EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms N Peprah-Boadu	**v**	**Intergence Systems Limited**

Heard at: London Central (by Cloud Video Platform)

On: 22, 23, 24, 25 and 26 March and 9 April 2021 (in chambers)

Before: Employment Judge Joffe
Mr G Bishop
Mr I McLaughlin

Representation

For the Claimant: Mr K Zaman, counsel

For the Respondent: Mr J Munro, employment consultant

RESERVED JUDGMENT

1. The claim for unfair dismissal under sections 94 and 98(4) Employment Rights Act 1996 is upheld.

2. The claim for direct disability discrimination contrary to section 13 Equality Act 2010 is not upheld and is dismissed.
3. The claim for unfavourable treatment under section 15 Equality Act 2010 is not upheld and is dismissed.
4. The claims for harassment related to disability under section 26 Equality Act 2010 are not upheld and are dismissed.
5. The claimant's summary dismissal was in breach of contract and her claim for wrongful dismissal is upheld.

REASONS

Claims and issues

1. The claimant brings claims of unfair dismissal and disability discrimination. The parties presented a list which they had agreed and which was revised by the Tribunal, with the parties' agreement. The list as agreed did not properly reflect the legal tests which the Tribunal would need to address; the final version at least adequately articulated the questions the parties wished the Tribunal to decide in relation to the claims brought. The issues have been adjusted to reflect the respondent's concession that the claimant had a disability within the meaning of the Equality Act 2010 and the claimant's withdrawal of her claim that she had not received employment particulars which complied with section 1 of the Employment Rights Act 1996.

2. Although we heard some evidence relevant to the issues of Polkey and contribution, we were not satisfied the evidence on Polkey in particular had been fully explored and we considered that these issues should be considered at the remedy hearing. We accordingly did not hear any submissions on remedy.

Unfair Dismissal

i) What was the reason or principal reason for dismissal? The respondent says the reason was conduct The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
ii) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
    a. there were reasonable grounds for that belief;
    b. at the time the belief was formed the respondent had carried out a reasonable investigation;
    c. the respondent otherwise acted in a procedurally fair manner;
    d. dismissal was within the range of reasonable responses.
iii) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
iv) In relation to the reason for dismissal and the fairness of the dismissal, the claimant says that the following factual issues are relevant:
    a. Did the respondent's Kyle Rokkas suggest to the claimant on 22 May 2019 that, following her diabetes diagnosis and request for adjusted shift patterns, she might want to work elsewhere and say that LME were not happy with the

arrangement? This is said by the claimant to cast doubt on the asserted reason for the dismissal and/or suggest that the dismissal was predetermined.

b. What steps did the respondent take following the claimant's diabetes diagnosis in relation to risk assessments and what consultations were there with third parties? Eg. HR.
c. Did a third party require the respondent to (a) remove the claimant from her workplace, (b) dismiss the claimant?

This may be relevant to the reason for dismissal and to the Polkey question.

d. Did the respondent investigate or consider moving the claimant to another of its sites?

Disability Discrimination

Direct Disability Discrimination – Section 13 Equality Act 2010

v) Was the claimant dismissed because of her disability?
vi) Did the respondent dismiss because it was unhappy about making adjustments to claimant's shifts and/or not prepared to make further adjustments?

NB: The parties left this in their agreed list of issues although we explained that it was not a direct discrimination issue and would not be decided as such.

Disability Related Discrimination - section 15 EqA 2010

vii) Was the claimant dismissed for a reason which arose from her disability or perceived disability?
   a. Did the respondent treat the claimant unfavourably. The unfavourable treatment relied on is dismissal.
   b. Did the following things arise in consequence of the claimant's disability:
      i. A requirement to make temporary or permanent adjustment to the claimant's shift pattern
      ii. The claimant going on a break at a time when the engineer arrived and not interrupting her break to deal with the communications about the engineer's arrival; and/or,
      iii. The need for the claimant going on an uninterrupted break after more than 8 hours of work?
viii) Was the unfavourable treatment because of any of those things?
ix) Can the respondent show the treatment is a proportionate means of achieving a legitimate aim? The aim relied on by the respondent is protecting business reputation.
x) What steps did the respondent take following the claimant's diabetes diagnosis in relation to risk assessments and what consultations were there with third parties? Eg. HR.

NB: The Tribunal made clear that that question may be a matter which is relevant to the fairness of the dismissal or other issues such as proportionality but is not a legal issue for the Tribunal to decide.

Disability-related Harassment – section 26 Equality Act 2010

xi) Did the respondent subject the claimant to unwanted conduct? The claimant relies upon the following:
   a. The claimant's suspension
   b. The claimant's dismissal

xii) If so, was the unwanted conduct in relation to the claimant's disability?

xiii) If so, did the unwanted conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Wrongful Dismissal

xiv) Did the claimant's actions amount to a repudiatory breach of contract entitling the respondent to dismiss without notice?

Findings of fact

The hearing

3. We heard from the claimant on her own behalf; for the respondent the following witnesses gave evidence: Mr Kyle Rokkas, head of operations; Mr Michael Warren, finance director; Mr Peter Job, chief executive officer.

4. We had a bundle of over 500 pages, which was supplemented by the claimant's transcript of a recording she made of the disciplinary hearing at which she was dismissed and by a number of other late produced documents. The respondent agreed the transcript was a materially accurate account of the recording.

