



EMPLOYMENT TRIBUNALS

Claimant Mrs J Withers

Respondent: Knowsley Metropolitan Borough Council

Heard at: Liverpool

On: 17-20 December 2019

Before: Employment Judge Aspinall
Mrs J L Pennie
Mr P Gates

REPRESENTATION:

Claimant: in person

Respondent: Mr Kenward, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was FAIRLY dismissed for gross misconduct.
2. Her claim for wrongful dismissal (notice pay) fails.
3. Her claim for direct discrimination on the protected characteristic of disability fails.
4. Her claim for discrimination arising out of disability fails.
5. Her claims for failure to reasonably adjust under Section 20 and 21 Equality Act 2010 related to periods prior to the claimant being disabled for the purposes of Section 6 Equality Act 2010 and are dismissed on withdrawal by the claimant.
6. The claimant's claim of harassment under Section 26 Equality Act 2010 related to acts prior to the claimant being disabled for the purposes of Section 6 Equality Act 2010 and is dismissed on withdrawal by the claimant.

REASONS

Background

1. By a claim form dated 22 December 2018 the claimant brought a claim for unfair dismissal, wrongful dismissal (notice pay) and disability discrimination. She claimed direct discrimination, discrimination arising from a disability, harassment and that the respondent had failed to make reasonable adjustments to her work in September 2017, December 2017 and on 4 April 2018.
2. By a decision dated 14 November 2019 Employment Judge Benson found the claimant to have been disabled from mid June 2018. The allegations in respect of failure to make reasonable adjustments arose at a time when the claimant was not disabled and could not succeed. The claimant's harassment claim also fell away. Those claims are withdrawn.
3. The claims before the tribunal at final hearing were as follows:
 - 3.1 A claim for unfair dismissal. In particular the claimant argued her dismissal was unfair because:
 - 3.1.1 There was an error in the briefing report that went to the investigatory panel to the effect that the claimant worked at Tesco *during hours when she should have been working for the respondent*. The offence should never have been classified as gross misconduct;
 - 3.1.2 She was questioned at investigatory interview by Sue Welsh, HR as well as the investigating officer and this was unreasonable and unfair;
 - 3.1.3 That her dismissal was also procedurally unfair because Natalie Hadwin was not interviewed about what was said on 26 February 2018. The claimant says she offered to work from home that day and the offer was declined by Ms Hadwin.
 - 3.1.4 Her suspension was excessive; and
 - 3.1.5 She had no welfare visits from the respondent whilst off sick.
 - 3.2 A claim for wrongful dismissal /breach of contract for notice pay. In particular the claimant says the offence ought not to have been gross misconduct and she ought not to have been dismissed for it but, in the alternative, if she were to have been dismissed then she ought to have been paid notice pay.
 - 3.3 A claim under section 13 of the Equality Act 2010 for direct discrimination on the protected characteristic of the claimant's disability. The claimant says her dismissal was the less favourable treatment and that the respondent would not have dismissed someone who was not disabled.

- 3.4 A claim under section 15 of the Equality Act 2010 for discrimination arising out of the claimant's disability.
- 3.4.1 The claimant says she was dismissed because she was off sick in February and March 2018. She says the sickness absence arose from a disability.
- 3.4.2 The claimant also argued as part of her closing submissions that her differing ability to work in different roles was a "something" which arose in consequence of her disability and for which she was dismissed.

The Hearing

4. The claimant gave her evidence in a reliable and straightforward way. She was consistent and credible as to the content of the telephone call with Ms Hadwin on 26 February 2018 in that she offered to "put bits on the system" that is to say to do some limited work from home that day but was instructed not to.

5. The respondent called Ruth France, Head of Service who acted as investigating officer, Justin Thompson, Assistant Executive Director (Corporate Support) who was the decision-making office on dismissal, Natalie Hadwin, Team Manager, the claimant's team manager and Colette Dutton, Executive Director (Children), who heard the appeal. All of the respondent's witnesses gave their evidence in a reliable and straightforward way.

6. Ms Hadwin readily admitted an error she had made in mishearing the claimant's condition in their telephone call on 26 February 2018 as gastroenteritis and not gastritis.

Adjustments

7. There was a discussion at the outset of the hearing as to any adjustments anyone might require. The claimant required no special adjustments. It was agreed that anyone could ask for a break at any time and that breaks would be given to allow the claimant, litigant in person, who described herself as still suffering from anxiety and depression, time after giving evidence to prepare to cross-examine the respondent's witnesses and time after each witness to prepare for the next. Time was also given to allow the claimant to prepare written closing submissions and the respondent's representative agreed to make his submissions first to assist the claimant in seeing how it might be done.

8. Just before the claimant cross-examined the respondent's witnesses she became upset and said this was the most difficult part for her as she had to face those she felt had discriminated against her. The tribunal consulted her and the respondent as to what adjustments might be made. The claimant was adamant that she wished to continue and that she would cope. The tribunal adjourned to consider how best to proceed. It was decided that we would, with the respondent's representatives consent, direct the respondent's witnesses to take the witness stand further away from claimant and we would, if it could be agreed, have closing submissions the following day to allow the claimant time to rest after cross examination and to prepare overnight for closing submission. The respondent's representative agreed and the adjustments were made.

Documents

9. There was an agreed bundle of documents presented in two large lever arch files together containing around 850 pages. There was also a small lever arch file containing the pleadings and there was a further small lever arch file containing the witness statements.

List of Issues

10. A List of Issues was agreed at the preliminary hearing for case management purposes. The agreed issues at final hearing were:

Unfair dismissal

- 10.1 Can the respondent show a potentially fair reason for dismissing the claimant?
- 10.2 Was the dismissal fair or unfair under Section 98(4) Employment Rights Act 1996?

Wrongful dismissal

- 10.3 Was the respondent entitled to dismiss the claimant without notice by reason of gross misconduct?

Direct disability discrimination Section 13 Equality Act 2010

- 10.4 Has the claimant proved facts from which the tribunal could conclude, in the absence of any other explanation, that the claimant was treated less favourably, because of a protected characteristic, namely any disability in issue, and a hypothetical comparator in the same material circumstances, who was not disabled, would have been treated?
- 10.5 If so, can the respondent nevertheless show that there was no contravention of Section 13?

