THE EMPLOYMENT TRIBUNALS

Claimant **Ms G Topp**

Respondent **Pinner View Motors Ltd t/a Northern Motors**

HELD AT: **London Central**

ON: **19-25 February 2019**

EMPLOYMENT JUDGE: **Mr J Tayler** **Members: Mrs J Griffiths**
Mr DL Eggmore

Appearances

For Claimant: **Ms A Sidossis**
For Respondent: **Mr D Beavis, Director**

JUDGMENT

By a Judgment sent to the parties on 27 February 2019[1] the tribunal held that:

1. The complaint of disability discrimination fails and is dismissed.

2. The Claimant was wrongfully dismissed.

3. The Claimant was unfairly dismissed.

4. The Claimant contributed to her dismissal by 33.3%.

5. The compensatory award stands to be uplifted by 15% for failure to comply with the ACAS Code.

6. The parties agreed total compensation in the sum of £4,780.12. By consent the Respondent is ordered to pay the Claimant that sum.

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[1] Corrected on 7 May 2019 to correct a typographical error as to the ACA uplift

REASONS

Introduction

1. By email sent on 27 February 2019 the Respondent requested written reasons. These reasons are produced pursuant to that request.

2. By a Claim Form submitted to the Employment Tribunal on 3 January 2018 the Claimant brought complaints of disability discrimination, wrongfully dismissal and unfair dismissal.

3. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Elliott on 15 August 2018 where the issues were identified as set out in the Case Management Order. A number of the issues were not pursued at the Hearing and so are not the subject of findings of fact.

Evidence

4. The Claimant gave evidence.

5. The Respondents called:

   5.1 Debra Beavis, Director

   5.2 Michael Beavis, Director

6. We were also provided with a witness statement from Mehdi Pour, Operations Director which we afforded such weight as we considered appropriate in circumstances in which he was not called to give evidence.

7. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

8. We were provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents.

Findings of fact

9. The Respondent is a business that operated the Pinner View Garage. Until December 2017 it also operated a car parts business.

10. The Claimant commenced employment with the Respondent on 11 July 2011. By the time of the termination of her employment the Claimant's role mainly involved driving a van to deliver car parts to customers of the Respondent. These included large-scale customers who had accounts with the Respondent and smaller scale customers that paid when parts were delivered.

11. In September 2014 the Claimant had an altercation with the Group Parts Manager, Sid Ahmed. The Claimant raised a grievance on 13 July 2015, alleging that she was suffering numerous problems at work and returning to the altercation that had happened the previous year.

12. The Claimant was invited to grievance hearing by email dated 21 July 2015. The outcome was sent on 28 July 2015. The grievance with not upheld. The Claimant was herself subject to criticism. Mr Beavis suggested that it had been unwise of the Claimant to raise the grievance and that she might come across as vindictive and difficult to manage. That was a surprising outcome. It formed part of the background to the deterioration of the relationship between the Claimant and Mr Beavis. The Claimant sent an email on 8 August 2015 expressing her concern about the way in which the grievance had been dealt with. She was told that a grievance appeal hearing would be held. The Claimant was asked to provide more specific details of her grievance, which she did by letter of 20 September 2015. A grievance appeal meeting was fixed with one day's notice. The Claimant did not attend, believing she would not have sufficient time to prepare. Thereafter the matter was not taken further by either party.

13. There is a report from Dr Curry dated 31st of December 2015, referring to the Claimant visiting the neurology clinic. It was noted that the Claimant had developed migraine in 2012 and could have migraine episodes lasting for more than one day. The Claimant was prescribed Zolmitriptan and Sumatriptan.

14. On 12 July 2016 the Claimant underwent a Hemithyroidectomy. At a follow-up on 1 August 2016 it was noted that the wound was healing well. The Claimant was signed off work from 12 July to 9 August 2016.

15. On 15 August 2016 Mr Beavis sent a memo to staff in the parts department complaining about the fact that there was a tendency for staff members to work their contractual hours without taking a lunch break and then go home, and state that they took their lunch break at home. Mr Beavis considered that this was not in compliance with the legal requirement that staff take breaks. There was a change to terms to ensure that a break should be taken during the working day, rather than at the end of the day. This was also to become a source of contention between Mr Beavis and the Claimant. Mr Beavis thought that the Claimant was still going home early and was working to the pattern that she had prior to the alteration in terms. On one occasion when he was in the vicinity of the Claimant’s house he waited outside to check the time at which the Claimant returned home; noting that she returned shortly before 4pm. When asked when she had gone home the next day the Claimant told Mr Beavis that she had not returned home until about 4.15, which was not accurate.