5. The hearing was a remote hearing via Cloud Video Platform as it was not practicable to hold an in person hearing. The parties consented to the hearing being held remotely and there were no significant technical issues.

Background

6. The respondent is a company which provides IT services to clients. We were told that the respondent has 'a couple of dozen' contracts, several are in London but they are otherwise dotted around the country. The respondent's headquarters is in Cambridge.

7. From 23 October 2015, the claimant was employed by the respondent initially as a service desk consultant working on the respondent's contract with the London Metal Exchange ('LME'). The respondent had a team of ultimately some 17 employees at LME. Trading took place at LME Monday to Friday but the contract with the respondent was for 24/7 cover.

8. The claimant worked on the IT Operations Bridge. The work was structured so that employees in the claimant's position worked twelve hour shifts alternating days and nights in three days on / three days off blocks. We understood the claimant's work to be broadly speaking an IT help desk role. Mr Rokkas was the claimant's line

manager but she reported on a day-to-day basis to LME management; there appeared to be a number of individuals the claimant reported to at LME over time. Mr Rokkas, we heard, would not be present at the LME premises and would be at a remove from the work carried out by the respondent's employees there.

9. Mr Warren, as well as being the finance director carried out the HR function for the respondent with assistance from Peninsula Business Services. He has no qualifications in HR. He had no relationship with the claimant prior to becoming involved in her disciplinary proceedings.

10. The claimant's contract of employment provided for a notice period of one month or statutory notice if greater.

11. The respondent had a handbook which contained disciplinary rules. Amongst the matters which were said to warrant disciplinary action were: 'failure to devote the whole of your time, attention and abilities to our business and its affairs during your normal working hours.'

12. Under the hearing 'Serious Misconduct', there were these provisions:

    Where one of the unsatisfactory conduct or misconduct rules has been broken and, if upon investigation, it is shown to be due to your extreme carelessness or has a serious or substantial effect upon our operation or reputation, you may be issued with a final warning in the first instance…You may receive a final written warning as the first course of action, if, in an alleged gross misconduct disciplinary matter, upon investigation, there is shown to be some level of mitigation resulting in it being treated as an offence just short of dismissal.

13. Under the heading 'Rules Covering Gross Misconduct', gross misconduct was described as 'any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship'. The non-exhaustive list of examples then given includes theft, physical violence, bullying and offences of similar gravity.

Relevant events

14. We saw some email correspondence between the claimant and managers dating from February 2016 on the subject of breaks. Mr Stephen Carl said: "we fully respect that it is difficult to take meal breaks when on the Bridge particularly during anti-social periods. As such we do not factor breaks as unpaid time. In turn, what we expect is that you take short breaks and that where possible you are contactable during that time…at weekends when monitoring us suspended you are pretty much free to take longer breaks."

15. We saw evidence that the claimant had some history of performance issues, although these were not presented as severe.

16. In 2018, records of the respondent's discussions with Peninsula about the claimant indicated the following concerns were raised with Peninsula and advice taken:

'02-Jan-18: Incorrect information provided to Managed Services

27-Nov-17: Not following long standing Incident Management process for raising tickets

Lack of confidence in capability

25-Jan-18: Raised by LME as a result of numerous shortcomings in service quality (raised following latest last minute sick leave)'

17. As email from Spencer Park of LME to Mr Rokkas dated 26 January 2018 set out a list of concerns about the claimant. These were concerns about the claimant not following procedures, her communication and notification of sickness. Mr Park commented that 'LME Support Teams have mentioned Natasha in a non-favourable light regarding support at times…if Natasha is the weekend cover it has been known for the testing to be rearranged or someone from the support team to come in due to lack of confidence.' In relation to short notice of sickness absence, he commented: 'I feel strongly that she has a total disregard for the problems she causes at such short notice'.

18. The advice given by Peninsula to the respondent was to conduct a performance review with the claimant, to set out what she needed to do, and to review her progress after six weeks.

19. The claimant was invited to a meeting with Mr Rokkas on 17 February 2018 to discuss the performance issues which had arisen. The claimant raised issues relating to her health at the meeting, in particular the effects of her fatty liver condition and a then undiagnosed gastric condition which caused her to feel tired and affected her concentration. There was some discussion with Mr Rokkas about a potential medical assessment. The claimant was told that Mr Park would monitor and report on her performance and there would be a follow-up meeting in six weeks. No follow-up meeting was in fact held.

20. Although Peninsula gave the respondent some advice about the claimant being asked to complete a health questionnaire; there was no evidence that the claimant was ever sent such a questionnaire.

21. The claimant had a performance appraisal on 10 May 2018. Her appraiser was Spencer Park of LME. The claimant met her key performance measures apart from the measure for timekeeping, attendance and expenses submission. The appraisal said however that a marked improvement from the situation six months prior to the appraisal needed to be noted.

22. There were several emails later in 2018 which suggested some issues about attendance. We saw correspondence between Mr Rokkas and Ms Whitfield, a team leader at LME, on 4 and 5 October 2018 about the claimant's lateness.

23. On 17 October 2018, there was an email from Mr Rokkas to claimant which was described as a: "(well overdue confirmation of successful completion of the Performance Investigation and Review process, which commenced with an initial meeting on Wednesday the 7th February 2018". Mr Rokkas in the email said that after a twelve week review and further twelve week observation period, in general the

respondent and LME were very happy with the attention and commitment the claimant had demonstrated. A couple of minor incidents had occurred in the period, which they had discussed.

