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EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Hawkes**

Respondents: **(1) Essex County Council**
(2) Pauline Kingman

Heard at: **East London Hearing Centre**

On: **12 – 15 and 19 June 2018**

Before: **Employment Judge Brown**

Members: **Ms M Long**
Mr D Ross

Representation

Claimant: Mr J Jenson (Lay Representative)

Respondent: Mr Bruce Gardiner (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The Respondents did not subject the Claimant to direct disability discrimination.**

2. **The First Respondent did not fail to make reasonable adjustments.**

3. **The First Respondent did not dismiss the Claimant unfairly and did not subject her to discrimination arising from disability when it dismissed her.**

4. **The First Respondent breached the Claimant's contract in relation to sick pay and the Respondent shall pay the Claimant £3,378.51 on account of breach of contract.**

5. **The Claimant's other claims for breach of contract are dismissed on withdrawal by the Claimant.**

REASONS

Preliminary

1 The Claimant brought complaints of direct disability discrimination, failure to make reasonable adjustments, discrimination arising from disability, breach of contract in relation to holiday pay, expenses and sick pay processes and unfair dismissal against the First Respondent, her former employer. She brought complaints of direct disability discrimination against the Second Respondent, her former Line Manager.

2 The Claimant had presented a previous complaint of sex and disability discrimination against the First Respondent in this Employment Tribunal, on 5 January 2016: case number 3200120/2016 (page 918). It was struck out on 26 April 2016 by Regional Employment Judge Taylor because the claim had been brought outside the applicable time limits. In the present case, at a hearing on 15 December 2017, Employment Judge Foxwell struck out various of the Claimant's claims as an abuse of process because, either they had been the subject of the first Employment Tribunal claim number 3200120/2016, or they were matters of which the Claimant was aware before she presented that first Employment Tribunal claim on 5 January 2016 and were therefore excluded from being brought in the current proceedings under the rule in ***Henderson & Henderson***. Employment Judge Foxwell then set out the issues to be decided in the current claim. They were:

Direct Discrimination

1. Pauline Kingman doubting C's absences and the reasons for them [ET1 paras 63 and 65].

2. Pauline Kingman repeatedly requesting fit notes when C was off work, even though these had previously been provided [ET1 paras 66].

3. Pauline Kingman and Arnold Pariag during the period from 2013 [?] to January 2017 failing to provide C with a copy of her occupational health referral form prior to sending it to occupational health [ET1 paras 62 and 67].

4. Failing to give C advance warning that Pauling Kingman was going to be present during the sickness meeting on 31 March 2017.

5. Bias shown by Nick Presmeg during the sickness review hearing on 31 March 2017 including his failure to acknowledge that C was disabled [ET1 para 73-76; 81]

6. Nick Presmeg's decision to dismiss C on 31 March 2017, which was

based on medical evidence from Pauline Kingman [ET1 para 78].

7. The delay in adjudicating on the outcome of C's appeal between the appeal hearing on 26 May 2017 and the outcome letter dated 12 June 2017 [ET1 para 84];

8. The failure in the appeal outcome letter to address all the points raised in the appeal [ET1 para 84].

9. The relevant time for the question whether the Claimant was a disabled person in 2017 and earlier depending on the answers to the request for further information.

Failure to make reasonable adjustments

10. Failing to allow C to be accompanied both by a colleague and by her daughter whilst Pauline Kingman was giving her evidence at the sickness hearing on 31 March 2017 [ET1 para 72].

Discrimination arising out of disability

11. Dismissing C on grounds of ill health [ET1 para 81].

Breach of contract

12. Failing to pay C the money she claims to have been entitled under her contract [ET1 para 89]

(a) Holiday pay;

(b) Expenses;

(c) Being sent a form SSP1

Unfair Dismissal

13. Was the Claimant's dismissal on 31 March an unfair dismissal?

3 Issue 3 related only to matters which post-dated January 2016.

4 On 15 May 2018 the Respondents wrote to the Employment Tribunal conceding that the Claimant was a disabled person at all material times in this claim, by reason of the following conditions:

4.1 Sero-positive erosive rheumatoid arthritis.

4.2 Fibromyalgia.

4.3 Lumber spondylosis; and

4.4 Stress/depression.

5 At the start of this hearing there was some discussion of the nature of the PCP replied on in the reasonable adjustment complaint and the substantial disadvantage to which the Claimant was alleged to have been put by it. The Claimant described the PCP as, *"Not allowing family members who were also carers into the sickness hearing while Pauline Kingman was giving evidence and not allowing them to ask questions on the Claimant's behalf instead of the Claimant attending the meeting and asking questions."* The substantial disadvantage was described as, *"The claimant did not feel able to attend the meetings due to anxiety and stress she suffered regarding being in meetings with Pauline Kingman."* The Claimant compared herself to non disabled people who would not feel in this way.

6 The First Respondent also made a concession regarding the Claimant's sick pay contract claim. The Claimant initially maintained the balance of her sick pay contract claim against the First Respondent and the parties agreed that the Tribunal would first hear the Claimant's disability discrimination and unfair dismissal claims from Tuesday 12 to Friday 15 June 2018 and would deliver judgment on these on 19 June and then proceed to determine the contract claims and any claim for remedy arising out of the Tribunal's judgment on liability in disability discrimination and/or unfair dismissal claims. On 19 June, however, the Claimant withdrew her outstanding contract claims.

7 The Tribunal heard evidence from the Claimant. It heard evidence from: Pauline Kingman, the Second Respondent, the Claimant's former line manager; Nick Presmeg, Director of the First Respondent's Adult Social Care Services, Dismissing Officer; and Julie Hunter, Senior Human Resources Consultant, HR Support Officer to the appeal hearing. Both parties made closing submissions. There was a bundle, to which some documents were added. The Tribunal timetabled the case at the outset and the parties complied with the timetable.

Relevant Findings of Fact

8 There was a complex factual history to the current claim. The Claimant contended that the First Respondent's employees were responsible for her absence from work, either because they subjected her to discrimination and/or to assaults and/or false allegations, or because they had failed to make reasonable adjustments at times before January 2016, for example in 2015, so that the Claimant was not able to return to work later.

9 The Respondents did not explore the Claimant's contentions in this regard in cross-examination. The Claimant's assertions were some of the assertions that she made in the first ET1 claim which was struck out.

10 The Tribunal has proceeded on the basis that the First Respondent may have been at fault in the way that the Respondent's employees behaved towards the Claimant, but it has not made any findings that this was the case.