16. A record in the GP notes dated 5 September 2016 shows that after a follow-up from her surgery the Claimant would need to be prescribed with levothyroxine. The partial thyroidectomy led to a reduced level of thyroxine which, if not, supplemented by administration of thyroxine would cause very considerable lethargy, tiredness and inability to concentrate for the Claimant

17. In a medical record of 19 September 2016 it was noted that the Claimant been prescribed Levothyroxine sodium 50 microgram tablets.

18. On 10 October 2016 there is a GP record noting that the Claimant had been having low mood since having partial removal of thyroid. It was recorded that she was under-medicated and had been having problems with feeling tired. That suggests that despite taking thyroxine the Claimant was still not fully recovered. It was noted that the Claimant should make an appointment with her doctor to undergo a review of the level of thyroxine she was taking so that consideration could be given to whether the dose should be increased.

19. On 30 March 2017 the GP noted that the Claimant had been feeling tired and that after the review of her thyroxine level her dosage was to be doubled.

20. On 11 July 2017 there was a reference in the GP notes to the Claimant having ongoing aches and pains. It was decided that there should be a further thyroxine level test. The results of that test were provided to the GP on 28 July 2017.

21. On 1 August 2017 there was an incident when, having delivered a car part, the Claimant was given a cheque for a sum greater than the cost of the part. The Claimant raised the matter with Mr Beavis and suggested that the overpayment should be repaid to the customer. Mr Beavis said that they should await reconciliation of invoices and payments before making a repayment. His experience was that on occasions cash paying customers did not have at their cheque-book or cash to hand when a part was delivered and would not pay then but later together with a payment for another part. He thought it was likely that the overpayment was to reflect the fact that the was an earlier invoice that had not been paid. The Claimant was unhappy with this approach and argued with Mr Beavis, stating that she wanted something to document the fact that she had raised the issue of the overpayment and was acting on instruction in not arranging for a repayment to the client. Mr Beavis was annoyed by this and felt that the Claimant should simply do as she had been instructed. There was an altercation.

22. The next day, 2 August 2017, Mr Beavis wrote on a Post-it note that the Claimant had raised the issue of the overpayment. The Claimant became very annoyed and suggesting that the matter was not being dealt with properly. She recorded the incident on her telephone. Mr Beavis became extremely annoyed and told the Claimant to “fuck off” and said that he was going to “sack her arse”. He was so annoyed that immediately after the altercation he did not have a clear recollection of what he had said. However, he was told by colleagues what he was said and realised that he had used inappropriate language and that he had suggested that the Claimant was being sacked. He had a letter delivered to the Claimant stating:

> “Today, in the face of your provocation and insubordination I uttered a profanity and despite my not recalling it, others tell me I used the word sacked. This was said in the heat of the moment and I would like to retract those comments and apologise for their utterance.
>
> You are not dismissed and would kindly ask you to forgive my outburst.

I expect your attendance tomorrow, Thursday 3rd August at 8am."

23. The Claimant responded by email that date, stating:

> "I will be seeking advice from ACAS first thing tomorrow regarding your behaviour towards me and our working conditions, I will act upon their advice and contact you in due course."

24. There was a suggestion in this email that the Claimant was not intending to return to work. She went on to state:

> "Your van is available to collect any time before 10 am."

25. The Claimant already had an appointment to see her GP to receive the results of her latest blood tests. The appointment was fixed for 7 August 2017.

26. At the consultation with the Claimant's GP reference was made to stress: "stress related problem (first)". The Claimant was not at that stage prescribed medication. We accept that the Claimant was feeling stressed, although her symptoms were not nearly as severe as they later were to become. The Claimant was issued a certificate on 7 August 2017 stating that she was not fit for work for a period of four weeks.

27. On 7 August 2017 at 3:03 PM Mr Beavis sent an email to the Claimant stating:

> "I've heard nothing since you last communication. Are you coming back to work."

28. On 11 August 2017 the Claimant sent an email to Mr Beavis attaching a copy of the fitness for work certificate. She stated:

> "Mr Beavis, could I have copy of my contract plus staff handbook. please find attached copy of certificate which I will send on to you."

29. We consider that the Claimant was still considering her position with the Respondent; whether she might resign, potentially claiming constructive dismissal.

30. On 5 September 2017 a further Med 3 certificate was issued stating that the Claimant would not be fit to work from 4 September 2017 to 1 October 2017. Again, a stress related problem was diagnosed. We accept that the Claimant was suffering from stress. However, no medication was issued at that stage, and no more specific diagnosis was made.