Discrimination arising from a disability section 15 Equality Act 2010

- 10.6 Did the respondent treat the claimant unfavourably because of something arising in consequence of any alleged disability?
- 10.7 If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Remedy

- 10.8 If any complaint is upheld, what is the remedy to which the claimant is entitled, and should any award be reduced on account of contributory fault, or on the basis of any finding as to the date by which, and or percentage chance, that the claimant might have been fairly dismissed in any event had a fair procedure been followed, and/or on the basis of a different reason?

Facts

The claimant's role as social worker

11. The claimant was an experienced social worker working part-time in children's social care for Knowsley Metropolitan Borough Council from 11 February 2011. She worked as a social worker in the Children and Families Division of Children's Social Care. Her team manager was Natalie Hadwin.

12. The claimant was a member of a profession, social work, and was bound by the Health Care Professions Council Standards of Conduct, Performance and Ethics and its requirement that social workers be honest and trustworthy.

13. The respondent had a Staff Behaviour Framework in place which set out expected behaviours which were developed with specific reference to the Council's core values. The core values were: act with integrity, being accountable, openness and transparency and respect for people.

(a) The core value of act with integrity requires employees to demonstrate honesty, reliability, and trustworthiness, and do the right thing.

(b) The core value of openness and transparency requires employees to make decisions in open and transparent manner and share information whenever possible.

Disciplinary procedures

14. The council's disciplinary procedure set out examples of gross misconduct. It provided that "gross misconduct is an act or omission on the part of the employee of such seriousness that the council is justified in no longer tolerating the employee's continued presence in the workplace and could lead to summary dismissal for a first offence. Some examples of gross misconduct that could lead to summary dismissal for a first offence are: theft, dishonesty, fraud, falsification of records..... this list is not exhaustive"

15. The claimant worked part time for the respondent for 18 hours per week. She worked Mondays and Tuesdays 9.30pm – 5pm and Wednesday mornings 9.30 – 1pm. Her role involved home visits.

16. In December 2017 the claimant had 11 cases to manage. There were children in placements that she had to visit on a weekly basis and she had case notes to record on the computer system known as ICS.

17. One of the cases the claimant was handling was a case involving two siblings who were in placement. The children were placed in Area B but were going to school in Area A. On occasions for three weeks in late November and early December 2017 the claimant had to drive the children from Area A to Area B after school and then get herself home. The round trip sometimes took two hours. The claimant was losing time driving which could have been spent visiting other children or writing up visits on ICS. In December 2017 the claimant was falling behind in her work.

18. The journeys the claimant made were on Monday 27 November, Tuesday 28 November, Tuesday 5 December, Wednesday 6 December, Thursday 7 December, Monday 11 December, Tuesday 12 December and Wednesday 13 December 2017.

19. When the children's placement ended on 19 December 2017 the claimant was behind with her work particularly in relation to the completion of case supervision records.

20. There had been no performance issues with the claimant, who had always been ready and well prepared for her monthly supervision meetings prior to December 2017.

21. On 8 January 2018 the claimant met with Natalie Hadwin for a supervision meeting. It lasted 90 minutes. There was agreement that no further cases would be allocated to the claimant and that outstanding record keeping "will be added into ICS retrospectively".

22. On 29 January 2018 Natalie Hadwin emailed her line manager Ann Clarkson to say "Ann, I have gone through Jo's case load these are her current outstanding tasks..... There is a lot to do and I am conscious she only works 18 hours, I'm thinking of reallocating some cases". The email included a list of cases and the outstanding work to be undertaken in each case.

23. Natalie Hadwin and Ann Clarkson met to discuss the claimant's workload. The meeting resulted in an agreed action plan which Natalie Hadwin emailed to the claimant on 8 February 2018 saying "Hi Jo, please see attached action plan as discussed with Ann. This will be reviewed fortnightly, starting on 27/2/18. I will send you invites. There is a lot of work to catch up on Jo, along with your current case in proceedings, you may need to factor admin time into your diary. If there is anything you are struggling with please let me know as soon as possible."

24. The next supervision meeting took place on 20 February 2018. Natalie Hadwin began, as the agenda for the supervision meetings always provided, by asking about the claimant's welfare. There was discussion and agreement that the claimant still had a lot of work outstanding and it was agreed that she would work at home for 2 days the following week to catch up on outstanding tasks.

25. The 26 and 27 February 2018 were the dates designated for the claimant to work at home to continue to work to the action plan.

26. On the morning of the 26 February 2018 the claimant was suffering severe upper abdominal pain. She went to see her GP who wanted to investigate the claimant for gastritis. The GP notes record "stress related problem". In the history section of the notes the GP records "still {part time} in Tesco which is a complete counter to main job, enjoys company there and no pressure, pay much less though". Omeprazole was prescribed to relieve stomach acid discomfort and a note was provided declaring the claimant "unfit for work".

27. The note entitled Statement of Fitness for Work, in the box where the condition is described, said "patient awaiting investigation" and a "X" was put in the box that said "I advise you that you are not fit for work". There was a box which provides an option for a GP to say that a patient may benefit from a phased return to work, amended duties, altered hours and or workplace adaptations. Each of these options was struck through as not applying to the claimant at that time. There is a section in the form that explains "what your doctor's advice means". It provides:

"You are not fit for work: Your health condition means that you may not be able to work for the period shown. You can go back to work as soon as you feel able to and, with your employer's agreement, this may be before your fit note runs out.

You may be fit for work: You could go back to work with the support of your employer. Sometimes your employer cannot give you the support you need and if that happens your employer will treat this form as if you are 'not fit for work'".

28. On 26 February the claimant was not fit for work. The GP said that would be the case until 12 March 2018. The note provided for a situation in which the claimant may be able to go back to work sooner than the 12 March with the employer's agreement. It was up to the claimant if she felt able to go back to work before the 12 March to tell the respondent and with its agreement and possibly support in terms of a phased return, amended duties, altered hours or workplace adaptations she might have returned before 12 March 2018.

29. 26 February was the first of the two agreed work from home catch up days for the claimant. She was due to have logged on to the respondent's computer system at 9.30 am. She returned home from her GP appointment later than 9.30 and telephoned her team manager to explain why she had not logged on.

30. There was agreement between the claimant and Natalie Hadwin as to what was said in that phone call. The claimant told Natalie Hadwin that she had been to the GP, that she was being investigated for gastritis and that she was signed off sick for two weeks. In response to this Natalie Hadwin said that she would arrange an urgent referral to occupational health. The claimant offered to work from home (she said she could "put some bits on the system"). Natalie Hadwin, who had not seen the fit note, said the claimant should not work whilst signed off sick.