11 The Claimant started work for the First Respondent on 14 September 2009. She

was employed as a social worker. The Claimant had an accident at work on 11 February 2014, page 164. She was off work, sick, from March to April 2014, page 172. The Claimant commenced a lengthy period of sickness absence in about June 2014, page 137.

12 From January 2015 Pauline Kingman became acting team manager for the Claimant's team. The Claimant returned to work in April 2015, but was almost immediately suspended from work pursuant to disciplinary investigation and proceedings. These ended in August 2015. The Claimant was signed off work by her GP on 11 August 2015 with work related stress, page 230. It appeared, from what the Claimant has told Occupational Health advisers, that the Claimant agrees that she was absent from work continuously on sick leave from August 2015 until her dismissal which took effect on 16 June 2017.

13 The First Respondent's sickness policy provides that, when an employee is off work for more than 7 days in a row, they shall provide a fit note, page 906. The policy also provides, "Line managers will know and understand the reasons for each of their employee's sickness absence. … Employees are expected to share the reasons for their sickness absence with their line manager and to do everything they can to improve their attendance or help their return to work..," page 906 – 907.

14 The Claimant submitted sick notes to the First Respondent during her absence. There was a dispute between the parties as to whether the fit notes which were received from the Claimant in electronic form were always legible. The Respondents drew the Tribunal's attention to some fit notes which did not appear to be legible, in that relevant pages in the bundle were so dark that nothing could be read, for example pages 245 – 249, or were extremely blurred, for example pages 145A and 147A.

15 The Claimant told the Tribunal that the scanned images she sent were clear and she alleged that the First Respondent's employees, including the Second Respondent, had interfered with the evidence and deliberately obscured relevant pages. Ms Kingman told the Tribunal that it would not necessarily have been she who would have printed the relevant documents, but that she did remember seeing some which were illegible and remarking on that fact. She told the Tribunal that the First Respondent's printer normally worked and, indeed, had printed some of the Claimant's sick certificates clearly, so that she considered it was unlikely that it was the printer which was at fault, rather than the particular image which the Claimant had sent.

16 On 17 May 2016 Krista Levey, Service Manager at the First Respondent, emailed the Claimant, asking her to provide sick certificates because the Claimant had not supplied any since December 2015, page 250.

17 On 2 June 2016, page 251, Krista Levey wrote again to the Claimant, asking once more that the Claimant provide sick notes and saying that it was a requirement that the Claimant submit fit notes and updates of her absence, the reason for it and information regarding when the Claimant expected to return to work. Ms Levey said that, in the past, there had been problems with the First Respondent receiving fit notes, in that scanned copies had not been legible. Ms Levey also said that, because the Claimant had been off for a considerable time, under the First Respondent's sickness absence policy she would be inviting the Claimant to attend a formal sickness absence hearing. Before that, Ms

Levey said that she would be arranging an Occupational Health appointment for the Occupational Health Service to advice on the prognosis for the Claimant's return to work and any support required to facilitate a return and to attend a meeting. Ms Levey said, "A copy of the referral form is enclosed … I also enclose a copy of the sickness absence policy." The letter did not, at its end, includes words like "enc. OH referral form and sickness absence policy." However, there was no record of the Claimant having responded to the letter from Ms Levey saying that documents had not been enclosed. Nevertheless, the Claimant did write to say that she could not make the Occupational Health appointment offered, page 261.

18 The Claimant had a telephone Occupational Health appointment on 22 July 2016. The Occupational Health report written as a result, page 267, said that the Occupational Health adviser did not consider the Claimant fit to return to work. The report said, "It is highly unlikely she will be able to return to her role as social worker at Ely House." The adviser said that she was unable to recommend any adjustments to assist the Claimant return to work beyond those already considered. The Occupational Health adviser commented that, from her discussions with the Claimant, it was clear that the Claimant had little faith in the First Respondent. The adviser said, "Mrs Hawkes could be considered permanently incapable of performing her job due to the fact that she feels unable to return due to work related stress and alleged bullying. It is my opinion that she is incapable of considering a return to work."

19 The Occupational Health adviser advised that redeployment was unlikely to be of benefit and that the Claimant's extended absence and poor mental and physical health were likely to make her incapable of work for the foreseeable future, page 267.

20 On 14 September 2016 the Claimant emailed Krista Levey, saying that she was attaching sick certificate, page 291 – 292. The attachment printed out in the Employment Tribunal bundle is completely illegible. The Claimant told the Tribunal that those images were sent by her telephone and that the image was quite clear on her telephone screen.

21 On 14 November 2016 Pauline Kingman emailed the Claimant, saying that she would be the Claimant's point of contact for emailing sick notes and asking to meet the Claimant. The Claimant did not respond.

22 On 24 November 2016 Ms Kingman wrote again to the Claimant, offering her two dates on which to meet. Ms Kingman also asked the Claimant to provide sick notes covering the period since 18 September 2016 and continuing to 24 November 2016. The Claimant responded on 28 November 2016, saying that she could not engage in communication with Ms Kingman and attaching documents supporting her claim for sick pay, page 317. Ms Kingman responded again on 7 December 2018, saying that the Claimant's issues had been concluded pursuant to various internal procedures. Ms Kingman said that, she, as the Claimant's line manager, was the appropriate person to communicate with the Claimant. Ms Kingman said that the Claimant's current fit note and Occupational Health report both indicated that it was unlikely that the Claimant would be returning to work in the near future, so that it was important for Ms Kingman to meet the Claimant to discuss her sickness. She offered to meet the Claimant at a neutral location. She said that, if the Claimant's attendance did not improved to a satisfactory level, the Claimant's current employment could be at risk. Ms Kingman offered the Claimant dates to meet, on either 19 or 20 December 2018, page 328.

23 On 14 December 2016 the Claimant replied further, saying that she was unable to meet on either 19 or 20 December as, "I have ongoing vasculitis causing severe rash and pain." Page 331.

24 On 20 January 2017, page 342 Ms Kingman wrote again to the Claimant, acknowledging the Claimant's letter saying that she was unable to meet. Ms Kingman said that her own letter would set out the matters that she had intended to discuss with the Claimant at the proposed meeting. Ms Kingman said that, in light of the length of the Claimant's sickness absence, Ms Kingman had no choice other than to progress matters under the council's sickness policy. Ms Kingman said that the Claimant had been on continuous long term sick leave since 7 August 2015. She said, "Your medical certificates have stated "work related stress, depression and "PTSD" and I note when you contacted me in December 2016 you stated you were ill with vasculitis. We have receipt of your latest sick certificate which states you are unwell with "PTSD"." Ms Kingman said that she had checked her file and noted that, despite several communications, the Claimant had failed to submit medical certificates covering the periods 13 March 2015 to 27 April 2015, 7 September 2015 to 2 March 2016 and 21 August 2016 to 22 November 2016. Ms Kingman said that the Claimant was required to provide fit notes under the Respondent's sickness policy in a legible and timely manner. Ms Kingman said that the sickness absence hearing would consider the Claimant's sickness absence and the Claimant's long-term ability to work under her contract. Ms Kingman said again that the Claimant's employment with the First Respondent was at risk. She said that Occupational Health would be asked to undertake a telephone review with the Claimant before the sickness absence hearing.