31. On 5 September 2017 a fitness for work certificate was issued stating that the Claimant was unfit for work for the period 4 September 2017 to 1 October 2017.

32. On 8 September 2017 Mr Beavis sent a letter by email and post to the Claimant stating:

> "I believe your sick note ran out and I was expecting you back to work on Monday 4th September. It is now Friday 8th and I have heard nothing

> from you. I hope you can understand it is very difficult to run a business without knowing who is working and when."

33. Mr Beavis set out the provisions in the staff Handbook that required notification of absence within one hour of an employee's normal start time. He stated:

> "As a result of your non communication since your sick note ran out you are now in a period of unauthorised absence and this brings the possibility of a more serious disciplinary.
>
> Please contact us as soon as possible with your explanations or reasons, but at least by Friday 15th Sept 2017."

34. On 8 September 2017 the Claimant sent an email stating that she was attaching her sick note. It appears that either the document was not attached or some technical problem preventing it being received by the Respondent.

35. On 15 September 2017, the date that Mr Beavis had set for a response to his previous letter, the Claimant sent an email again purporting to attach a copy of her certificate. Mr Beavis replied that there was nothing attached. The Claimant then sent the certificate as a WhatsApp message on 16 September 2017.

36. On 19 September 2017 Mr Beavis sent a letter to the Claimant by email and post, contending that the Claimant was continuing to fail to follow reporting procedures and stating that there would be a disciplinary hearing upon her return to work that could result in a written warning. He went on to state:

> "In order for me to plan the business operation it is imperative we know of any period of sick as soon as possible. The procedures are very clear please make sure that most importantly you send a paper copy of any further fitness to work statements in advance of the next period of absence, if it transpires you don't return on Monday 2nd October 2017"

37. We consider that the Claimant thought that she would comply with Mr Beavis's requirement, providing that she provide a copy certificate on 2 October 2017. Her approach was not to provide certificates until she felt she was required to do so.

38. On 19 September 2017, the Respondent wrote seeking copies of the Claimant's medical records and asking the Claimant to go undergo assessment by a Fit For Work occupational health consultant under the scheme then operated by the government. There was a section where the Claimant could sign to state whether she agreed to being referred to Fit For Work. The Claimant signed that section.

39. On 24 September 2017 the Claimant sent an email stating that there had been a mix-up with sending her sick at certificates suggesting that the delays had been because she had suffered from migraine and stress. She alleged that she was being adversely treated because she was a whistle-blower. She complained about the way in which her lunch breaks had been dealt with. She stated:

> "I agree to the Fit for Work Occupational Health Consultant to contact me (I will post the consent letter) and for a medical report on my present health condition and the effect it has on my ability to perform my job (I will forward the consent letter to my GP)."

40. On 25 September 2017 the Claimant took a video showing her holding an envelope addressed to the Respondent. Her television was in the background showing the time and date. We conclude that the letter in which the Claimant signed her agreement to undertake a fit for work assessment was in the envelope. The Claimant must have known at the time what was in the envelope.

41. There is a video from the Respondent CCTV system on 25 September 2017 showing that the Claimant delivered the envelope.

42. On 26 September 2017 Mr Beavis sent an email to the Claimant. He stated:

> "I have received the Occupational Health Consultants approval hard copy, thank you I will get that arranged"

43. Mr Beavis was expressly stating what had been received on 25 September 2017. We consider that the Claimant must have appreciated that Mr Beavis was stating that he had received at the consent form. Mr Beavis went on to challenge the late delivery of September certificate and concluded:

> "I still look forward to your return to work on Monday second October, or your timely notification and fit for work note"

44. The email must have made it clear to the Claimant that as of 26 September 2017 Mr Beavis had not yet received a certificate for the period post 1 October 2017.

45. The Claimant attended her GP on 26 September 2017. Again there was a reference to a stress related problem. It was recorded that the Claimant was feeling low and tearful. It was noted that she has signed consent to provide her employer with information about her condition. The Claimant was provided with a fit note at that consultation. She knew the date on which she was provided with the certificate and that she had not provided it to the Respondent.

46. There are a number of emails in which the Claimant forwards correspondence to her sister on 26 September 2017. This includes a copy of the letter that Mr Beavis had sent that day. Next to sentence in which Mr Beavis states he has received the Claimant's consent to be referred to Fit For Work. The Claimant added a note "sent a copy of 25/9/17 MPEG-4 movie not opening up on my phone". This suggests that the Claimant appreciated that the video she had taken was of the envelope containing the consent form rather than a sickness certificate. The Claimant did not make any comment about the section of the letter where Mr Beavis states he was looking forward to the Claimant's return on 2 October 2017, or timely notification that she not able to do so. We considered that at this stage the Claimant believed that she would be complying with Mr Beavis's requirement provided if she delivered fitness a note on 2 October 2017, rather as soon as she receive it.