31. Natalie Hadwin made an urgent referral to occupational health. In that referral form she misdescribed the claimant's condition as gastroenteritis. She also noted "given that Joanne is currently dealing with formal capability issues this may also impact upon her current sickness and may require support from occupational health at this time". An appointment was made for the following week on Tuesday 6 March 2018. The letter inviting the claimant to attend the occupational health appointment was sent on 26 February 2018 and said, "It is important that you attend this appointment as the occupational health unit will be able to offer you advice regarding any health problems you have and support you".

32. On 27 February, the second work from home day, the claimant remained unfit for work.

33. On 28 February 2018 the claimant, still unfit for work under the terms of the fit note, went to work in her second job at Tesco Formby. The claimant had had this second job for some years. The claimant had never told the respondent that she had this second job. She worked part time hours over Wednesday evenings, Thursdays and Fridays for Tesco. She usually worked ten hours per week for Tesco.

34. The claimant was not well enough to drive and so got a lift to work at Tesco on Wednesday 28 February. She arranged with her colleagues on the checkouts that she would do checkout duties but not the plastics, tags or moving trolleys; all of which required lifting, moving about or bending which she would find uncomfortable. Her colleagues covered those parts of her role for her.

35. She did not tell Tesco that she had been signed unfit for work by a GP. She did not approach a team manager or Tesco HR to report that she was unfit but would be fit with the adjustments to her duties.

36. The claimant also worked for Tesco on Thursday 1 March 2018.

37. On Monday 5 March the claimant would have been due to work for the respondent had she not been signed off sick. She made no contact with the respondent. She did not attend work for the respondent and did not inform them that she had been able to work at Tesco the previous week. She did not contact Natalie Hadwin to request any adjustments and she did not ask if she might work from home.

38. On Tuesday 6 March the claimant attended the occupational health appointment that Natalie Hadwin had requested. She was seen by occupational health nurse Margaret Cotgrave. The claimant reported work related stress since summer 2017. Margaret Cotgrave prepared a report for the respondent in which she said that the claimant presented as “physically depleted” and “low in mood”. Ms Cotgrave’s advice to the respondent was “Joanne is unfit for work and this is likely to be the case for the next 4 weeks at least until she is further investigated and her symptoms have improved”. The symptoms to which she refers are gastritis symptoms. During the meeting there was much discussion about managing nutrition and wellbeing. Ms Cotgrave also reported “prior to returning to work, I plan to refer her for a stress risk assessment to identify her work related stressors and this will be discussed with her Manager to discuss any support measures that can be accommodated until she recovers. Unfortunately, at this current time she is too unwell to engage in this process”.

39. The claimant who had been able to work at Tesco the week before and went on to work at Tesco the next day had persuaded the occupational health nurse that she was unfit for any work and too unfit even to engage in a stress risk assessment questionnaire. The claimant did not tell Ms Cotgrave that she had been able to work at Tesco. The duties in the Tesco role and the respondent social worker role were different but the claimant presented at the occupational health assessment as being so unwell that she could not even complete a questionnaire. She deliberately withheld information from Ms Cotgrave that was directly relevant to their discussion.

40. Wednesday 7th March 2018 was the date that Natalie Hadwin had arranged for the claimant to meet with her and Ann Clarkson to review the action plan and the support that was in place to bring the claimant’s work up to date. The meeting did not take place as the claimant was signed off sick.

41. The claimant went to work at Tesco on Wednesday 7th and Thursday 8th March 2018 and did not inform Tesco HR manager that she was still signed unfit for work or that an occupational health nurse engaged by the respondent had said she was not even fit to complete a questionnaire risk assessment.

42. On Monday 12 March the claimant went back to her GP. The fit note was due to expire and she reported that her symptoms had not eased. She was signed off, again as unfit for work, this time for a month until 9 April 2018. The GP again ticked the box “unfit for work” and scored through the options for the claimant to be able to work with a phased return, amended duties, altered hours or workplace adjustments. The GP knew that the claimant worked at both Tesco part time and the respondent

part time. The GP issued a fit note that said that the claimant was unfit for work, it did not differentiate between roles.

43. On 12 March Ann Clarkson wrote to the claimant regarding concerns about her working practices. The letter said that Ruth France was appointed as investigating officer to investigate (i) significant gaps within case recording despite the implementation of an informal action plan and the claimant's (ii) failure to carry out important tasks for one particular child.

44. On Wednesday 14 March 2018 the claimant was again working at Tesco whilst signed off sick, having not told the respondent she was fit to work at Tesco and having not told Tesco that the GP had signed her off as unfit to work. At around 6.30pm whilst she working on the checkouts a colleague from the respondent, Virinder Crawford saw her at work. Virinder Crawford reported this to her Head of Service. Virinder Crawford said in her email "When Joanne recognised me she was clearly surprised and looked physically uncomfortable.....I asked her how long she had been working at the TescoI asked her how she was and she said she was fine...."

45. On 15 March 2018 occupational health nurse Margaret Cotgrave emailed Senior HR Adviser Sue Welsh. "Hi Sue, following our conversation this morning regarding Joanne having been discovered working in Tesco ... in my opinion...from a gastro intestinal perspective, if she is fit enough to work in Tesco she is fit enough to work at her substantive role in KMBC...regarding her alleged work related stressors, if she is fit to work in Tesco, she is fit to engage in the suggested Stress Risk Assessment to identify and address her alleged work related contributing factors to her current low mood."

46. In response to the information from Virinder Crawford and the occupational health nurse's opinion the respondent convened a meeting of its Investigation Panel for Financial Irregularity.

Investigation Panel meeting and suspension

47. The panel met on 19 March 2018. It comprised Yvonne Ledgerton, Bernie Green, Karen Hogan, James Duncan, Peter Murphy and Dave Turner. The notes of the panel meeting record that Ann Clarkson had telephoned the claimant on 14 March 2018 at around 17.31 as she had wanted to tell the claimant that a letter was coming out to her convening a disciplinary for her performance issues. Ann Clarkson hadn't wanted to just send such a letter to someone off sick so she rang to discuss it. The claimant's phone had gone to voicemail and Ann Clarkson had left a message. The claimant returned the call at 17.48 and said that she had been on the toilet. At 18.30 that same evening Virinder Crawford saw the claimant at work in Tesco. The claimant had not mentioned being either at work at Tesco previously, or about to go to work when speaking to Ann Clarkson forty two minutes earlier.