24. On 18 October 2018, the claimant had an episode of lateness because of a problem with trains. There were a couple of further episodes of lateness in December 2018. In relation to the latter of these, the claimant had not notified Ms Whitfield, because, she said, her phone battery had died.

25. On 4 January 2019, Ms Whitfield, raised with the claimant an issue relating to the claimant not returning to work right away after a GP appointment but instead going to collect a parcel. The claimant said that she would take the feedback on board.

26. On 20 February 2019: the claimant was diagnosed with Type 2 diabetes and told Mr Rokkas about the diagnosis in an email the same day. Mr Rokkas wrote back sympathising with the claimant and suggesting that they discuss the matter on his next visit to LME. The claimant told us that Ms Whitfield was sympathetic and said that she would speak with the respondent about changing the claimant's shift pattern

27. The claimant then attended her GP surgery and was advised that working day shifts only and maintaining a regular sleep pattern would assist her to manage her diabetes

28. On 10 March 2019, the claimant wrote to Ms Whitfield and Mr Rokkas to say she had discussed her diagnosis with her GP and mentioned her shifts. She said that upon advice she had decided it would be best to alter her hours to cover days only and that she was consider either working Monday to Friday or continuing with her current three on three off pattern. We noted that Mr Rokkas understood 'Monday – Friday' to mean a 9-5 pattern as opposed to the claimant's existing twelve hour shifts.

29. The claimant told us in evidence she was very anxious at this time about her diagnosis and the situation at work and we could well understand that.

30. Mr Rokkas wrote back on 12 March 2019 to say that whilst he sympathised with the claimant's situation, it was not her decision to make as to whether to alter her shift pattern. If the change was a doctor's recommendation, she should request a signed letter from her doctor on practice letterhead. They would then look at what options were available within the respondent and LME.

31. The claimant in evidence said that she was 'taken aback' by Mr Rokkas' tone which she said was 'business-like and distant'. She felt that she faced a battle.

32. Having reviewed this and other correspondence, we were not able to detect anything objectively concerning about the tone. Mr Rokkas seemed to us to be dealing with matters sensibly and quickly. Mr Rokkas understandably was concerned by the impression given by the claimant's email (which she explained was not what she had intended to convey) that she believed she could simply choose herself what shifts she worked. We understood that the claimant was anxious about the situation and that no doubt influenced her perception of the tone of the emails.

33. We saw some internal emails from LME the claimant obtained as a result of a Data Subject Access Request; these were redacted so that the names of those emailing were not apparent. In response to the email in which the claimant suggested that she might work Monday to Friday, there was some discussion in the emails about proposed changes to the claimant's shift pattern which included the following

statements: 'LME needs to maintain coverage on the rota whilst making it fair to all' and 'I would like to have some input in this. I think agreeing any changes sets a dangerous precedent.' It was clear that the 'dangerous precedent' referred to was the possible Monday – Friday shift pattern.

34. On 15 March 2019, the claimant wrote to her GP and on 15 April 2019 she received a GP certificate which said that she may be fit for work taking account of the following advice: she would benefit from altered hours and 'may benefit from adjusting her shift patterns in order to benefit her sleep cycles which may have a positive impact on her diabetic control.' The certificate was valid for three months.

35. The GP certificate was sent to Mr Rokkas on 24 April 2019. There was some consultation with Peninsula and a recommendation to seek occupational health advice in relation to the proposal that the claimant might work a Monday – Friday, 9 – 5 shift, which was a pattern the respondent told us that LME could not accommodate.

36. On 26 April 2019, Mr Rokkas emailed the claimant to say that there was no shift pattern at Bridge Operations which was Monday – Friday, 9 – 5 available, however he could offer the claimant day shifts only for three months from early May 2019: 'Please do let me know if this is a suitable compromise for you, as if not we would need to look at other roles within the business outside of LME to accommodate your request.' We note that Mr Rokkas was under the impression at this stage that the claimant wished to work the Monday – Friday shift pattern which was not available.

37. On 1 May 2019, the claimant emailed Mr Rokkas to ask whether the arrangement would continue beyond three months. She said that she would be seeing her doctor again within the next four weeks and it was likely there would be a recommendation going beyond the three month statement.

38. Mr Rokkas replied that day saying that if the initial period were to increase additional checks would need to be done including external health advice and consideration of the impact on Bridge Operations.

39. The claimant's evidence was that she felt the respondent's attitude was begrudging and that hurdles were being put in her way. We considered that it was reasonable for the respondent to review the situation at the end of the current certificate, particularly in light of the fact that the claimant had a new diagnosis. The claimant's need for day shifts was accommodated quickly by the respondent and by LME

40. On 21 May 2019, the claimant visited her GP and asked about permanent adjustments. She told Mr Rokkas that her GP had said that the respondent should write to her to confirm that the adjustments were needed for an indefinite period. It does not appear that there was a response to this email.

41. On 22 May 2019, there was a meeting between the claimant and Mr Rokkas about the claimant's annual appraisal. The claimant was recorded as having met all of her key performance measures.