47. On 2 October 2017 the Claimant was sent a note inviting her to a redundancy meeting. Mr Beavis was considering closing the parts department.

48. On 2 October 2017 the Claimant is seen on CCTV footage delivering a further letter. We conclude that the Claimant was delivering her fitness for work certificate. The Claimant thought that she was delivering it in time. Notwithstanding the fact that the Claimant was suffering from stress and was beginning to become depressed, we consider that she knew that she was delivering the fitness for work certificate.

49. On 5 October 2017 the Fitness For Work Case Manager sent a letter stating that he had consent for a conversation with Mr Beavis about arranging a return to work.

50. On 5 October 2017 Mr Beavis sent a letter to the Claimant thanking her for the fit for work certificate received that morning and stated that he was reminding her again of the requirement to contact the Respondent on the first day of an absence and of criticising the Claimant for failing to comply with the sickness reporting rules. We accept that the Claimant thought that the way you dealt with this was to provide a sick certificate. Mr Beavis stated that the sick certificate was late and stated due to this further contravention the Claimant was now in danger of being dismissed subject to representations at a disciplinary hearing. The Claimant was invited to a disciplinary meeting on 11 October 2017.

51. We consider that the Claimant panicked. She had thought that she had delivered her certificate in time. She now appreciated that she had delivered it a day late. In her state of panick she thought that she might get herself out of the problem by suggesting that the document that she had delivered on 25 September 2017 was the fitness for work certificate. That was not true.

52. On 5 October 2017 the Claimant made an unscheduled visit to the Herts Urgent Care Mental Health Clinic.

53. On 8 October 2017 the Claimant wrote to Mr Beavis explaining her position in respect of the August and September fit notes and stating that the 25 September 2017 certificate had been at delivered the day that she received it. Up to the date of the Claimant's dismissal there was a common mistake that the Claimant and Respondent’s staff thought that the certificate was dated 25 September 2017. It was only at the stage of dismissal that Mrs Beavis appreciated that it was dated 26 September 2017.

54. The Claimant attended a disciplinary hearing on chaired by Mrs Beavis on 11 October 2017. Most of the discussion was about the failure of the Claimant to notify the Respondent of her sickness absence in good time. The CCTV video for 25 September 2017 was considered. On 12 October 2017 the Claimant provided a copy of the video of her holding up an envelope next to her television on 25 September 2017.

55. On 12 October 2017 Mrs Beavis relied to the Claimant :

> "Further to our disciplinary meeting at your home yesterday; I have seen the email and WhatsApp and their attachments which you sent to Michael Beavis.
>
> In my view the clip adds nothing to your case as it neither shows the delivery nor the note, just an envelope.
>
> I can confirm that the CCTV footage was examined for 25th September at the relevant time you indicated and there was no footage of yourself.
>
> Further CCTV footage was examined for 2nd October, the evening I suggested you pushed the relevant sick note under the premises shutters and you were seen at 1906 doing that very thing. I have asked Mr Lane to send you the clip so you have the opportunity to explain.
>
> I must remind you that lying in a disciplinary meeting is a serious matter and could result in a decision of gross misconduct due to a breakdown of trust."

56. When this email was sent there was still the common misunderstanding that the certificate was dated 25 September 2017. That is why the CCTV footage had been looked at for that date, but not 26 September 2017.

57. The Claimant responded by email on 12 October 2017 stating that she believed she had sent the certificate on 25 September 2017 and asking that the CCTV footage at be rechecked.

58. By this time the Claimant became more stressed and began to develop a depressive condition. The Claimant also referred to delivering a fit note on 2 October 2017. That was reference to the document that she suggested had also been hand delivered on 25 September 2017. As at the situation became more dire the Claimant became more confused.

59. The GP records have an entry dated 16 October 2017 recording that the Claimant had now developed a depressive disorder. It was recorded that the Claimant was feeling very low, tearful on a daily basis, that she was not sleeping well and had reduced appetite.

60. On 17 October 2017 Mrs Beavis wrote to the Claimant stating she had decided that the Claimant should be dismissed. She concluded that the Claimant had deliberately lied to her at the disciplinary hearing regarding the September/October fitness for work note. She noted for the first time that the fitness for work note was dated 26 September 2017 and therefore could not have been delivered on 25 September 2017. This was the fundamental basis for Mrs Beavis deciding the Claimant had deliberately lied.