48. An email from Peter Murphy Assistant Executive Director of Children's Social Care to Ann Clarkson confirmed that the panel decided to suspend the claimant from duty and to investigate her for gross misconduct. The email referred to two separate investigations; one was the disciplinary linked to performance issues and the email referred to "this latest act which takes precedence", that was the working at Tesco whilst off sick issue. Ruth France was now appointed to deal with both

investigations, though the working at Tesco, a potential gross misconduct issue took precedence.

49. The panel classified the potential offence as gross misconduct and so decided to suspend the claimant from work. She was suspended by a letter dated 20 March 2018 from Ann Clarkson sent to her home address. The letter sets out that the allegations are: "Working for Tesco plc whilst claiming sick pay from Knowsley Council and that you are in breach of the Council's Code of Conduct Section 5.1 regarding other employment."

50. The letter informs the claimant that the suspension is a precautionary act and not a form of disciplinary action. It informs her that the Health Care Professions Council (HCPC) will be advised of her suspension, that Ruth France will be appointed to investigate the allegations and it says that the claimant is encouraged to be accompanied at the investigatory interview by a Council work colleague or trade union representative.

51. The letter states in bold type "These are very serious allegations which could constitute gross misconduct under the Council's Disciplinary Procedure and, if proven, could lead to the termination of your employment with the Council."

52. The claimant was suspended on full pay, though she was off sick. Her annual leave continued to accrue and she was provided with a support officer, Claire Cashmore. She was also referred to the Council's Listener Scheme and given contact details for the Senior HR Adviser Sue Welsh.

Letter inviting claimant to investigatory interview for working at Tesco

53. The claimant was invited to an investigatory interview by a letter from Ruth France dated 27 March 2018. The interview was to take place at 9.30 am on 4 April 2018 at the respondent's Computer Centre premises. The interview was to investigate the allegations set out in the suspension letter. The warning in bold type in the suspension letter was also repeated in the invitation letter as was the right to be accompanied. The claimant was also reminded of the respondent's counselling service.

54. On Thursday 29 March 2018 the claimant had been scheduled to have her review appointment with occupational health nurse Margaret Cotgrave. This review had been arranged at the 6th March appointment before the claimant had been seen working at Tesco. The claimant pointed out that Thursdays were not a working day for her at the respondent and asked could the appointment be rearranged. Emails between Sue Welsh and Ann Clarkson confirmed that the appointment was rearranged. A second letter of 27 March 2018 invited the claimant to attend a rearranged occupation health meeting also on 4 April 2018, the date of the investigatory interview, but to take place after the interview at 11.15 am.

55. James Robinson, deputy secretary of Unison for Knowsley was advising the claimant at this time. He was corresponding with the respondent's managers in relation to the disciplinary procedure and the convening of hearings.

Investigatory interviews

56. On 27 March 2018 at 9 am at the respondent's premises at Nutgrove Villa, Ruth France interviewed Virinder Crawford. Virinder Crawford confirmed that she

knew that the claimant was a social worker who was off sick when she saw her working in Tesco on 14 March 2018.

57. On 4 April 2018 Ruth France interviewed the claimant. Also present were Sue Welsh the Senior HR Adviser, James Robinson from Unison supporting the claimant and Emma Griffiths to take notes. In this interview the claimant admitted that she had worked for Tesco since July 2016. When asked had she received permission to do this work the claimant said that she had not realised that she had to.

58. The claimant knew that she had to have permission to work in another role whilst working as a social worker. She had not obtained this permission. She told Virinder Crawford on 14 March 2018 that she had been working for Tesco for about a year. She told Ruth France at the investigatory interview on 4 April 2018 that she had worked there since July 2016.

59. Ruth France asked the claimant why she hadn't mentioned working at Tesco to occupational health. Ruth France said "there may have been other duties we could have put you on to support you with this". Sue Welsh said "You need to understand that the fact that you were off work sick yet working in alternative employment is a fraudulent issue. You didn't inform us of anything you couldn't do, therefore we weren't able to support you in this. We could have reviewed and maybe offered other duties". Sue Welsh asked if she could ask a question and James Robinson pointed out that she had already asked questions and that it felt as though there were two investigating officers. The claimant had no questions and nothing to add. The meeting closed.

60. The claimant then went directly to an occupational health appointment. Margaret Cotgrave made an appointment for the Stress Risk Assessment (SRA) to take place on 10 April 2018 and reported "I understand that following her OH consultation on 6.3.18 she continued to work at her second job in Tesco and following KMBC becoming aware and conducting an investigation, she is citing this as the contributing factor to her developing anxiety. I discussed with Joanne today that my concerns regarding her health at the last appointment was largely due to her gastric condition and reported symptoms, however if she felt well enough to attend her second job then in my opinion she was well enough to attend her role with KMBC and engage in the SRA process to help identify her concerns and advise on support measures"

Disciplinary hearing arranged for 16 May 2018

61. The claimant was invited to attend a disciplinary hearing by a letter dated 30th of April 2018 from Ruth France. The letter sets out the following allegations made against her "You have been working for Tesco plc whilst claiming sick pay from Knowsley Council and you are in breach of the Council's Code of Conduct section 5.1 regarding other employment". The letter warned "these are very serious allegations which could constitute gross misconduct and the council disciplinary procedure and if proven could lead to the termination of your employment with the council". The claimant was advised of the right to be accompanied by a trade union or the representative. The disciplinary procedure was attached as were relevant documents to be used at the disciplinary hearing. The claimant was advised that Virinder Crawford would be called as a witness at the disciplinary hearing, as would Ann Clarkson.

Mr Peter Murphy / Mr Justin Thompson

62. At the claimant's request the disciplinary hearing scheduled for 16 May 2018 was postponed. The claimant was advised in writing on 9 May 2018 that the disciplinary hearing officer would be Peter Murphy, Assistant Executive Director. Sue Welsh, senior HR adviser, also advised the claimant that James Robinson from Unison would be available to represent her as a rescheduled hearing to take place on 30 May 2018. The allegations, and the claimant's rights, were restated. The claimant objected to the hearing being conducted by Mr Murphy as he had been part of the investigatory panel that had suspended the claimant. The respondent accepted that objection and stood Mr Murphy down and appointed Justin Thompson who had had no prior involvement with the case to hear the disciplinary case.

The claimant's grievance

63. The claimant brought a grievance on 10 April 2018. It related to her feeling overwhelmed by her caseload and to the lack of support she had received following her return to work. The grievance was investigated by Tracey Overs.