42. There was a dispute between the parties as to what was said by Mr Rokkas during the appraisal meeting about the claimant seeking work elsewhere. At the claimant's appeal against dismissal she gave this account:

However, during that appraisal Kyle Rokkas told me verbally, "I think you should look into seeking work elsewhere. LME Operations management have decided they

cannot accommodate your request to work Monday to Friday. The contract requires shifts. They believe it would be unfair on the rest of the team'

43. In her claim form, the claimant said:

On 22 May 2019 the Claimant had her 2018/2019 annual appraisal with her manager, Mr Rokkas. During the appraisal Mr Rokkas suggested to the Claimant that she might want to seek work elsewhere. He intimated that the Second Respondent's management were not happy with the arrangement whereby the Claimant worked days and such arrangement was unfair on the rest of the team. Mr Rokkas omitted to put these comments on the Claimant's appraisal form.

44. In her witness statement, the claimant said that Mr Rokkas said that Monday to Friday schedule was not something LME would be able to accommodate; 'He then went on to say that I should consider looking for another job because of my condition.'

45. Mr Rokkas's account in evidence was that:

'What I said was LME do not have a Monday-Friday 9-5 option for Bridge Operations and creating such an exception specifically for Natasha would be unfair on the rest of the team. I also stated that if Natasha was specifically looking for Mon-Fri 9-5 work, Intergence wouldn't obstruct her from seeking work elsewhere.'

46. We accepted that Mr Rokkas's version of what was said was closest to the truth. The claimant provided three materially different accounts, the last of which (in her witness statement) was substantially enhanced to support her disability discrimination claim, containing for the first time the allegation that Mr Rokkas had said she should look for another job because of her condition. Mr Rokkas' account is consistent with the impression we accepted he had formed as a result of the email correspondence that what the claimant really wanted was a Monday – Friday, 9 – 5 working pattern.

47. The claimant received a salary increase which in part reflected her satisfactory appraisal.

48. On 21 June 2019, the day shift on the IT Operations Bridge sent an email inter alia to the inbox for the Operations Bridge entitled 'Bridge Shift Handover – 21/06/2019 – Day Shift'. This recorded that there were no ongoing issues but also included, under the heading 'Any further Notes / Instructions for next shift': 'Please be aware that Access is Required at Slough / Cyxtera on the 22nd June 2019 for Colt Engineers, please read incident [number] for information.' Slough / Cyxtera was a reference to the data centre used by LME.

49. On 22 June 2019, which was a Saturday, the claimant was rotaed for the twelve hour day shift. She was working alone although she had expected to be on a shift with another employee. It was her first day at work after annual leave. She arrived at 8 am and took over from the nights shift employee and he told her that there was nothing to hand over but that the other employee would not be there.

50. There was shortly after that an issue with engineers trying to get access to the LME equipment at the Slough data centre. The claimant discovered there was an issue with the CCTV which the claimant needed to use to verify the engineers' credentials; the sound was not working. The claimant had to contact Slough and initiate

something called the 'break glass' procedure so that the engineers could be let in. She then sent emails to LME personnel about the issue which had arisen.

51. The claimant's evidence was that she was skimming emails before and after this issue was dealt with. She did not see or did not register the handover email from the 21/6/2019 day shift which recorded that access was required for a Colt engineer at Slough on 22 June and directed that the incident report be checked for information. She did not do a search on the inbox for handover emails.

52. The claimant accepted there would usually be a handover email between shifts; that was the practice. In addition the outgoing shift would provide an oral handover and relevant information might be printed.

53. The claimant said she did not take a break during the first eight hours of her shift as she was very busy. She accepted in evidence that the CCTV issue had been resolved by about 9:30 and it would have practicable to interrupt the activities she was carrying out after that but she chose not to take a break. She said that after eight hours, her medication was wearing off and she had stomach pain and leg pain. Some of these issues were to do with her diabetes but we heard that she had a gastric condition also. About 4:30 she decided to take a longer break of about an hour and went to the kitchen to get away from her desk. In evidence she accepted that she could have taken some sort of break earlier in the day and it had been her choice to take a longer break at the point she did.

54. The Colt engineer who attended at the Slough data centre shortly after was unable to get access and there were a number of telephone calls to the claimant's mobile phone to alert her to the problem. The claimant accepted that she heard her phone ringing; she said that did not recognise the numbers as she had a new phone and had not migrated all of the numbers. She told the Tribunal that she was avoiding contact from a mobile hairdresser who had apparently used multiple numbers to repeatedly call the claimant about some dispute between the hairdresser and the claimant. The claimant did not suggest to the Tribunal that her failure to answer her phone was connected with her disability.

55. There were also a number of WhatsApp messages sent, at least some of which were sent to a group which included the claimant. She accepted that there were some WhatsApp messages which included her. She eventually saw a WhatsApp message from Seb Perada, another of the respondent's employees who was on leave at the time, at about 5:45 pm and she contacted David Rosa Casado of LME and made arrangements to let the engineer in. There was a delay of up to about an hour.

56. On 24 June 2019, Kunal Mistry of LME emailed Mr Rokkas:

    I *am having some concerns with Natasha. And mainly her being unreliable.*

    We had a situation on Saturday afternoon where an engineer needed access to one of the LME Data Centres which was a pre agreed time. Natasha knew an engineer was expect[ed] on Saturday afternoon. But Natasha decided to go on a break at this time. Therefore the engineer has to wait an hour to gain access.

    Multiple members of LME management tried to contact the Bridge team and Natasha's personal mobile, and there was no answer. Kate Whitfield then had to contact other Bridge members. And Seb kindly remotely logged in.