61. On 24 October 2017 a further fitness for work certificate was provided with a diagnosis of stress and depression. The Claimant has continued to be subject

to a series of fitness for work notes thereafter and with a diagnosis of depression.

62. On 10 November 2017 the Claimant was seen by a registrar in the neurology department of the Hillingdon Hospital. It was recorded that she had intermittent headaches and of a migraine nature and that she was taking anti-migraine medication. It was recorded that she was suffering from low mood.

63. The Claimant appealed against her dismissal and attended an appeal hearing on 1 December 2017 before Mr Beavis. She continued to suggest that the fit note been delivered on 25 September 2017. She was extremely upset by this stage and did not feel able to resile from the previous statements that she had made, particularly as she had been found guilty of lying without the matter having been put to her in the disciplinary hearing. On 4 December 2017 Mr Beavis wrote to the Claimant dismissing her appeal.

The Law

Unfair Dismissal

64. Pursuant to s.94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed. It is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98(2)(b) ERA, a reason which relates to the conduct of the employee.

65. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case.

66. In considering dismissal for misconduct the Tribunal is guided by the principles set out in **British Home Stores v Burchell** [1978] IRLR 379, taking into account the neutral burden of proof that now applies in considering the fairness of the dismissal. The Tribunal considers whether at the time of the dismissal the Respondent had a genuine belief in the misconduct alleged, whether the Respondent had reasonable grounds for believing the Claimant was guilty of that misconduct and, at the time it held the belief, whether the Respondent had carried out as much investigation as was reasonable in all the circumstances.

67. The Tribunal will go on to consider whether the dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.

68. It is not for the Tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank plc v Madden** [2000] IRLR 827.

69. The band of reasonable responses test applies to the decision to dismiss and the investigation that took place**: Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23.

70. The Tribunal must consider whether the investigation was reasonable, not whether it itself would have chosen some alternative reasonable process to that adopted by the Respondent.

71. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

72. Section 122(2) ERA provides for a reduction of the basic award where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it.

73. Section 122(2) ERA provides for a reduction of the basic award where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it.

Wrongful dismissal

74. Dismissal of an employee without giving notice is unlawful unless the employee is guilty of a fundamental breach of contract which permits the employer to dismiss immediately because it goes to the root of the contract and shows that the employee no longer considers himself to be bound to comply with the terms of the contract.

Disability Discrimination

75. Disability is a protected characteristic for the purposes of the Equality Act 2010 ("EQA").

76. Disability is defined by Section 6(1) EQA:

> A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

77. An effect is 'substantial' if it is more than minor or trivial: S212(2) EQA and it is 'long-term' if it has lasted or is likely to last for 12 months: Schedule 1 section 6 EQA. The House of Lords held in **SCA Packaging Ltd v Boyle** [2009] IRLR 746 that likely meant "could well happen"; not "more likely than not".

78. If at the time that the Tribunal has to determine whether the Claimant was disabled the impairment has neither lasted 12 months nor is likely to last 12 months the effect is not a long-term within the meaning the act, even if subsequently the effect did last for more than 12 months: see **Croal v Network Rail Infrastructure Ltd** UKEAT/0506/07.

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

80. The effect of medication should be ignored for the purpose of determining whether a person is disabled.

81. The focus is on the effect that the impairment has on the ability of person to carry out the day-to-day activities: **Aderemi v London and South Eastern Railway Ltd** [2013] ICR 59. The focus is primarily on what the person cannot do as opposed to what they can do; although evidence as to what a person can do may affect the credibility of evidence about what cannot be done.

82. The Tribunal has to compare the way in which the Claimant in fact carried out normal day-to-day activities compared with how she would have carried them out if she was not impaired: **Paterson v Metropolitan Police Commissioner** [2007] ICR 1522, EAT.

83. Paragraph A7 of the Guidance on matters to be taken into account when determining questions relating to the definition of disability ('The Guidance') makes it clear that it is important to focus on the effect of the impairment rather than its cause.

84. In **Ministry of Defence v Hay** [2008] IRLR 928 the EAT held that:

> 'According to the Court of Appeal in McNicol v Balfour Beatty and the EAT in College of Ripon and York St John v Hobbs, the term "impairment" bears its ordinary and natural meaning. It may be an illness. It may result from an illness. It is not necessary to consider the cause of it. The statutory approach is self-evidently a functional one, directed towards what a Claimant cannot, or can no longer, do at a practical level'.