25 Ms Kingman sent Occupational Health a referral on 25 January 2017, page 362.

26 On 26 January Occupational Health sent the Claimant an appointment, page 348. The Occupational Health referral form itself states, *"You MUST share all the contents of this referral with the employee before the Occupational Health appointment is sent."* page 364.

27 Ms Kingman told the Tribunal that she had not sent the Occupational Health forms to the Claimant before the Claimant received the Occupational Health appointment and that Ms Kingman had made a mistake; it was a human error. Ms Kingman also told the Tribunal that, regarding other employees whom Ms Kingman referred to Occupational Health, Ms Kingman had had open dialogue with them about their absences, reasonable adjustments and Occupational Health referral forms, but that this had been impossible with the Claimant because the Claimant had not been engaging with Ms Kingman.

28 On 26 January 2017 at 14.38 the Claimant asked Occupational Health for a copy of her Occupational Health referral form. The same day at 14.41 Occupational Health replied, saying that the Claimant will need to contact her manager to ask for a copy as it was the manager's responsibility to send the Claimant a copy. At 15.27 that day the Claimant emailed the Chief Executive of the Council and Councillor David Finch, copied to Pauline Kingman amongst others, saying that she was entitled by law to a copy of her Occupational Health referral form, that she had not received any referrals since July 2016 and it appeared that her line manager had not followed through with her duties. At 16.38 that day, Pauline Kingman sent the Claimant the Occupational Health referral form, apologising for the delay, page 358.

29 The Occupational Health appointment took place on 30 January 2017.

30 On the facts, the Employment Tribunal decided that Krista Levey did send the Claimant a copy of the Occupational Health referral form before sending it to Occupational Health in advance of the Occupational Health July 2017 appointment. Ms Levey's letter of 2 June 2016, at page 251, said that Ms Levey was enclosing the Occupational Health referral form and the Claimant never replied saying the Occupational Health referral form had not, in fact, been enclosed. The Tribunal noted that, on 26 January 2017, the Claimant said in her email that she had not received an Occupational Health referral since July 2016, implying that she did received the one sent to her in June 2016. Pauline Kingman did not send the Claimant an Occupational Health referral form in January 2017 before sending it to Occupational Health. The Tribunal accepted Ms Kingman's evidence that this was human error on her part. The Tribunal noted that Ms Kingman rectified her error very promptly when it was drawn to her attention.

31 At the Tribunal, the Claimant argued that Ms Kingman should have discussed the Occupational Health referral with her before sending it to Occupational Health. This was not the issue that had been set out in the list of issues but, in any event, the Employment Tribunal found that Ms Kingman had written to the Claimant, seeking to arrange a meeting with her in November and December 2016, including a meeting at a neutral venue, and the Claimant did not attend the meetings offered and did not suggest any dates when she could meet. Furthermore, the Claimant said that she could not engage with Ms Kingman. In Ms Kingman's letter of 20 January 2017, Ms Kingman said that she was setting out the things that she would have discussed at a meeting - these included the Occupational Health referral. The Tribunal concluded that, had the Claimant attended any meeting offered by Ms Kingman, the Occupational Health referral would indeed have been discussed. It was quite clear to the Tribunal, from what the Claimant said during her evidence and in her witness statement, that she was not willing to engage with Ms Kingman at any meeting. The Tribunal entirely accepted Ms Kingman's evidence that, while Ms Kingman was able to discuss Occupational Health referrals with other employees, she was unable to discuss them with the Claimant because the Claimant was not engaging with her.

32 The Claimant contended that, in Ms Kingman's letter of 20 January 2017, Ms Kingman had indicated that she doubted the Claimant's absences and the reason for them. The Claimant said that Kingman used quotation marks around the word PTSD to denote that Ms Kingman doubted the veracity of the diagnosis. Ms Kingman told the Tribunal that she used quotation marks because she was quoting from medical certificates and that this was her writing style and she did it in other documents too. The Tribunal noted that, in Ms Kingman's witness statement, she used quotation marks over 20 times when quoting from documents. Ms Kingman also told the Tribunal that she raised the issue of the reason for absence because the Claimant's fit notes gave different reasons for absence than the reason the Claimant gave for not attending meetings. It was correct, on the facts, that there were different reasons given by the GP fit notes and the Claimant for her absence and/or inability to attend meetings. The Respondent's sickness policy makes clear that employees are required to share the reasons for their absences with their managers, and that managers are required to take those reasons for absence into account in deciding the appropriate course to take. The Tribunal decided that Ms Kingman's explanation was consistent with the facts. The Tribunal found that the reason that Ms Kingman asked about the reasons for absence was that she wanted to establish

the correct reasons for the Claimant's absences, as she was required to do by the Respondent's policies. It found that she used quotation marks because this was her normal practice when quoting from other documents.

33 The Claimant contended that Pauline Kingman repeated requested fit notes, even though these had previously been provided. She told the Tribunal that she did provide legible copies. On the evidence, the Tribunal concluded that it was not only Ms Kingman, but other employees, including Ms Levey, who asked the Claimant for missing sick notes and considered the sick notes which were supplied to be illegible. A number of the pages in the bundle did appear to be so dark, or blurred, as not to be legible. The Tribunal rejected the Claimant's contention that the Respondent's employees deliberately obscured documents and interfered with the evidence. It was reasonable, the Employment Tribunal concluded, for managers to request and require legible fit notes. It is standard practice in workplaces, both private and public, for managers to require legible fit notes and additional notes where there are gaps in the records. The Tribunal found that the Respondent's employees asked the Claimant for fit notes because they genuinely had not received them, even if the Claimant had sent them in good faith, or because they were illegible, even if the Claimant's versions appeared to be legible on her own electronic devices.