When Kate did get hold of Natasha, we was told Natasha did not take her mobile phone nor the Bridge business continuity mobile phone. Which means it was impossible to get hold of her.

Please call me when you are available. So I can discuss this further.

57. We saw some internal LME emails from 24 and 25 June 2019 which showed that Mr Prentice of LME was seeking to set up a meeting on 25 June 2019 which would involve seven people including senior people at LME; it was clear that the matter was being taken seriously.

58. The senders of the emails were redacted but some of the text of emails was as follows:

"Detail from the multiple feedback sources on the event involving Natasha on 22"" June are pretty damning. if I call for her exit; as this really is the last straw, are you in agreement?"

'Yes, I agree, let's move on, it's one thing after another.'

59. Also in 24 June 2019 emails, Mr Mistry asked the claimant about the CCTV issue and the problem of access for the Colt engineer. The claimant replied with an explanation about the CCTV issue. In relation to the Colt engineer, she said, "In oversight I took a break after 4 pm and wasn't fully aware who was calling because I don't have certain team members phone numbers registered. I reacted when I saw a text from Seb and went back to the desk to assist the Colt engineer."

60. In a further email she said: "I did have my phone with me but the alarm tones were ringing instead of my ringtone. I did answer a call from Kate which may have come from WhatsApp and a text from Seb which may have a mistake in the response." We did not hear any explanation in evidence about the 'alarm tones'.

61. On 25 June 2019, the planned meeting involving a number of LME staff and Mr Rokkas was cancelled but Mr Rokkas had a phone call with Mr Prentice. Mr Prentice wrote to Mr Rokkas: "I spent yesterday collecting data on the event of the weekend involving Natasha, including the input form her back to Kunal. Bottom line is she's let us down one too many times and it's time to remove her with immediate effect. She's a risk to service and from a capability perspective pales into comparison with her peers."

62. Mr Rokkas wrote to Mr Mistry :

"As discussed; we confirmed that Natasha will exited from the Intergence/LME IT Bridge role immediate effect on the basis of dereliction of duties on Saturday 22"" June 2019."

63. Mr Rokkas wrote to Steve Carl, service operations manager at LME:

"Have you had this discussion with Steve Prentice, are you onboard with initiating Natasha's removal?"

64. Mr Carl responded to Mr Rokkas:

"I have had enough now as well. I just think that this is a pattern that has taken place over the years. It's a general lack of responsibility towards her duties. I would accept

that if you are on site alone there is the need to take occasional breaks. However in this case there was an engineer booked to visit a datacentre who she had to grant access. Even if she had responded to messages and calls to her mobile I would have had a degree of sympathy. Her action resulted in an escalation from Colt to Networks, who in turn escalated to David, Kate, me, Tom Crofts, Kunal, Seb and Amarjit!!

I was concerned for her safety and well-being and had arranged for someone to come to site.

I have been a dove on this in past, but this time I think she has let us down for the last time."

65. On 25 June the claimant was suspended with immediate effect and received a letter from Mr Warren about the suspension and containing an invitation to an investigation meeting on 28 June 2019 with Mr Rokkas.

66. The letter explained the issue in this way:

"As you are aware our client London Metal Exchange… have contacted the company requesting that you be removed from the Finsbury Square site due to the following matters of concern: It is alleged that you were absent and unaccountable for 1 hour during your shift, causing a significant issue due to planned engineering works that were known to all staff." We note that there was no allegation relating to the claimant's handling of the CCTV issue in this letter.

67. The letter also said: "After this meeting we will be in a better position to consider whether to pursue a formal procedure with you and what representations can be made to the client on your behalf."

68. Mr Warren received advice from Pensinsula at this time:

Once the investigation is complete please send copies of any statements, minutes or any other relevant evidence (where possible signed and dated) and an outline of what you would like to achieve.

In the meantime, if you have not already received this, we need to ask your client to put their concerns to you in writing. Once received please send this across to me for us to discuss their concerns and impact to the case. Once received you will need to respond to your client advising them you have held a meeting with your employee to discuss his conduct and ask them to reconsider one final time (I can assist you with the letter). This is important as the tribunals will expect you to have "championed" your employee.

If your client is not prepared to change their mind and/or regardless you consider this to be an act of gross misconduct we may have no alternative to dismiss your employee. To do so we would need to have a final meeting with them to discuss this further again and also incorporate a disciplinary hearing, minutes should be taken and sent to me before I can approve a dismissal for third party pressure and/or gross misconduct. In the event of dismissal for 3rd party pressure the employee would be entitled to their contractual or statutory notice whichever is the higher and any

outstanding holiday/benefits. In the event of a gross misconduct dismissal they would only be entitled to outstanding holiday/benefits.

69. On 28 June 2019, Mr Rokkas held the investigation meeting with the claimant. The claimant was not provided with any documents at this or any point. Mr Rokkas told the Tribunal that he spoke to various people who would have attended the cancelled meeting about the incident but he made no notes. He spoke to Mr Carl and Ms Whitfield but not to Mr Rosada.