85. An impairment which is long-term and 'hinders the participation of the person concerned in professional life' would ordinarily be classed as a disability: **Chacon Navas v Eurest Colectivadades SA** [2006] IRLR 706, paragraph 43. For example, in **Sobhi v Commissioner of Police for the Metropolis** [2013] EqLR 13, the EAT held that the claimant's memory loss was a disability because it directly affected her ability to apply to become a police constable, which application was an 'activity' within the scope of section 6(1) EQA.

86. Direct discrimination is defined by Section 13 EQA:

> 13 Direct discrimination
>
> (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.

87. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision

88. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. However, the focus should be on the facts established at the conclusion of the hearing rather than on those "proved" by the Claimant. Taking that into account the guidance may be summarised in two stages: (a) there must be established from the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.

89. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

90. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the section: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

91. Discrimination because of something arising in consequence of disability is defined by section 15 EQA:

(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.

92. Section 20(3) and (4) EQA provide:

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

93. The approach to PCP cases was considered in **Royal Bank of Scotland v Ashton** 2011 ICR 362 and **Environment Agency v Rowan** 2008 IRLR 20. The tribunal should consider the PCP relied upon, the identity of the non-disabled comparators, the nature and extent of the substantial disadvantage asserted to be suffered by the Claimant in comparison with the comparators and the practical result of the reasonable steps the employer can take to ameliorate the disadvantage.

94. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:

> "(1) … proceedings on a complaint … may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.

95. The time limit is adjusted to take account of pre-claim conciliation.

Analysis

96. We consider that the Claimant was dismissed for a reason that related to her conduct; namely, Mrs Beavis's conclusion that the Claimant had lied when stating that she had delivered a fitness for work certificate to the Respondent's offices on 25 September 2017. That was a potentially fair reason for the dismissal of the Claimant.

97. We accept that the Respondent formed a genuine opinion that the Claimant was guilty of the conduct alleged against her.

98. However we do not consider that the Respondent conducted a reasonable and fair investigation. The Claimant was called to the disciplinary hearing to answer a charge that she had failed to comply with the Respondent's sickness reporting procedures. There was a fundamental shift in the case being advanced by the Respondent. The Claimant was not given a proper opportunity to answer the allegation that she had lied about delivering certificate on 25 September 2017. Even at the stage that Mrs Beavis sent the email with the video evidence after the disciplinary hearing she had not yet appreciated that the sickness certificate was dated 26 September 2017. It was that realisation that led her to believe that the Claimant could not be telling the truth when she stated that she delivered the certificate on 25 September 2017. This was the core piece of evidence against the Claimant. For there to be a fair procedure it was necessary that the Claimant should have an opportunity to be confronted with the clear and unambiguous inconsistency in her

contention that she had delivered the fitness for work certificate on 25 September 2017, whereas it had not been issued until 26 September 2017.

99. We consider that not giving that the Claimant an opportunity to answer this new fundamental charge was unfair and rendered the decision to dismiss the Claimant unfair.

100. There are further matters that also add to the unfairness of the dismissal. The Claimant was not provided with the rather limited notes of the disciplinary hearing until the day of the appeal hearing. Mr Beavis was significantly involved in the investigation and then undertook the appeal.

101. However, out key finding is that it was fundamentally unfair not to give the Claimant an opportunity at a hearing to address the inconsistency between them her statement that she delivered the certificate on 25 September 2017 when it was dated 26 September 2017. While that was raised again at the appeal the Claimant. By that stage was extremely upset and did not feel able to resile from her previous position.

102. We next considered what would have happened had a fair procedure been operated. We note that the Claimant's condition had been gradually deteriorating over the period of absence up to at the disciplinary process and appeal. We consider that if the Claimant had been confronted at the disciplinary hearing with the certificate and it had been explained to her calmly that she could not have delivered it on 25 September 2017 as it was not issued to 26 September 2017, we consider that the Claimant would have accepted that she her suggestion could not be right. In such circumstances, we do not consider that the Claimant would have been dismissed by this Respondent.

103. We noted that the Respondent had previously been prepared to accept that employees had made mistakes, as was the case for an employee who had taken money from the Respondent, accepted that he had done wrong and agree to repay the money. He was not subject to any disciplinary sanction. If the Claimant had been confronted with the fact that her statement that she had delivered the certificate on 25 September 2017 could not logically be correct as it was dated 26 September 2017; she would have backed down and this particular employer would have been prepared to give her the benefit of the doubt and would not have dismissed, particularly as she was soon to be made redundant. Unfortunately, once the Claimant had been held to be a liar without having the charge put to her and had become much more upset she did not feel able to resile from her contention that she delivered the certificate on 25 September 2017 when she attended the appeal. By then she had dug her heels in.