34 The Claimant had a telephone Occupational Health appointment on 30 January 2017 and a report was produced, page 375. This was the Occupational Health review Ms Kingman had mentioned would take place before the sickness absence meeting. The Occupational Health report recorded that the Claimant had been diagnosed with PTSD which the Claimant said was as a result of work place issues. The Occupational Health report said:

> "I would not consider her fit to return to work. I am unable to say when she may return but this is unlikely to be for some time to come. She is currently on the waiting list for CBT to help with her PTSD and, from my experience this form of therapy would need to be ongoing for some considerable time. Unfortunately, there is no definitive timescale and whilst some people may find some benefit within two to three weeks, every person is different and with deep seated problems the likelihood is that it could take several months or even longer.", page 375.

35 The Occupational Health adviser said that there were no adjustments which could be recommended to assist the Claimant's return to work. The Claimant told the Occupational Health adviser that the Claimant would need significantly to improve her mental health wellbeing and physical health in order to be able to return to any role. The Occupational Health adviser said that PTSD was not a condition that was easily remedied and, allowing for the timescale from the alleged incidents, the Occupational Health adviser was not optimistic that the Claimant would be ready to return to work for several months or even longer, page 376.

36 The Claimant raised a grievance in relation to Ms Kingman, saying that Ms Kingman had victimised her and discriminated against her, on 15 February 2017, page 399.

37 On 6 March 2017 the First Respondent wrote to the Claimant, inviting the

Claimant to a formal sickness absence hearing to be held on 16 March, page 448. The letter enclosed a management report setting out the background to the meeting, as collated by the First Respondent. The report had 38 appendices, page 450A. The invitation said that Ms Kingman would attend to present the management case.

38 The Claimant wrote to the First Respondent saying that she could only attend a hearing with someone to assist her on Fridays between 10.00am and 2.00pm. She said:

> "… I would like to request Ms Kingman is not present at the hearing and someone impartial attend in her place due to conflict of interest*."* Page 454.

39 Samantha Myddleton, HR Support employee, wrote to the Claimant saying that the meeting would take place on 31 March 2017 - a Friday. Ms Myddleton told the Claimant that Pauline Kingman's role at the hearing would be to present the management case and that the hearing officer would be independent, page 479.

40 The First Respondent agreed that, for the purposes of the sickness absence hearing, instead of the usual Trade Union or County Council employee to attend with the Claimant, the Claimant would be permitted to be accompanied a family member. The Claimant sent a written submission to the sickness hearing, page 489 – 497. In it, she set out that the First Respondent had, in her contention, been in breach of various provisions of health and safety legislation. She said that the First Respondent had not undertaken risks assessments in 2012 and that her previous managers had negligently failed to follow through with Occupational Health requests, page 492. She said that she had raised a grievance against Ms Kingman and that Ms Kingman should not attend the hearing and that Ms Kingman's evidence should be given in another way, which would represent a reasonable adjustment. The Claimant said in her conclusion:

> *"*There has been a fundamental breach of trust and confidence between Essex County Council and myself*."*

41 The Claimant said that she was undertaking counselling at her own expense. She also attached a schedule of appendices, page 498 – 510.

42 On 30 March 2017 Samantha Myddleton wrote to the Claimant, telling her that the sickness absence meeting would be conducted by Nick Presmeg, Director of Adult Operations and that Mr Presmeg had decided to conduct the meeting in the absence of Pauline Kingman. Ms Myddleton said:

> "If there is anything you would like to question Pauline about this can be put to Nick who will ask her in turn." Page 512.

43 The Claimant attended the formal sickness absence hearing on 31 March 2017, accompanied by her daughter and her sister-in-law, page 516. At the meeting, the Claimant said that she had not been allowed to have her own desk and that reasonable adjustments had not been made for her. Mr Presmeg commented that reasonable adjustments were a two way process and that the Claimant needed to work with her manager in relation to appropriate adjustments for her needs. Mr Presmeg asked the Claimant what adjustments the First Respondent could make, page 520. The Claimant

replied:

> "Not working in Ely House. I do not know how I can return to work… I cannot trust what you are going to say to me. This is what I have been reduced to from the lack of actions from the Council*."*

44 The Claimant talked about adjustments which had not been made for her in the past. Her representatives said that the First Respondent had not followed a sickness policy. Mr Presmeg said:

> *"*We are meeting today after such a long period of absence and need to draw to a conclusion." Page 522.

45 The Claimant asked whether that was because Mr Presmeg was considering striking the Claimant off. Mr Presmeg responded:

> "I truly do not know … it is important we move this on. Have I managed to get a good picture of the facts and circumstances? Also what … course of action is for you and consider viability*."* Page 522.

46 At 11.30am on the morning of the meeting, Mr Presmeg said that he wished to speak to Pauline Kingman. He said to the Claimant and her representatives:

> *"*What would make you most comfortable how I deal with this*?"*

47 Mr Presmeg agreed to adjourn the meeting and meet Ms Kingman and ask her questions in the absence of the Claimant. The Claimant contended that her representatives were not given the opportunity to be present while Mr Presmeg met Pauline Kingman to ask Pauline Kingman questions directly. In evidence to the Tribunal, the Claimant agreed that neither she nor her representatives had asked for the representatives to be given that opportunity. The Tribunal found that they did not make this request, despite specifically being asked by Mr Presmeg how he should deal with the meeting with Ms Kingman. The Claimant agreed, in evidence at the Tribunal, that, after the meeting with Ms Kingman, Mr Presmeg summarised to the Claimant what Ms Kingman had said.

48 In their separate meeting, Mr Presmeg and Ms Kingman discussed the Claimant's disability, page 526. Mr Presmeg asked Ms Kingman whether she considered that the Claimant was disabled. He asked, if the Claimant came back to work, what reasonable adjustments would need to be made. Ms Kingman said that the Claimant had disabilities, but that she did not know whether they fell under the Equality Act. Mr Presmeg said the Claimant would have to come back to work for the First Respondent to be able to make adjustments. He asked whether the Claimant regularly used a wheelchair. He also asked whether the Claimant had been diagnosed with rheumatoid arthritis, as he commented that she did not appear to have the physical side of it.

49 When the hearing resumed, page 527 Mr Presmeg asked the Claimant about CBT (Cognitive Behavioural Therapy). He asked, if CBT was successful in helping, whether the Claimant thought that she would be able to engage with the First Respondent's staff in

planning return to work. The Claimant replied, "I do not know. I feel that after everything has gone on, I cannot trust what people say to me." Mr Presmeg asked the Claimant what adjustments could be made when the Claimant was ready to return. The Claimant replied, "It is really difficult to picture that based on my experience with staff." Page 528.