Disciplinary hearing opened on 30 May 2018

64. On Wednesday 30 May 2018 at 9:30 am the disciplinary hearing began. Justin Thompson was the hearing officer. Graham Ennis was present as employee relations officer. Ruth France was present as investigating officer. The claimant was accompanied by James Robinson from Unison. Emma Griffiths took notes. The claimant said that she had said on 26 February 2018 that she could work from home and that Natalie Hadwin said that she couldn't. The claimant said that she was able to work at Tesco because adjustments were made for her and that she could have worked from home for the respondent if she had been allowed to do so. Justin Thompson asked the claimant if she was happy that they contact Tesco to find out what they had been told and what adjustments had been put in place. The claimant agreed. The hearing was adjourned for the respondent to contact Tesco.

Respondent writes to Tesco

65. On 21 June 2018, Nicola Hawkins, corporate board unit investigator wrote to Tesco seeking information about the claimant. The respondent wanted to know whether Tesco had known the claimant was unwell and if so what adjustments Tesco had made to help the claimant stay in work. Andrea Griffiths checkout manager at Tesco replied on 28 June 2018 "I was not aware that Joanne was unwell at this time and no adjustments were made"

Mid June 2018 claimant disabled

66. By mid June 2018 the claimant, who was suspended from work and facing disciplinary action, was disabled due to her stress and anxiety.

July 2018 grievance process

67. On second July 2018, Tracey Overs, investigating officer for the grievance, wrote to the claimant. A meeting was arranged to take place to hear the claimant's grievance on 9 July 2018. The claimant was advised of her right to be accompanied at that meeting.

68. The grievance hearing took place and was adjourned for a decision to be made.

August 2018 documents shared with claimant

69. On 2 August 2018 Graham Ennis wrote to the claimant enclosing a copy of the reply from Tesco. He notified the claimant that the reconvened disciplinary hearing would take place on Tuesday 28 September 2018.

The claimant contacts Tesco

70. The claimant then contacted Tesco herself and at her request three of her colleagues prepared statements to the effect that the claimant had been ill in late February and early March 2018 and that adjustments had been made, informally to her role. The checkout manager Andrea Griffiths wrote a second time to the respondent. This time she said that she had not been aware of the arrangements that had been put in place for the claimant at the time but was now aware that the claimant could not complete some of her normal jobs and that the team had made adjustments for the claimant amongst themselves.

Grievance outcome

71. The claimant's grievance outcome letter was sent to her on 5 September 2018. The letter summarised her concerns as the following four issues:

- (1) You felt you were not supported upon your return to work on 27 September 2017 until the end of February 18 by your team manager Natalie Hadwin and Head of Service Ann Clarkson.
- (2) The lack of support caused you health issues.
- (3) the lack of support meant you accrued many hours of flexible time that you state you were unable to take due to the pressure of your workplace during that time from September 2017 to February 2018.
- (4) You are requesting that hours owed to you are paid.

72. Tracey Overs upheld points 1 and 4. The claimant appealed against the findings on 2 and 3. On 11 September 2018 the claimant was informed that the appeal would be heard by a senior manager and she was advised to prepare a written statement setting out the grounds of the appeal, any evidence to support her and the reasons why the appeal should be upheld. The claimant set out her case in writing in a letter dated 28 September 2018.

18th September disciplinary hearing reconvened

73. The reconvened disciplinary hearing took place on 18 September 2018. The claimant attended and was represented by James Robinson. Ruth France presented the management case. Virinder Crawford gave evidence. Natalie Hadwin gave evidence. Graham Ennis from HR attended and Emma Griffiths took notes. At the end of the hearing the claimant agreed that she had had a fair opportunity to present her case. Justin Thompson adjourned to consider his decision.

74. Justin Thompson decided to dismiss the claimant. He put his reasons in writing to her on 25th September 2018. The reason for dismissal was that the claimant did not inform the council that she was fit and able to return to work as

evidenced by her working at Tesco on multiple occasions between 28 February and 21 March 2018. Mr Thompson took the following into account in reaching his decision

- (a) The council had made adjustments to enable the claimant to work from home for the week beginning 26 February 2018
- (b) The claimant went to her GP on 26 February and received a doctor's note signing her off work until 12 March 2018.
- (c) The claimant informed her line manager of her illness on that day and due to the conditions that she described and the fact that she had already been to the doctor and been declared unfit the manager informed her that she was unfit to work and would be deemed absent due to illness
- (d) The doctor's note included provision that the claimant could go back to work as soon as she felt able and with the employer's agreement
- (e) On 28 February the claimant went to work at Tesco so was fit to return to work, with adjustments, at that point
- (f) The claimant did not tell the respondent she was fit to return to work with adjustments and was therefore claiming sick pay from the respondent when she was fit to be at work
- (g) The claimant did not inform the respondent that she was fit to work on 5 March 2018
- (h) The claimant did not inform the respondent that she was fit to work when she met the occupational health nurse on 6 March 2018 and did not disclose her ongoing work at Tesco to OH
- (i) The primary responsibility for disclosure lay with the claimant

75. Mr Thompson decided to dismiss the claimant. He considered other sanctions such as final written warning but said that the seriousness of the issue warranted dismissal. He notified the claimant of her right to appeal.

Second stage grievance

76. The claimant's appeal against points 2 and 3 being dismissed in her appeal was heard on 14 November 2018. The claimant attended and was supported by her union representative Mr Robinson. The outcome was put in writing in a letter dated 11 December 2018 from the second stage appeal manager Jill Albertina, Assistant Executive Director. Ms Albertina wrote " I believe there is sufficient evidence that appropriate supervision and support was in place to meet your needs at what was clearly a difficult time for you. I could find no evidence that opportunities to leave or use flexi hours were denied you". The claimant was advised of her right to appeal against the second stage outcome.

Appeal

77. The claimant appealed against her dismissal. Caroline Wood, Senior HR Officer wrote to the claimant telling her the appeal would be heard on 10 December

2018. It was postponed and took place on 21 January 2019. Colette Dutton, Executive Director heard the appeal.

78. The claimant attended and was represented at the appeal. The respondent has brought its senior solicitor Alan Johnson to sit in at the hearing to advise the panel. The claimant objected and threatened to withdraw from the appeal hearing unless the respondent's solicitor withdrew. The respondent accepted the objection and the hearing reconvened without Alan Johnson.

79. James Robinson stated the claimant's case. He submitted that the sanction should be a two year final written warning and that the claimant should not lose her career as a social worker because of these allegations. Colette Dutton adjourned to reach her decision.