104. We next considered the claim of wrongful dismissal. We considered whether the Claimant was guilty of conduct that was so serious as to go to the root of the contract to enable the Respondent to dismiss her without notice. We consider that generally a lie will be sufficient to amount to gross misconduct. However, we do not consider that it is on every occasion that an employee tells an untruth that their conduct will be so serious as to amount to a fundamental breach of the implied term of mutual trust and confidence, particularly in the circumstance in which an employee has a previously clean

disciplinary record. We do not consider the Claimant was guilty of the type of deliberate lie alleged by the Respondent in these proceedings. They contended that after being informed of a possible redundancy situation the Claimant lied in order to obtain a redundancy payment. We considered that the Claimant believed that by delivering her sick note in on 2 October 2017 she was complying with the notification requirement. When she realised that she had failed to do so and that she might now face dismissal, in a moment of panic she told said that she had delivered the certificate on 25 September 2017. We consider that there is a significant difference between a deliberate lie told in an attempt to extract monies from the Respondent and an untruth lie in a moment of panic by an employee who is stressed and who has a previously good disciplinary record. We do not consider that the Claimant's conduct was so severe as to entitle the Respondent to dismiss her forthwith without notice. Accordingly, we find that the Claimant was wrongfully dismissed.

105. We next consider the claims of disability discrimination. Firstly, we consider that that as a result of her thyroid condition the Claimant is a disabled person. If the Claimant was not taking thyroxine she would suffer from very severe lethargy and confusion that would restrict her substantially in carrying out normal day-to-day activities, and would be likely to prevent her fully taking part in working activities.

106. Migraines were not relied upon and at the Preliminary Hearing for Case Management as representing a separate disability. They were contended to be something arising in consequence of the thyroid condition. However, we do not consider that there is medical evidence before us that supports that contention. What is more, although the Claimant was suffering from migraines from time to time, we do not consider that in this case they had any effect on the conduct for which the Claimant was dismissed.

107. By the date of her dismissal, we consider that the Claimant was disabled by reason of stress/depression. Although the Claimant was feeling stressed for much of August and September 2017 we do not consider that at that stage it would it could have been said that it would be likely to last for 12 months or more. When the Claimant took urgent advice on 5 October 2017 and was diagnosed with a depressive condition, in circumstances in which there had been a previous depressive episode at in 2016 and because of the increased severity of the symptoms, we consider from that date the Claimant was suffering from a disability of stress/depression that was likely to last more than 12 months. We consider that this did have an adverse effect on her on her day-to-day activities, limiting her ability to concentrate on even simple tasks, causing her to isolate herself and limiting her ability to deal with matters such as looking after her house.

108. We do not consider that the Claimant has established that she was subject to direct discrimination because of disability. That claim is put in an unusual way; it being suggested that the direct disability discrimination resulted from the fact that the Respondent did not believe that the Claimant had a disability and that that had caused them to discipline and then dismiss her. We do not accept that that is factually made out. Even if we analyse the matter more conventionally, we do not consider that there is evidence to establish, even a prima facie case, that the Respondent dismissed the Claimant because of her

stress/depression or hypothyroidism. We accept that the Respondent’s sole reason for dismissing the Claimant was their belief that she had not been truthful about delivering a sickness certificate on 25 September 2017.

109. We do not consider that the Claimant was dismissed to avoid making a redundancy payment. Accordingly, that element of the direct disability discrimination complaint is not made out.

110. The Claimant contends that she had an inability to submit sick certificates on time and that was something that arose in consequence of disability. We do not accept that the Claimant was incapable of delivering her certificates on time. She delivered a number of documents to the Respondent. There was nothing to prevent her either delivering the certificates by posting them under the Respondent door/shutters as she did on 25 September 2017 or sending them by email or WhatsApp. We do not consider that the delay in delivering certificates was something that arose in consequence of the Claimant's disability. Although it was not put in this way in the list of issues, it might be said that the thing that arose in consequence of the Claimant's disability was a confusion as to the date on which the certificate was delivered. We would not find that claim was made out on the facts. We do not consider that the Claimant was so confused that she did not appreciate that she delivered the certificate on 2 October 2017, rather than 25 September 2017. Our conclusion was that in a moment of panic, having thought that she had delivered the certificate on time, that the Claimant thought she could use the video from 25 September 2017 to suggest that she delivered the certificate within time.

111. We do not consider that the decision to dismiss was a result of anything arising in consequence of the Claimant's disability.

