. The Tribunal was satisfied that the Claimant, in her first weeks in the job, did not demonstrate a capacity to get to grips with the requirements and context of the role. There was no evidence showing, on a balance of probabilities, that this was due to her bipolar disorder, as opposed to other factors or characteristics shared by a far wider sweep of the non-disabled population. The Tribunal had insufficient evidence before it to find that the Claimant's failure in the role was causally connected to her bipolar disorder.

40 Even had such a causal link been established, the Tribunal would have been minded to conclude that the Respondent had shown that her dismissal was a proportionate means of achieving the legitimate aim of effectively, and within budget, conducting the business with a team of only 3 people. It would have been a proportionate means of achieving that aim to end a probationary contract after a month where the employer had genuinely and reasonably reached the view that the candidate was not up to the demands of the job, for whatever reason or reasons.

41 The Claimant's complaint under **section 15 of the Act** therefore must fail.

42 **Sections 20 and 21 of the Act:** The Claimant alleges that the Respondent's practices or requirements of a) writing 2 blogs a week, b) meeting daily deadlines for social media content, c) taking individual responsibility for seeing tasks were done on time and d) meeting challenges in meetings put her, as a disabled person, at a substantial disadvantage in comparison with persons who are not disabled. She contends that the reasonable adjustments in this case would have been, as inferred in her email of 3 November 2016 in which she revealed her bipolar disorder, the reduction in workload to 1 blog a week and to have feedback relayed to her through Mr Stenlund.

43 As set out in paragraph 37 above, the Claimant has not satisfied the Tribunal, on the evidence, that whatever challenges she found in fulfilling her role with the Respondent were the result of her bipolar disorder. She may have found it difficult to write 2 blogs a week, meet deadlines, take responsibility for seeing that tasks were done on time and meet challenges in business meetings, but she has not satisfied the Tribunal, on a balance of probabilities, that these requirements of the Respondent put her, *as a disabled person*, at a substantial disadvantage *in comparison with persons who are not disabled*, within the meaning of **section 20(3) of the Equality Act 2010**. (Italics supplied). There was no evidence before the Tribunal establishing a causal connection between bipolar disorder and the difficulties of meeting the stated requirements of this role. There may well be a wide range of non-disabled persons, persons not suffering from bipolar disorder, who would find it impossible or very difficult

to meet these requirements and, conversely, persons with bipolar disorder who would not find themselves substantially disadvantaged by these requirements. The Claimant has therefore failed to satisfy the Tribunal that the Respondent's requirements placed her, as a disabled person, at a substantial disadvantage in comparison with persons who are not disabled. The duty to make reasonable adjustments therefore did not arise.

44 In any event, the duty to make reasonable adjustments does not arise until the employer has real or constructive knowledge that the employee is disabled and is likely to be placed at the substantial disadvantage in question **(Para 20(1)(b) of Sched 8 to the Act).** It is not contended in this case that the date of the Respondent's knowledge fell before 3 November 2016, the day after the decision to dismiss was taken. The reason for the dismissal decision, as found by this Tribunal, included the Claimant's failure to meet deadlines, manage 2 blogs per week and meet challenges in meetings, but was of broader scope, including the Claimant's apparent misunderstanding of the need to produce high quality content per se which was of interest to prospective clients, rather than producing explicit client-promoting material, which, as Mr Foux told her, would not work and could in fact damage the Respondent's reputation. There was no evidence that this misunderstanding was a result of the Claimant's bipolar condition.

45 Further, and in any event, Mr Stenlund and Mr Foux together did consider the option already proposed by Mr Stenlund to the Claimant, namely, the reduction in work load to 1 blog per week, and Mr Foux decided that this was not a viable option because it did not provide sufficient online material to generate sufficient business to keep the company afloat. This decision was taken the day before the Respondent had any knowledge of the Claimant's disability and there is therefore no reason to doubt that it reflected what may be regarded as reasonable in terms of one of the adjustments proposed in this context.

46 The Claimant's complaint that the Respondent failed to make reasonable adjustments accordingly also fails. The provisional Remedy hearing listed for 8 September 2017 is therefore vacated.

Employment Judge A Stewart
28 August 2017