50 Mr Presmeg asked the Claimant whether she would consider roles other than social work roles. The Claimant replied that the CQC had been looking for inspectors but that she was highly unlikely to get that, as it was all above her head, page 528. The Claimant sister-in-law said that it was a difficult question to answer immediately and they would need to think about it. Mr Presmeg said that he would take time to consider his decision.

51 On 14 April 2017 the Claimant wrote to Mr Presmeg, page 542. In her email, she said that Mr Presmeg had asked when the Claimant might be able to return to work and what role might be appropriate for her. She said that, on reflection, she did not see how she could fulfil a CQC role due to mobility issues. She also said:

> "I really do not honestly know how long my recovery will take, so I remain unable to answer your question about how long it might be before I might be fit to return to work. I could not work in Ely House location and I cannot think of any alternative roles that would be suitable or of interest to me…" page 542.

52 On 6 April 2017 Mr Presmeg wrote to the Claimant, dismissing her, page 544. He said, of the meeting on 31 March, that he had adjourned it to ask questions of Pauline Kingman. He said, "You and your representatives do not wish to attend this part of the hearing nor did you ask me to put forward any questions on your behalf."

53 Mr Presmeg said that he noted that the Claimant had said that there were other factors which caused her absence from work, including grievance and disciplinary processes. He said that he had asked the Claimant if she could confirm when she would be able to return to her role as a social worker and what adjustments she would need. Mr Presmeg said that the Claimant had replied that she was unable to answer this as she had just begun CBT and counselling. Mr Presmeg said that he had asked the Claimant if she had considered other roles. He recorded that the Claimant had said that she had lost trust and confidence in Essex County Council. Mr Presmeg said that he decided to terminate the Claimant's employment with notice on the grounds of unsatisfactory attendance. He said he had taken into account the following.

53.1 That there was no likelihood of the Claimant being able to return to her role or any other role in the near future.

53.2 That the Claimant had said that she did not feel confident in or able to trust Essex County Council.

53.3 That the Claimant had been absent since 18 June 2014. Mr Presmeg told the Claimant of her right of appeal.

In his letter of dismissal, Mr Presmeg noted that the Respondent had provided Occupational Health appointments and offered reasonable adjustments to the Claimant.

54 The Claimant contended that the First Respondent had failed to give the Claimant advance notice that Pauline Kingman was going to be present during the sickness meeting on 31 March 2017. At the Tribunal hearing, the Claimant clarified the allegation to say that the First Respondent had not told her that Pauline Kingman would be present in the building.

55 The Tribunal found that on 30 March 2017 Samantha Myddleton had told the Claimant that Nick Presmeg would conduct the meeting in the absence of Pauline Kingman, but that Mr Presmeg would put the Claimant's questions to Pauline Kingman. Nothing was said in that letter about Ms Kingman's presence in the building. The Tribunal concluded that Pauline Kingman was not, in fact, in the meeting at all; this was an adjustment that was made for the Claimant. No representation was ever made by the First Respondent about Pauline Kingman's presence in the building - this was not an issue that was raised by either party at the time. There was no evidence that the First Respondent would have told a person who was not disabled that Pauline Kingman would be in the building when that issue had never been raised by that person.

56 The Claimant contended that Mr Presmeg showed bias during the meeting and failed to acknowledge that the Claimant was disabled. She said that he based his decision on medical evidence provided by Pauline Kingman. The Tribunal found on the facts that Mr Presmeg repeatedly asked the Claimant about reasonable adjustments. For example, Mr Presmeg asked the Claimant whether she had considered alternative roles. Reasonable adjustments apply to disabled people.

57 The Claimant told the Tribunal that Mr Presmeg had said to her, during the meeting, that she was not disabled. She said, in evidence to the Tribunal, "I will never forget that statement." Immediately afterwards, the Claimant was asked when Mr Presmeg had said that statement, the Claimant replied, "I can't remember". The Claimant was then asked, in cross-examination, where, in the notes of the meeting, this statement by Mr Presmeg was recorded. The Claimant said, "I don't know. I haven't read them.. I have a visual impairment."

58 The Tribunal noted that Mr Presmeg did ask Pauline Kingman whether the Claimant was disabled and commented that she did not appear to have the physical side of rheumatoid arthritis. Mr Presmeg told the Tribunal that he had asked Ms Kingman about whether the Claimant was disabled and the features of her condition in the context of exploring what reasonable adjustments would need to be made if the Claimant returned to work. On the notes of the meeting, this context was correct. Mr Presmeg was asking about whether reasonable adjustments needed to be made.

59 The Claimant told the Tribunal that Mr Presmeg did not appear to have read her written submissions. Mr Presmeg told the Tribunal that he had read all the material presented to him.

60 Mr Presmeg was cross-examined about his comments in the meeting about needing to draw matters to a conclusion after a long period of absence. Mr Presmeg said that he believed resolution would be beneficial and he felt that the First Respondent needed to resolve the matter, but that he had not prejudged the matter, or come to a decision on it.

61 On all the evidence, the Tribunal decided that Mr Presmeg was not biased during the meeting. He did explore, on numerous occasions with the Claimant, what adjustment she might need in order to return to work and whether she could return, even to a different role. That was evidence of him conscientiously considering a return to work, rather than having a concluded view that the Claimant should be dismissed. The Tribunal found that the point of the meeting, as conducted by Mr Presmeg, was, indeed, to come to a resolution or conclusion regarding the Claimant's lengthy absence. A decision did need to be taken, one way or the other. The Tribunal concluded that it was highly unlikely that an employee would have been allowed, after such a lengthy absence, to have continued to be absent from work without any resolution being sought.

62 The Tribunal did not find that Mr Presmeg made his decision based on the medical evidence of Pauline Kingman. Mr Presmeg simply asked Ms Kingman about the Claimant's disability in the context of an exploration of reasonable adjustments. He did not say that he had taken any view of the Claimant's disability in his outcome letter, nor did he refer to Ms Kingman's opinion regarding disability in his outcome letter. Mr Presmeg did refer to the lack of likelihood of the Claimant being able to return to her role, or any other role, in the near future. That view was consistent with the view of Occupational Health reports and was consistent with the Claimant's expressed view.

63 The Tribunal rejected the Claimant's contention that Mr Presmeg told her that she was not disabled in the meeting. There was no note of this having been said and, while the Claimant asserted that she would never forget that statement being made by Mr Presmeg, she could not remember when, in the meeting, it had been said. The Tribunal considered that, if the Claimant had such a clear recollection of the statement, it was highly likely that she would have had some memory of what was said before, or after it. She had none.