112. In respect of the harassment claim; we do not consider that when Mr Beavis waited outside the Claimant's house to see what time she returned this was related to the Claimant's disability. We do not consider that it had the purpose of creating an intimidating, hostile etc environment; or that to the extent that it did it was reasonable of the Claimant feel that way. The Claimant was contending that she was leaving work at the appropriate time. Mr Beavis was entitled to check whether that was true. He found that it was not correct. In any event, that claim would be substantially out of time. There is no reason why it would be just and equitable to apply a longer time limit.

113. We do not consider that the dismissal was to avoid a redundancy payment or that the dismissal was related to the Claimant's disability, so it could not amount to harassment.

114. We do not consider that the Claimant was paced at a disadvantage by being expected to submit sickness certificates on time. Her disability did not prevent her form so doing. There was not duty on the Respondent to make reasonable adjustments in this regard.

115. Accordingly, although we do accept that by the time the Claimant was dismissed a condition of anxiety/the stress/depression had developed to an extent it was a disability and the Claimant was disabled by reason of her thyroid condition (although it was controlled by medication) we do not consider that Claimant was subject to direct disability discrimination, discrimination

because of something arising in consequence of disability, that there was a failure to make reasonable adjustments or that the Claimant was subject to disability related harassment

116. We next considered whether compensation should be subject to any reduction on the basis of any contributory conduct. We conclude that when the Claimant stated that her certificate had been submitted on 25 September 2017 she knew that she had failed to deliver it on time. We conclude that she knew that what she was saying was untrue even though she told the untruth in a moment of panic. She was guilty of culpable and blameworthy conduct. That conduct did lead to the decision to dismiss her. We consider that it is just and equitable to reduce both the basic and compensatory awards in respect of that conduct. We also note that the at the time the Claimant was feeling stressed and that the Claimant did not have an adequate opportunity to explain herself. We consider that the appropriate level of contribution to be awarded is 1/3. Both the basic award and the compensatory awards are to be reduced by 33 3%.

117. In respect of the ACAS uplift, we considered that there was a very significant failing on the part of the Respondent, in failing to give the Claimant an opportunity to adequately respond to the revised charge against her. She was dismissed for something very different to that with which she was charged. That being said, there was at least some process. There was a disciplinary hearing and an appeal hearing. We consider that the appropriate level of ACAS uplift is one of 15%.

118. While dealing with remedy an issue arose as to whether the Claimant could amend the schedule of loss to claim that if she had not been dismissed for misconduct she would have, as alleged by the Respondent and accepted by the Claimant, been dismissed by reason of redundancy when the parts department closed, and would have been entitled to a redundancy payment. Initially, when the Claimant submitted her Claim Form the box was ticked to claim a redundancy payment. That is a payment made pursuant to the Employment Rights Act 1996. Such a redundancy payment is only payable where an employee is dismissed as redundant. However, that does not preclude the possibility that an employee might receive compensation for not becoming entitled to a redundancy payment as part of their compensatory award, if they would have been dismissed by reason of redundancy had a fair procedure been operated. Where compensation is reduced because the employee would have been dismissed as redundant the employer faces a much less substantial claim for loss of earnings than they might otherwise have faced. We accept that the Respondent is acting as a litigant in person. We accept that the Respondent has limited resources. We also accept that the precise basis of the calculation of loss has altered at this hearing. However, the Respondent has always faced a claim for compensation for unfair dismissal. The schedule of loss sets out a calculation, setting out the Claimant's estimate appropriate compensation. However, there is always a possibility that the tribunal may adopt a different approach. We consider that the Respondent has had an adequate opportunity to consider before this hearing the sums that might possibly be awarded to the Claimant. There were a number of breaks during the proceedings during which telephone advice might been obtained. However, more fundamentally, we consider that the Respondent in preparing for the tribunal hearing always has to consider what sums might be awarded. The basic approach is that the Claimant should be

put in the position she would have been in had the dismissal not been unfair. That gave rise to the possibility of a claim for the sums that would have been paid on the Claimants termination by reason of redundancy. On balance, we consider that the prejudice to the Claimant of not being able to put forward this claim outweighs that to the Respondent of having to respond to it. The Respondent has not been able to put forward any point of principle as to why such payment should not be included in the compensatory award. We do not consider there is any proper basis for contending that such payment could not be made. Accordingly, we permit the amendment to add redundancy payment as one of the sums claimed by the Claimant in this matter by way of compensation for unfair dismissal.

119. After we had dealt with the points of principle the parties agreed the calculation of compensation.

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Employment Judge Tayler

7 May 2019

Judgment and Reasons sent to the parties on 14 May 2019