70. We saw a total of four versions of the notes which were made. They were not in the form of minutes and it was not always clear what was a note of something the claimant had said and what was a comment. We set out relevant extracts

The shift should start with a handover, which is expressed in 3 ways:

1. *Verbal handover from night shift consultant*
2. *Important emails printed for Incoming Operations Bridge Consultant*
3. *Handover email*

Natasha stated that:

1. *No mention of the DC visit was made in the verbal handover*
2. *No important email was printed to show any events of note*
3. *Was unable to locate the handover email inn the volume of emails to review*

…

Natasha had been working from 8 am without a break, and had experienced some Neuropathy (nerve) pain during the shift and as the workload started to decrease around 4:40 she decided to take a break for lunch as everyone is entitled to do. Her medication was wearing off.

This was unfortunate timing based on DC engineer for a colt Change Request arriving at 4:45, and this is when they were unable to contact base on CCTV, and calls Natasha was receiving to her mobile were from unknown numbers and therefore ignored.

Around 5:15 this was escalated and Kate Whitfield (LME Incident & Problem Manager) set up a WhatsApp group with numerous IT Ops personnel including Natasha. However as this was not a typical activity, Natasha did not respond to the WhatsApp group.

Natasha has a new phone and not all numbers came across during transfer, therefore some previously known numbers came up as unknown and hence not answered. Natasha admits not paying attention to the WhatsApp messages as this was a previously unused Bridge Operations communications medium.

...

Unaware to Natasha, LME were getting very concerned at no response form Natasha and Steve Carl (LME IT Operations Manager) requested for someone to attend LME offices to check if Natasha was ok.

Around 5:45 Seb Perada (who was on leave) picked up the WhatsApp message and initiated the Break Glass procedure to provide access to the Colt Engineer.

Natasha picked up an email / call / WhatsApp from Seb and returned to her desk to assist the Colt DC engineer entry to Cyxtera DC … The issue was resolved around 6 pm.

…

Natasha has stated her Neuropathy (nerve pains) and Type 2 Diabetes affect her concentration levels. Neuropathy medication currently work intermittently. Diabetes medication causes severe nausea / cramps needs reviewing. She intends to work with her doctor to find the appropriate medication.

71. The claimant also raised an issue with lone working. She said that both her doctor and a nurse at a Desmond's course she attended had raised the issue that she could have a medical emergency whilst working alone.

71. On 11 July 2019, Mr Rokkas sent the notes of the meeting to Mr Warren. He had added comments to the notes which add information / evidence. The version of the notes with his comments was not provided to the claimant prior to these proceedings. An example of one of these comments in relation to an assertion the claimant made about the Colt engineer incident is: "An assumption based on a process and a contact that is over 12 months out of date. This shows a lack of effort to actually locate and follow the current procedure, and a general assumption (without verification) that having escalated it is now someone else's problem. This is inexcusable behaviour from someone who has been on the team for almost 4 years."

72. In his covering email, Mr Rokkas said:

"Natasha is the longest serving member of the Bridge Operations team and we would expect to be the most conversant with procedure and requirements. However too many times issues have been raised informally and formally by LME regarding Natasha's performance. This latest significant issue was determined to be "dereliction of duties" by LME and caused a massive escalation chain within the organisation and the associated costs with the delay to the engineer. As such LME stated they no longer had faith in Natasha's ability to operate in this role and instructed us to remove Natasha from site and not return.

My opinion of this incident is one of gross negligence, wherein she ignored a serious issue and made no effort to contact any of the on-call escalation people to either inform them of the problem in the eight hours since she recognised it as a serious issue, nor to inform people that she felt unwell and might need assistance."

73. On 12 July 2019, Mr Warren sent an email to Peninsula, attaching the notes of the investigation meeting and commenting: "Our opinion is that this would still be classed as gross negligence and we would be looking for instant dismissal. Could you review the attached notes and confirm that we have a strong enough case to action this.

LME have no desire to let her back on site and we believe her excuses are not strong enough for someone in her position."

74. In terms of further investigation, Mr Rokkas obtained the handover email but did not provide it to the claimant.

75. On 17 July 2019 Mr Warren invited the claimant to a disciplinary hearing on 22 July 2019 to consider the following charges:

- *Alleged negligence in your duties of not identifying the handover details, which are a standard part of every consultant's shift.*
- *Alleged negligence in your assumption that escalating the DC access issue to someone not on call ended your responsibility for this issue, despite recognition and admission of the seriousness of the issue.*
- *Alleged negligence in ignoring increasing communication from Intergence & LME personnel whilst on your break.*
- *Allegations of not taking personal responsibility for ensuring you were suitably prepared for the expectations of your role, namely:*
    - *Citing loss of numbers from your phone in justification for not answering phone*
    - *Citing significant and worrying personal health impact of being the sole person on a shift without informing your employer of the heightened risk.*

The notes / summary of the investigation were attached. We note that the second charge, relating to the claimant's handling of the CCTV issue, had been added but had not formed part of the allegations originally notified to her.

76. On 22 July 2019, Mr Warren held a disciplinary hearing with the claimant. Mr Rokkas attended to take notes.

77. In terms of the documents that Mr Warren looked at, he told us he looked at the notes of the investigation and 'a number of emails I asked for in advance to establish the facts'. He said that these related to the efforts to contact the claimant and had been related to the claimant at the investigation meeting.

78. Mr Warren said he had done further investigation into the incidents: 'Making sure she received the handover email and checks into why she had not responded to WhatsApp and phone. I spoke to a number of people.' He made no notes of these investigations.