80. Colette Dutton dismissed the appeal. She agreed with Mr Thompson that the claimant had failed to notify the council that she was fit enough to work for a second employer whilst she was reportedly unfit to fulfil her duties as a social worker for the Council. Ms Dutton concluded that the claimant deliberately withheld this information with the intention of misleading the Council and that constituted serious dishonesty and gross misconduct.

81. At each stage of the disciplinary process; investigation, disciplinary hearings and appeal hearing the claimant was provided with copies of the minutes of the hearings and given the opportunity to amend or agree the minutes. Amendments were made at her request. The claimant pointed out that the appeal minutes wrongly recorded Graham Ennis as having been in attendance.

82. The claimant's dismissal was upheld at appeal. Her employment had ended on 25 September 2018. She brought her tribunal claim.

The Law

Unfair dismissal

83. The claimant claimed unfair dismissal. The relevant law on unfair dismissal is set out in Section 98 of the Employment Rights Act 1996 which provides, so far as is relevant:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**
 - (a) the reason (or, if more than one, the principal reason) for the dismissal; and**
 - (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
- (2) A reason falls within this subsection if it...(b) relates to the conduct of the employee...**

...
- (3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**

- (a) 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, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

84. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: Abernethy v. Mott, Hay and Anderson [1974] ICR 323, CA.

85. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out such investigation as was reasonable in all the circumstances of the case and whether the sanction of dismissal was within the range of reasonable responses: British Home Stores Ltd v. Burchell [1978] IRLR 379, Iceland Frozen Foods Ltd v. Jones [1983] ICR 17.

86. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: J Sainsbury plc v. Hitt [2003] ICR 111.

87. The tribunal also has regard to The ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures* which provides, at paragraphs 4, 9 and 10:

4. ...whenever a disciplinary ... process is being followed it is important to deal with issues fairly. There are a number of elements to this:

...

- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

...

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

Discrimination claims

88. The claimant also brought discrimination claims and the law is set out in The Equality Act 2010. The Equality Act provides for a shifting burden of proof. Section 136 provides as follows:

- “(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.”

89. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal. It is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Direct Disability Discrimination

90. Direct discrimination is defined in section 13(1) of the Equality Act 2010 as follows:

“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.”

91. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

“On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

92. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person’s abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable.

Discrimination arising from disability

93. Section 15 of the Equality Act 2010 reads as follows:-

- “(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”.**

94. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

95. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

“The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance

to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:

*31.the proper approach to determining section 15 claims
.... can be summarised as follows:*

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the “in consequence test” to be satisfied, the connection can be a relatively loose one.”

Submissions

96. The claimant made the following submission in relation to her unfair dismissal claim:

- 96.1 There was a flaw in the briefing report that went to the panel that decided to suspend her. The report said she worked at Tesco during hours when she should have been working for the council and that was not correct.
- 96.2 That her working at Tesco should not have been classified as gross misconduct. She says she was not working during her working hours for the respondent and at worst she had failed to notify the respondent of her other job and that that should not be gross misconduct.
- 96.3 She was questioned at the investigatory interview by the HR Adviser Sue Welsh and she ought not to have been. She argues that being questioned by two people, not one, makes her dismissal procedurally unfair.
- 96.4 That her dismissal was also procedurally unfair because Natalie Hadwin was not interviewed about what was said on 26 February. The claimant says she offered to work from home that day.
- 96.5 The claimant also argued that her suspension was excessive and that she had no welfare visits from the respondent whilst off sick.

97. The tribunal records that the claimant had to be prompted to make closing submissions on her discrimination claims and that in response she said that she had set out, in writing in her closing submission document, the facts and reasons as to why she felt it (the dismissal) was unfair.

98. The claimant's case at the outset of the hearing was that the act of less favourable treatment for Section 13 was her dismissal and the decision to uphold that dismissal at appeal.

99. The claimant's submission in relation to her Section 15 was that the respondent was not looking at her different ability to cope in the different roles and that was the “something arising”. She also submitted that her absence was a “something arising” for Section 15.

100. The respondent made the following submissions on the Section 13 claim: the initial burden is on the claimant and only if the claimant establishes a prima facie case of contravention of the Equality Act 2010 does the burden shift to the respondent. The respondent submitted that there was no contravention of the Equality Act 2010 in this case. In the alternative, the respondent submitted that it had a non discriminatory reason for the less favourable treatment of dismissal in the claimant's gross misconduct.

101. The respondent made the following submissions on the Section 15 claim. It submitted that the different ability to cope, as argued by the claimant, does not amount to a “something” for the purposes of section 15 but in the alternative, if it did, then the something arose in March 2018 *before* the claimant was disabled (from June 2018) so the claim cannot succeed. In the alternative, it says that the dismissal was a proportionate means of achieving a legitimate aim.

Applying the Law

The Section 13 claim

102. The claimant claimed direct discrimination; that she had been dismissed because of her disability. The tribunal had to ask why was she dismissed, was it because of her protected characteristic of disability? That required us to consider a comparator. We asked ourselves would an employee with no material difference in circumstances to those of the claimant have been dismissed?

103. The reason for dismissal was that the claimant did not inform the council that she was fit and able to return to work as evidenced by her working at Tesco on multiple occasions between 28 February and 21 March 2018.

104. Mr Thompson set out the reasoning for his having reached that decision in his letter of dismissal. We have added the italics for emphasis:

- (a) The claimant *did not tell* the respondent she was fit to return to work with adjustments and was therefore claiming statutory sick pay from the respondent when she was fit to be at work
- (b) The claimant *did not inform* the respondent that she was fit to work on 5 March 2018
- (c) The claimant *did not inform* the respondent that she was fit to work when she met the occupational health nurse on 6 March 2018 and did not disclose her ongoing work at Tesco to OH

105. Mr Thompson would have dismissed any employee who had failed to disclose. For that reason, there is no less favourable treatment *because of* a protected characteristic. It is not the disability that caused the less favourable treatment. It was the claimant’s failure to disclose that she had worked at Tesco whilst off sick from the respondent.