64 The Claimant appealed against the dismissal on 10 April 2017, page 551 – 553. In her letter of appeal, she set out 8 grounds of appeal against the decision to dismiss her. She said, amongst other things, that Occupational Health were not independent and impartial because they were employed by Essex County Council. She said that, under the Council's sickness absence policy, the First Respondent should have moved through the process at 5 week and 10 week trigger points, but that there had been a delay of two years in her case. Regarding her return to work, the Claimant said, "I think we can all agree that it is an impossible question for me to answer." She said that there had been a complete breach of trust and confidence due to the First Respondent's actions around her sickness. She said that she was not a medical professional and had no idea when she would be ready to return to work. The Claimant referred to Mr Presmeg, saying he wanted to draw a line under matters one way or the other and said it was no coincidence that her dismissal meeting was on the last day of the financial year.

65 The Claimant was invited to an appeal meeting on either 2 or 15 May 2017 by a letter of 25 April 2017, page 579. On 26 April the Claimant said that she could only attend on a Friday. On 27 April the First Respondent offered her two Friday dates on which the appeal officer could sit: 26 May or 9 June, page 577. The appeal meeting was held on 26 May 2017, page 621. David Wilde, Director Digital Place Operations, chaired the hearing. The Claimant was again accompanied by her sister-in-law and her daughter.

66 On 1 June 2017 the Claimant sent further information to Mr Wilde, page 645. On

5 June, the Claimant sent additional material for Mr Wilde to consider, page 652. On 13 June, David Wilde interviewed Mr Presmeg, page 704. On 15 June, the Claimant emailed Mr Wilde asking for a decision on her appeal and, on the same day, Mr Wilde replied, saying that he had one further question to ask Mr Presmeg and would notify the Claimant of the outcome by 20 June, page 703. On 15 June the Claimant replied further, saying that she had requested a medical report from her GP and would forward it to Mr Wilde. On 19 June Mr Wilde sent the Claimant the minutes of his meeting with Mr Presmeg, page 707.

67 On 20 June the Claimant forward her GP medical report to Mr Wilde, page 707. The medical report was dated 19 June 2017. It confirmed that the Claimant was suffering from following long term medical conditions: rheumatoid arthritis diagnosed June 2004, lower limb vasculitis, fibromyalgia diagnosed October 2016, early osteopenia diagnosed April 2016 and work related stress and depression diagnosed 2012. The GP report did not suggest that the Claimant was fit to return to work, nor did it suggest that any adjustments could facilitate her return to work. None of the GP sick notes that the Claimant had supplied during 2016 and 2017 suggested the Claimant could return to work, or that any adjustments might be made to help her to return to work.

68 On 22 June 2017 the Claimant sent Mr Wilde comments on Mr Wilde's interview with Mr Presmeg, page 709. On 23 June 2017 the appeal outcome letter was sent to the Claimant, page 711. In the appeal outcome letter, Mr Wilde addressed each of the 8 bullet points which had been set out in the Claimant's appeal letter. In cross-examination evidence at the Employment Tribunal the Claimant agreed that Mr Wilde had provided an outcome to each of her grounds of appeal, but said that she did not agree with Mr Wilde that his conclusions were correct.

69 The Claimant contended that Mr Wilde discriminated against her by delaying the outcome of the Claimant's appeal between 26 May meeting and his outcome sent on 23 June. The Tribunal found that Mr Wilde was busy between 26 May and 23 June dealing with the Claimant's appeal, for example, interviewing Mr Presmeg and receiving the Claimant's further correspondence. He waited for the Claimant's medical note. The delay was explained by all the steps taken by him in the interim. There was no evidence that a non disabled person would have been given an appeal outcome more quickly. The Tribunal concluded that the delay of one month was not, in any event, an extended period. The Tribunal also found as the Claimant conceded that the appeal outcome letter did address all the Claimant's appeal point against her dismissal, albeit that the Claimant was not satisfied about Mr Wilde's conclusions and answers.

70 The Claimant sought early conciliation through ACAS on 22 June 2017 and issued her claims to the Tribunal on 24 July 2017. She was cross-examined about why she did not issue her claim to the Tribunal earlier. She said that she was unable to read or comprehend documents, or deal with matters herself due to her illnesses. She said that she had had to be helped in all regards by her daughter and other family members.

Relevant Law

Discrimination

71 By *s39(2)(b)(c)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access, or by not affording the employee access for receiving any benefit, facility or service, or by dismissing him or subjecting him to any other detriment.

72 The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010*. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

Direct Discrimination

73 Direct discrimination is defined in *s13(1) EqA 2010*:

"(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."

74 In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010*.

75 Accordingly, for a Claimant to succeed in a direct race or disability discrimination complaint , it must be found that:
75.1 A Respondent has treated the Claimant less favourably than a comparator in the same relevant circumstances;
75.2 The less favourable treatment was because of race or disability - causation;
75.3 The treatment in question constitutes an unlawful act, such as dismissal or detriment.

76 The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?" Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77].

77 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only, or even the main, reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

78 In *Madarassy v Nomura International Plc [2007] IRLR 246* Lord Justice Mummery said that, in discrimination cases, the burden of proof does not shift from the Claimant to the Respondent where the Claimant has proved only the bare facts of a difference in status and a difference in treatment. He said that a difference in protected status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities a Respondent had committed an unlawful act of discrimination, paragraph 56 of that Judgment.

Discrimination Arising from Disability

79 *s 15 EqA 2010* provides:

"Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

(2) Subsection (1) 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".

80 In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

80.1 What was the cause of the treatment complained of ("because of something" – what was the "something"?)

80.2 Did that something arise in consequence of the disability?

81 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

Reasonable Adjustments

82 By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

83 *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

84 *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know

that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

85 The test of 'reasonableness' in a reasonable adjustment complaint imports an objective standard. Per Maurice Kay LJ in *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] ICR 524, *Collins v Royal National Theatre Board Ltd* 2004 EWCA Civ 144, 2004 IRLR 395 per Sedley LJ para 20.

86 The *Equality Act 2010* does not specify any particular factors which are to be taken into account in deciding whether an adjustment is reasonable. The Code of Practice on Employment 2011 provides examples of some of the factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;
86.1 whether taking any particular steps would be effective in preventing the substantial disadvantage;
86.2 the practicability of the step;
86.3 The financial and other costs of the step and the extent of any disruption caused;
86.4 The extent of the employer's financial and other resources;
86.5 The availability to the employer of financial and other assistance;
86.6 The type and size of the employer.