79. The claimant covertly recorded this meeting and provided a transcript., the accuracy of which the respondent did not dispute. In the meeting, shortly after it started, Mr Warren told the claimant she was being instantly dismissed and then said, 'I don't know if you have any comments'. The note of the meeting made by Mr Rokkas misrepresents the order of events and suggests that the claimant was told she was being dismissed after being given an opportunity to comment:

Upon reviewing the evidence from the previous meeting, and no new evidence being brought to this meeting it was concluded that the dereliction of duty constituted gross

misconduct, and therefore instant dismissal was made. MW stated NPB would be paid up to (and including) today.

Are there any overall mitigating factors you would like us to take into account before I close the meeting?

80. Mr Warren's witness statement also misrepresented the order of events.

81. In oral evidence, Mr Warren said that Peninsula told him it was highly likely that it was gross misconduct unless the claimant could provide other evidence. The respondent's disciplinary rules said gross misconduct was instant dismissal. He did not consider other options and decided trust was gone and the respondent did not want to risk another customer. He said that the claimant could have saved her job if she had given a satisfactory explanation at the disciplinary hearing but she did not. Asked what that explanation could have been, he said if, for example, she had fainted.

82. We did not accept that evidence. The claimant had not put forward fainting or anything similar to fainting as an explanation at the investigation meeting. Had she done so at the disciplinary hearing, it is hard to see how Mr Warren could have reached any other conclusion than that she was lying.

83. Mr Warren could see not mitigating factors. He considered that her disability was not relevant as it had not caused her to disregard procedures and fail to answer phone calls. He said that she did not respond to 113 WhatsApp messages and phone calls from four or five people. Although the claimant's poor concentration level might explain her missing the handover email, he could not see how it explained not answering the many phone calls. He heard no good evidence as to why the claimant did not take a break earlier in the day.

84. We note that Mr Warren did not see any WhatsApp messages and 113 was the number reported as having been sent to the manager group.

85. On 24 July 2019, the claimant was sent a letter of dismissal. Her conduct was said to have been a fundamental breach of her contractual terms which had irrevocably destroyed trusts and confidence.

86. On 25 July 2019, the claimant sent a letter of appeal. Her grounds were:

1*. After I notified the company and management at LME that I was diagnosed with Type 2 Diabetes in February 2019, my relationship with my team lead superiors deteriorated greatly.*

2. I have always received satisfactory reviews throughout my employment. In fact, my June 2019 appraisal was glowing.

3. However, during that appraisal Kyle Rokkas told me verbally, "I think you should look into seeking work elsewhere. LME Operations management have decided they cannot accommodate your request to work Monday to Friday. The contract requires shifts. They believe it would be unfair on the rest of the team."

4. From that point onwards it was clear to me that what Kyle Rokkas said was correct and my employment at the company was far from secure. I firmly believe that the real reason for my dismissal on the 22nd of July 2019 was not serious neglect on my part

warranting a termination. The real reason was that after my Type 2 Diabetes diagnosis, the company was looking for a way to end my employment. Kyle Rokkas as mentioned above evidenced this verbally.

87. On 30 July 2019, an advertisement was placed for the claimant's role which included the words: 'a desire to work antisocial hours will be crucial'.

88. On 1 August 2019, there was an appeal hearing in front of Mr Job. Mr Rokkas was again the note taker.

89. Prior to the hearing, Mr Rokkas sent an email to Mr Job:

Long email so stick with me. If you want to meet up before 1 pm to answer any questions, just let me know. Also attached are the two investigation minutes / summaries (the 28 Jun summary has my notes which have been shared with Mike but not Natasha).

…

During the break there were 15 calls to the Bridge Operations number from COLT Engineer and LME staff that went unanswered, a significant number of calls from LME Staff to Natasha's mobile, and over 100 WhatsApp message to the group chat that Natasha had been added to.

90. After summarising the charges and findings, the email went on to deal with the claimant's grounds of appeal. This email was not shown to the claimant.

91. It was clear from Mr Job's evidence that he simply looked at the claimant's grounds of appeal, which centred on the allegation that her diabetes had played a role in her dismissal. He neither reheard the original dismissal nor reviewed its fairness. He said that he conducted further investigations in the form of discussions with Mr Warren and looking at the claimant's appraisal. He received an email from Mr Rokkas on 5 August 2019 which disputed the claimant's claim that her diabetes was the reason for her dismissal.

92. On 20 August 2019, Mr Job wrote to claimant rejecting her appeal.

Submissions

93. Both parties made oral submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Law

Unfair Dismissal

94. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

Reason for Dismissal

95. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it 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.'

Reasonableness

96. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…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 that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

97. Tribunals must consider the reasonableness of the dismissal in accordance with s 98(4). However, tribunals have been given guidance on fairness in conduct dismissals by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?
(2) did the Respondent hold that belief on reasonable grounds?
(3) did the Respondent carry out a proper and adequate investigation?

98. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

99. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

100. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

101. The Acas Code contains the following requirements for a disciplinary hearing:
- the employer should explain the complaint against the employee and go through the evidence that has been gathered
- the employee should be allowed to set out his or her case and answer any allegations that have been made
- the employee should be given a reasonable opportunity to ask questions, present evidence and call witnesses
- the employee should be given an opportunity to raise points about any information provided by witnesses; and
- where an employer or employee intends to call relevant witnesses, advance notice of this should be given).

102. It is clear from case law that a thorough appeals process may remedy earlier defects in a disciplinary procedure. Such a process may need not be a rehearing Taylor v OCS Group Ltd 2006 ICR 1602, CA.