106. Mr Thompson considered whether any sanction less than dismissal might have been appropriate. He heard from the claimant’s representative at the disciplinary hearing who submitted that a two year final written warning would be an appropriate sanction. He considered mitigating factors including that the claimant had anxiety and low mood. He saw the claimant’s GP fit notes and the two occupational health reports. Mr Thompson knew that the claimant had lodged a grievance and that it had been resolved. The Tribunal accepted Mr Thompson’s evidence that he had considered that the claimant hadn’t felt supported, that she had said that she hadn’t had the welfare visits she should have had. He knew that a dismissal would put the claimant’s career as a social worker and her livelihood at stake but he had to balance that with the requirements of honesty and integrity in a social worker. He considered the loss to the public purse in the claimant having taken sick pay whilst being able to work at Tesco.

107. Mr Thompson felt there had been a breach of trust and that none of the mitigation outweighed that dishonesty so that dismissal was the appropriate sanction. Mr Thompson considered that the sanction was appropriate because of the seriousness of the offence and not because the claimant was disabled. There was no direct discrimination in relation to the imposition of dismissal as a sanction.

108. The claimant claims that the decision to uphold dismissal on appeal is also direct discrimination. The tribunal heard from the appeal officer Ms Dutton. We had to consider why the appeal officer upheld the dismissal and whether it was *because of* the claimant's protected characteristic.

109. Ms Dutton had an appeal hearing at which she heard the appeal put by the claimant and her representative and she heard the management statement of case put by Mr Thompson. Ms Dutton concluded that the claimant "deliberately chose to withhold" information that she was well enough to work at Tesco whilst off sick from the respondent with "the intention of misleading". Ms Dutton applied the respondent's disciplinary policy and found this constituted serious dishonesty and gross misconduct. Ms Dutton upheld the decision to dismiss because she believed it had been arrived at fairly and she concurred with Mr Thompson's view that the claimant's conduct amounted to gross misconduct. She did not dismiss the appeal because of the claimant's protected characteristic.

110. Ms Dutton considered whether or not dismissal was the appropriate sanction. She thought about whether a final written warning might have been appropriate. The Tribunal accepted her evidence that as Director she is responsible for the quality of the staff. She balanced her decision against the context of her borough being the second most deprived borough nationally and the context of the HCPC requirement of honesty and transparency in a social worker. Ms Dutton felt that Mr Thompson's decision to dismiss was appropriate given the need for social workers to be honest and transparent as they work with the most vulnerable people in society. She agreed with Mr Thompson that there was no mitigation in this case against dishonesty.

The burden of proof on the Section 13 claim

111. The tribunal noted how little we heard about disability at all in this case. There were no facts from which the tribunal could conclude that the decision to dismiss was motivated by the fact that the claimant had a disability. The burden of proof did not shift to the respondent.

Applying the law on the Section 15 claim

112. The claimant claims that she was discriminated against because of something arising in consequence of her disability. Applying Pnaiser, the claimant's dismissal amounts to unfavourable treatment for the purposes of section 15. Then we had to ask ourselves, what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of Mr Thompson.

113. The claimant was dismissed because of her failure to disclose working for Tesco.

114. Applying the next stage of the test as in Pnaiser we then had to consider whether the reason is something arising in consequence of the claimant's disability.

The question we had to ask ourselves then was, did the claimant's failure to disclose arise in consequence of her disability?

115. In March 2018 when the claimant failed to disclose, she was not disabled. Her failing to disclose could not have arisen in consequence of her disability because she was not disabled then. The section 15 claim must fail on that ground.

116. If the claimant had been disabled in March 2018, we asked ourselves what would that have meant for the section 15 claim. The tribunal considered the guidance in Scott v Kenton about the relatively loose connection between the disability (though none was found in March 2018) and the something relied on. In effect, we had to consider was there a loose connection between being the claimant suffering stress related illness/ investigation for gastritis and failing to disclose that she had worked at Tesco whilst off sick from the respondent. We were persuaded by the fact that the claimant presented as someone so unwell that Ms Cotgrave felt it was inappropriate even to undertake a stress risk assessment questionnaire on Tuesday 6 March 2018 and yet the claimant was able to work at Tesco the next day, that she was dishonest. Even if the claimant had been disabled in March 2018 her section 15 claim would have failed because having accepted the evidence of Mr Thompson that her dismissal arose out of her failure to disclose and we do not accept that there was in this case a connection, however loose, between the claimant's stress related illness and her failure to disclose/dishonesty.

117. The claimant said in closing submissions that her differing ability to work in the different roles in March 2018 was the "something arising in consequence of her disability". Applying Section 15 and Pnaiser she has to have suffered the less favourable treatment, that is the dismissal, because of the "something". The claimant was not dismissed because of differing ability to work in different roles. She wasn't dismissed because she had worked at Tesco and not the respondent. She was dismissed because of failure to disclose that she had worked at Tesco. Her definition of the "something" is a misapplication of test in Pnaiser. To succeed in her claim (in addition to her having been disabled at that time, and putting aside time issues) the failure to inform would have had to have arisen in consequence of a disability. For the reasons set out above we found that it did not.

118. Alternately, the claimant said that her absence was the something arising in consequence of her disability. Again, applying Pnaiser and for the reasons set out above the section 15 claim fails because the claimant was not dismissed for absence but for failure to disclose.

The burden of proof on the section 15 claim

119. There were no facts from which the tribunal could conclude that the decision to dismiss was disability related. We were able to make a positive finding that the dismissal was motivated wholly by the claimant's failure to disclose and not by the mere fact that she was absent from work. The burden of proof did not shift on the section 15 claim.

Applying the law on unfair dismissal

120. We found that the reason for the dismissal was that set out in the letter of dismissal; that the claimant did not inform the council that she was fit and able to return to work as evidenced by her working at Tesco on multiple occasions between 28 February and 21 March 2018.

121. That reason is a potentially fair reason, misconduct, in this case gross misconduct. Next, applying Burchell we had to ask ourselves, did Mr Thompson have a genuine belief on reasonable grounds of the claimant's guilt of that misconduct at that time and had there been such investigation as was reasonable in all the circumstances of the case.

122. Mr Thompson had a genuine belief that the claimant had failed to inform the respondent that she had worked at Tesco while off sick because she admitted that she had done so and because he saw the statement of Virinder Crawford and heard from Virinder Crawford to confirm that to be the case.

123. He held that belief on reasonable grounds because he saw the Investigation Panel for Financial Irregularity Report and again, he had an admission from the claimant herself that she had been working at Tesco while off sick from the respondent and he had the evidence of Virinder Crawford.