Knowledge

87 In *Secretary of State for the Department of Work and Pensions v Alam* [2010] IRLR 283, [2010] ICR 665, [2009] All ER (D) 174 (Nov) the EAT held that the correct statutory construction the knowledge defence in a reasonable adjustment complaint involved asking two questions;
(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in (s20 EqA)? If the answer to that question is: 'no' then there is a second question, namely,
(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in (s 20 EqA)?

88 What the employer knew or should reasonably have known is one for factual assessment of the Tribunal, *Wilcox v Birmingham Cab Services Limited*, para 34.

89 In *General Dynamics Information Technology Ltd v Carranza* [2015] IRLR 44 the Employment Appeal Tribunal said that it is unsatisfactory to define a PCP in terms of a procedure which is intended at least in part to alleviate the disadvantage of disability. The PCP should identify the feature which actually causes a disadvantage and exclude that which is aimed at alleviating the disadvantage.

Unfair Dismissal

90 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

91 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Capability is a potentially fair reason for dismissal.

92 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

93 The Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

94 The fact that an employer has caused the incapacity in question, however culpably, cannot preclude the employer from ever effecting a fair dismissal, *Royal Bank of Scotland v McAdie* [2008] ICR 1087. In that case, the Court of Appeal held that, where the reason for the dismissal was an employee's indefinite incapability to do their job, the dismissal was fair, notwithstanding the employer's culpability in bringing about the relevant incapability. The Court of Appeal also cited with approval the EAT judgment in the same case, which held that there must be cases where the fact that an employer is responsible for an employee's incapacity is, as a matter of common sense and fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may be, for example, necessary in such a case to put up with a longer period of sickness than would otherwise be reasonable, paragraphs 36 and 40 of the judgment.

95 Factors which may be relevant in considering whether a dismissal for incapability was fair include the nature of the illness, the employer's need for the employee, the impact of the absences and the extent to which the employee was made aware of the position, *Lynock v Cereal Packaging Limited* [1988] ICR 760.

Discrimination – Time Limits

96 By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

96.1 the period of three months starting with the date of the act to which the complaint relates or
96.2 such other period as the Employment Tribunal thinks just and equitable.

97 By *s123(3)* conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.
98 Where a claim has been brought out of time the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure* Link [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint

unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Discussion and Decision

99 The Employment Tribunal has taken into account all the facts when coming to its conclusion in this case. However, for simplicity and clarity, it has addressed each allegation individually.

Direct Discrimination

100 *Pauline Kingman doubting the Claimant's absences and the reasons for them*. The Tribunal has found that Ms Kingman used quotation marks as a normal style of writing when quoting from other documents and that this did not denote doubt about the Claimant's illnesses. Further, all managers are required, under the First Respondent's policies, to know the reasons for employees' absences. The Tribunal concluded that there was no evidence that Ms Kingman would have treated a non-disabled person, who had given different reasons for absences and inability to attend meetings, any differently. The Tribunal is satisfied that the Claimant's disability was not part of the reason that Ms Kingman acted as she did.

101 *Pauline Kingman repeatedly requested fit notes from the Claimant even though those had been provided*. The Tribunal found that Pauline Kingman and other managers asked the Claimant to provide fit notes because there were gaps in the fit note records and because some fit notes provided were genuinely illegible. The Tribunal has concluded that Ms Kingman would have acted in the same way towards a non-disabled comparator. The way in which she acted was consistent with the Respondent's policies. Her actions were nothing to do with the Claimant's disability.

102 *From 2016 Pauline Kingman failing to provide the Claimant with copies of Occupational Health referrals before sending it to Occupational Health.* Ms Kingman did this on one occasion, only, in January 2017. The Tribunal found that this was an error and the reason for it was nothing to do with the Claimant's disability. Insofar as Ms Kingman did not discuss the OH referral contents with the Claimant, this was because the Claimant, unlike other employees, would not engage with Ms Kingman and had not attended the relevant meeting to which she had been invited. Again, Ms Kingman did not act towards the Claimant in any way because the Claimant was disabled.

103 *The First Respondent failing to give the Claimant advance warning that Pauline*

Kingman would be present at the meeting on 31 March. On the facts, Ms Kingman was not present during the Claimant's sickness meeting. Mr Presmeg saw Ms Kingman separately from the Claimant. Insofar as the First Respondent did not tell the Claimant that Pauline Kingman might be in the building, the Tribunal found that this was nothing to do with the fact that the Claimant was disabled, but was because it was necessary for Ms Kingman to present the management case as line manager, as had been explained to the Claimant earlier in the process. It was never raised as an issue by the Claimant, or anyone else, that Ms Kingman might be present in the building; and, therefore, the matter was not specifically addressed by the First Respondent. Again this was nothing to do with the Claimant's disability.

104 *Bias shown by Mr Presmeg during the sickness meeting on 31 March including failing to acknowledge the Claimant's disability*. The Tribunal has found, on the facts, that Mr Presmeg did not show bias. On the contrary, he carefully explored possible reasonable adjustments and whether the Claimant could return to work, thereby repeatedly acknowledging the Claimant's disability. The Tribunal did not accept Mr Presmeg said to the Claimant that she was not disabled.

105 *Nick Presmeg's decision to dismiss on 31 March 2017 which was based on evidence from Pauline Kingman*. The Tribunal has found, as a fact, that Mr Presmeg did not dismiss the Claimant based on the evidence of Pauline Kingman, but on the basis of Occupational Health evidence and what the Claimant herself told Mr Presmeg. The fact that the Claimant was disabled was not part of the reason Mr Presmeg dismissed her. The Tribunal accepted that Mr Presmeg dismissed the Clamant for the three reasons set out in his letter. There was no likelihood of the Claimant being able to return to work in her own role, or any other role, in the near future. The Claimant did not feel confident in, or able to trust, Essex County Council. She had already been absent for a very long time. While those factors may "arise from disability" they were not "disability," itself. Mr Presmeg did not discriminate against the Claimant directly in dismissing her. The discrimination arising from disability claim is dealt with below.

106 *Delay in adjudicating on the outcome of the Claimant's appeal between the appeal meeting on 26 May and the outcome letter in June*. The Tribunal found that there was no prolonged delay and that the delay was entirely explained by the Appeal Officer investigating the appeal and dealing with the Claimant's correspondence. There was no evidence that a non-disabled person in the same circumstances would have been treated any differently.

107 *Failure in the appeal letter to address all points raised in the appeal.* On the facts, the Tribunal found that the Claimant raised 8 points in relation to her appeal against the decision to dismiss. The Claimant agreed, in evidence to the Tribunal, that the appeal outcome letter had addressed each of those points, but that, simply, the Claimant did not agree with the conclusion. The Tribunal concluded that the appeal letter did address each of the 8 points. The allegation failed on its facts.