124. For Mr Thompson Monday 5 March was significant in the reasonable formulation of his belief. The tribunal accepted his evidence that for him this was the point at which the claimant became dishonest. It was the first day she was due to work for the respondent after having worked at Tesco and found she could cope (subject to the local arrangements she had in place with her Tesco workmates). Mr Thompson's evidence was that the claimant should have told the respondent on Monday 5 March 2018 (if not sooner) that she had been well enough to work at Tesco and should have asked for adjustments from her line manager on 5 March 2018.

125. Mr Thompson also formed the reasonable belief that the claimant, by her presentation at occupational health on 6 March 2018 and her very different presentation at Tesco the next day, was being dishonest.

126. Turning now to the reasonableness of the investigation and the fairness of the dismissal. The respondent convened a meeting of its Investigation Panel for Financial Irregularity.

127. The claimant argued that there was a flaw in the briefing report that went to the investigatory panel. She said that the report misdescribed her as having been working for Tesco *during hours when she ought to have been working for the respondent*. It was accepted by Mr Thompson, prior to dismissal that this was not the case. We found that this mistake in the briefing report played no part in Mr Thompson's decision to dismiss. We also find that it was immaterial in the decision to suspend the claimant. The suspension was imposed not because of the claimant having been alleged to be working during hours when she should have been working for the respondent (she wasn't) but because she was in receipt of sick pay from the respondent when there was evidence before the panel that she may not have been sick, because she was working elsewhere whilst in receipt of that pay.

128. The panel classified the allegation, at that stage, as potential gross misconduct. This was a reasonable classification given the terms of the respondent's Staff Behaviour Framework and Disciplinary Procedure.

129. An independent investigating officer was appointed, Ruth France. Ms France interviewed Virinder Crawford and the claimant. The reports and the witness evidence of Ms Crawford were put to the claimant.

130. The claimant argued that she was not fit to be interviewed at investigatory interview on 4 April 2018. We saw the notes of that meeting and heard oral evidence on it. We reject this argument. The claimant was represented by her union representative at the investigatory interview, if she had not been well enough to proceed he would have stopped the meeting. The claimant was seen by occupational health the same day. Occupational health found her to be fit to be interviewed.

131. At the investigatory interview it was entirely appropriate that Ms Welsh from HR should ensure that the allegations were put to the claimant and that she had an opportunity to respond to them. Her questioning of the claimant was not excessive or unfair as the claimant alleged.

132. The claimant argued that her dismissal was unfair because Natalie Hadwin was not interviewed as part of the investigation. Natalie Hadwin attended the disciplinary hearing on 18 September 2018 and gave evidence. She was questioned by the claimant's representative James Robinson about the content of the telephone call on 26 February 2018 and about welfare visits. The claimant had ample opportunity to put her case to Natalie Hadwin and to hear her response. We find no flaw in the investigation or disciplinary procedure in the failure to interview Ms Hadwin as part of the investigation.

133. The issue of welfare visits and whether there were adequate visits or not had no bearing on the fairness of the investigation or the procedure that lead to dismissal. The claimant's representative put the welfare points to Natalie Hadwin at the disciplinary hearing on 18 September 2018. Justin Thompson was aware that there had been a grievance on this point and that it had been resolved. He relied on the occupational health reports he saw in forming his view that the claimant was able to engage in the disciplinary process.

134. The respondent complied with the guidance in the ACAS Code. The claimant was informed in writing of the allegations against her. She was given an opportunity to state her case at investigatory interview. She was informed in writing that the matter would proceed to a disciplinary hearing and was given adequate notice of that hearing and her right to be accompanied or represented at the hearing. The claimant had sufficient detail of the allegations to be able to respond fully to the case against her. The claimant was informed that the allegations might lead to dismissal. She was able to influence the identity of the disciplinary hearing officer; Mr Murphy was stood down and Mr Thompson appointed in response to her objection to Mr Murphy.

135. The claimant was represented at the disciplinary hearings. The first disciplinary hearing was adjourned to allow time to seek out evidence to support the claimant's case. The claimant was able to contact Tesco and obtain witness statements from her colleagues there to attest to the fact that there had been local arrangements in place to support her to work at Tesco whilst off sick from the respondent.

136. The second disciplinary hearing was convened on notice with the claimant being readvised of her right to be represented or accompanied and of the seriousness of the allegations. The claimant contributed to the hearing. The claimant was aware that it might lead to her dismissal and was able to bring potential mitigating factors to Mr Thompson's attention. The disciplinary hearing was adjourned for a decision to be made. The decision was communicated in writing and

the claimant was given the reason for the decision to dismiss. She was informed of her right to appeal.

137. We found that the respondent's investigation and disciplinary procedure fell within the range of reasonable responses and that the procedure which led to dismissal was fair.

138. The claimant argued that she should not have been dismissed, that the sanction was excessive. Our role was not to substitute our decision for that of the dismissing officer but to consider whether the decision to dismiss fell within the range of reasonable responses. For the reasons set out at paragraphs 106 and 107 above we find that the decision to dismiss fell within the range of responses of a reasonable employer.

139. Applying Section 98(4) and having taken into account the circumstances, including the size and administrative resources of the respondent, and considering equity and the substantial merits of the case, we find that the respondent acted reasonably in treating the failure to disclose as gross misconduct and as a sufficient reason for dismissing the employee.

Applying the law on the breach of contract issue

140. The claimant was dismissed for gross misconduct and was not entitled to receive notice pay.

Conclusion

141. Until November 2017 the claimant was a social worker with no performance issues. She fell behind in her work during late November and early December 2017 when she was driving children home from school to the address at which they were placed. She became stressed about her work. A plan was agreed for her to work from home to catch up but by that time she was suffering gastric symptoms and was signed off sick for investigation. She told her employer she had been signed off sick. Her manager arranged an occupation health referral and told her not to work from home whilst signed off sick. Whilst off sick, she worked in her second job at Tesco and did not tell the respondent.

142. If the claimant had told her employer, either Natalie Hadwin on 28 February 2018 or Ms Cotgrave on 6 March 2018 or Ann Clarkson on 14 March 2018, that she was able to work at Tesco with adjustments in place and if she had asked the respondents for adjustments to enable her to work from home, then she may have kept her job. It was the failure to disclose that led the respondent, fairly and reasonably, to classify this offence as gross misconduct and to dismiss.

143. The claimant's claims for unfair dismissal, breach of contract and discrimination all fail.

Employment Judge Aspinall
Date: 21 April 2020

JUDGMENT AND REASONS SENT TO THE
PARTIES ON 1 May 2020

FOR THE TRIBUNAL OFFICE

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