Failure to make reasonable adjustments

108 The relevant PCP relied on was: "Not allowing family members who were also carers into the sickness hearing while Pauline Kingman was giving evidence and not allowing them to ask questions on the Claimant's behalf instead of the Claimant attend the

meeting and asking questions."

109 The Employment Tribunal had some doubts about whether this could come within the definition of a PCP, in that it related to the Claimant individually and to an adjustment which had already been made for her. Nevertheless, the Tribunal found that the PCP was not, in fact, applied to the Claimant. The First Respondent did not fail to allow family members into the sickness hearing while Ms Kingman was in attendance. Ms Presmeg specifically asked the Claimant and her family members how they would like him to proceed. Neither the Claimant nor her family members asked that the family members be permitted to attend the meeting with Ms Kingman. Mr Presmeg invited the Claimant to put questions to Ms Kingman through him, but none was suggested by the Claimant or her family members, whether to be put by Mr Presmeg or by the family members themselves. Accordingly, it was not the case that Mr Presmeg failed to allow, or prevented family members from attending or asking questions.

110 In any event, with regard to knowledge, the Tribunal concluded that it would have been impossible for Mr Presmeg to know that the Claimant would be put at a disadvantage if family members were not allowed to attend or ask questions, rather than Nick Presmeg doing this himself. He asked the Claimant and family members to comment on the best way to conduct the process and they failed to provide him with any suggestions or observations. They did not suggest the process that he was proposing would put the Claimant at a disadvantage in any way. It was not possible for Mr Presmeg to know that the suggested disadvantage arose.

Dismissal – Discrimination Arising from Disability

Unfair Dismissal

111 It was correct that at least two of the reasons given by Mr Presmeg for dismissing the Claimant arose from her disability: that is, that there was no likelihood of the Claimant being able to return to her role, or any role, in the near future; and her previous lengthy absence. Dismissal was clearly unfavourable treatment. Therefore, the Tribunal moved on to consider whether dismissal was a proportionate means of achieving a legitimate aim. Legitimate aims included managing its workforce efficiently and in a cost effective manner and ensuring that departments were adequately staffed.

112 For the purposes of the unfair dismissal claim, the Claimant was dismissed for her inability to return to work and her lengthy absence. The Respondent had shown, therefore, that capability was the reason for dismissal, which was a potentially fair reason. The Tribunal was required to consider whether it was reasonable for the Respondent to dismiss, applying the test in *s98(4) Employment Rights Act 1996*.

113 The Tribunal noted that the Respondent had warned the Claimant that she could be dismissed if she did not return to work. It referred to Occupational Health advice, but Occupational Health had not advised that the Claimant would be likely return to work for some considerable time. OH did not advise that any reasonable adjustments could be made to facilitate her return to work.

114 The Claimant argued that Mr Presmeg should have waited until the CBT course

she was undertaking was over and/or that he should have obtained a further Occupational Health report. However, in the meetings, Mr Presmeg asked the Claimant when she considered she might be able to return but the Claimant did not give any indication that she might return after her CBT. She did not suggest that Mr Presmeg should wait until the CBT was over. She said, specifically, that she could not trust what the First Respondent said. She did the opposite of suggesting that there might be a return to work following CBT - she said she could not think of any role that she could envisage returning to. Occupational Health had already advised that CBT, in the case of the Claimant, would be likely to take an extended period to be effective, if at all.

115 The Tribunal decided that it was both proportionate and reasonable for Nick Presmeg not to seek a further Occupational Health report when the Claimant was not holding out any hope of any change. The Claimant was providing sick notes from her GP and did provide later a GP report for the appeal. Even then, her GP never suggested that there were any reasonable adjustments which could be made to facilitate a return to work. The GP report did not signal any future likelihood of a return to work.

116 Further, the Employment Tribunal considered that there was no undue delay between the First Respondent obtaining the Occupational Health report in January and inviting the Claimant to a meeting in March 2017.

117 On the evidence before Mr Presmeg, the Tribunal concluded that there was no likelihood of a return to work in the foreseeable future. Given that the Claimant had been off work since August 2015, the Tribunal concluded that it was entirely reasonable and proportionate for Mr Presmeg to dismiss the Claimant, rather than waiting for a further indefinite period. The Tribunal did not make a finding that the Respondent caused the Claimant's illness but, even if it had, in the light of a very long absence and the lack of any prospect of a return to work, as well as the Claimant being clear that the relationship of trust and confidence had broken down, it was reasonable and proportionate to dismiss. Mr Presmeg asked the Claimant about all possible reasonable adjustments, including working in other roles, to no avail.

118 Accordingly the Respondent dismissed the Claimant fairly and the dismissal was not an act of discrimination arising from disability.

Time Limits – Disability Claim

119 Given that the Claimant claims failed on their merits, it was not strictly necessary for the Employment Tribunal to consider arguments regarding time. It did not uphold any of the allegations and therefore the allegations could not amount to a continuing act. In so far as individual acts were presented out of time, the Claimant said that it was just and equitable to extend time for them. She said that the delay was short and that she had not been able to engage with the Employment Tribunal process because she was ill at the time and required the help of family members to do anything in relation to the Employment Tribunal process.

120 However, the Tribunal concluded that the Claimant was able to engage with the dismissal and appeal processes with the assistance of her family members, who attended meetings and sent relevant correspondence. It decided that the Claimant was clearly aware of Employment Tribunals and time limits. She had attended a hearing where an

earlier claim had been struck out due to failure to comply with the time limits. Given that the Claimant did know about Employment Tribunals and the time limits and given that she was able to engage with other complex appeal procedures and dismissal procedures, albeit with the help of family members, the Tribunal was not persuaded that it would be just and equitable to extend time for presenting her Employment Tribunal claim, This was so, even though the delay in submitting the claim, in relation to the meeting on 31 March and the decision to dismiss, was a short one.

121 The burden of proof was still on the Claimant to establish that it was just and equitable to extend time. In this case, on the facts, the Tribunal concluded that it was not.

Contractual sick pay claim

122 The First Respondent conceded that the Claimant was entitled to judgment on her contractual sick pay claim in relation to statutory sick pay in the sum of £3,378.51. The parties agreed that, by consent, the Tribunal should given judgment for the Claimant in her contractual sick pay claim in the sum of £3378.51.

123 Mr Jenson, acting for the Claimant, withdrew the Claimant's remaining holiday pay and expenses and other contractual ESA and SSP claims. Those claims were therefore dismissed on withdrawal.

Employment Judge Brown

5 July 2018