Direct discrimination

103. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:
- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic.

104. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

105. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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. "

106. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as

having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

107. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

108. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

109. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

110. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

111. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Harassment

112. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

113. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

114. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

115. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Discrimination arising from disability

116. In a claim under s 15, a tribunal must consider:

- Whether the claimant has been treated unfavourably;
- Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
- Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

117. There are two aspects to causation:

- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.

118. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

119. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

Conclusions

Unfair Dismissal

Issue: What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

120. It was clear to us that conduct was the genuine reason for dismissal. The client, LME, raised the issue of the claimant's conduct with the respondent. The contemporaneous documents show that LME was extremely unhappy about the conduct and that the respondent saw the force of the criticisms and commenced and pursued a disciplinary process as a result of the concerns. There was no evidence which suggested to us that there was some alternative reason for the claimant's dismissal.

Issue: If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

at the time the belief was formed the respondent had carried out a reasonable investigation;

121. It is trite employment law that the nature of the investigation required depends on all the circumstances including the seriousness of the offence / potential sanction. It can include matters relevant to mitigation even if central facts are not in dispute.

122. In this case, many central aspects of the charges were not in dispute, for example that the claimant had failed to notice or act on the handover email and that she did not answer her phone although it rang a number of times.

123. There were ultimately two matters which were said to have led to the claimant's dismissal – her handling of the problem with CCTV at the beginning of her shift and her delay in letting in the engineer because she was on a break and not answering her phone.

CCTV issue:

124. There was no charge in relation to the claimant's handling of this matter in the suspension letter. She provided her account in the investigation meeting as to what happened on the day. She said she dealt with the immediate issue relating to the entry of the engineers and then sent emails to the individuals who would deal with the underlying issue about the CCTV when they were at work during the week.

125. In Mr Rokkas' evidence and his comments on the hearing notes, he suggested that the claimant was at fault for not contacting a person on call as mentioned on the on call board. He also suggested that the claimant had followed an out of date procedure. These matters were not put to the claimant at any stage. The Tribunal was not told what the on call people would have done nor was it intelligibly explained to the Tribunal what the claimant should have done differently from what she did. So not only was the matter not properly investigated with the claimant, but we could form no view as to what the outcome would have been had it been so investigated.

126. The investigation of this issue fell outwith the band of reasonable investigations.

Taking a break and not being contactable:

127. We took a different view of the level of investigation into this issue. Some employers, we considered, would have been considerably more thorough; the WhatsApp messages might have been looked at and the claimant provided with a copy of the handover email. She would have been in a position to point out that the relevant handover email was in fact the handover from the previous day shift to the previous night shift. By looking at the WhatsApp messages, the respondent might have ascertained precisely how many had included the claimant.

128. However we were not able to say that the investigation of this issue was not within the band of reasonable investigations. Had the claimant searched for and read the handover email she would have been aware the engineer was expected. It was apparently the most recent handover email. Even if she had missed the handover email and informed someone she was taking a long break or answered the phone or what she accepted were a number of WhatsApp messages, the issue would not have arisen. She admitted the basic facts and had an opportunity to explain them. There was very little more that could have been investigated and we were not able to say that the investigation which was done was not within the range of the reasonable.

Issue: If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

there were reasonable grounds for that belief;

129. In relation to the CCTV issues we were not satisfied that the respondent had reasonable grounds for a belief that the claimant was guilty of misconduct in relation to how she handled this matter. Mr Warren was not 'on the ground' at the LME premises and did not have a detailed knowledge of the contract and the procedures. All he had to work from was the claimant's account of what occurred on the day and Mr Rokkas' critique of what she did, which was not put to her. This did not constitute reasonable grounds to conclude that the claimant was guilty of misconduct.

130. On the other hand, in respect of the claimant's failures in respect of the Colt engineer, we concluded there were reasonable grounds to conclude that the claimant was guilty of misconduct, given the matters which she admitted. Her explanation as

to why she had not answered the phone was, as the respondent reasonably found, unsatisfactory. If it was correct that the claimant had failed to put work numbers on her new phone, she should have been alive to the fact that if she received a number of calls from unknown numbers, there was every likelihood that one or more of these was a work call and was potentially important, particularly as she was the only member of staff on shift. The claimant had not suggested that she did not answer the telephone because of some issue connected with diabetes, so her disability did not provide a non culpable explanation for what had occurred. Her explanation for not picking up the WhatsApp messages was that this was not an established method of communication; but again this did not appear to be an explanation of why she did not notice or act upon messages from colleagues which would have been appearing on her phone.

Issue: Did the respondent otherwise act in a procedurally fair manner?

131. We concluded that the respondent had not acted in a procedurally fair manner. The claimant was not provided with a copy of the handover email nor with Mr Rokkas' annotated notes of the investigation meeting.

132. What was far more serious is the fact that the claimant did not have a disciplinary hearing which complied with natural justice or the Acas Code. Mr Warren had made up his mind to dismiss the claimant before she had the opportunity to say anything. It was fundamentally unfair to proceed as the respondent did; no reasonable employer would have caried out the disciplinary hearing in that way.

133. The appeal hearing did nothing to rectify the unfairness of the dismissal hearing. The claimant was still not provided with the documents she had not been provided with earlier nor with Mr Rokkas' email to Mr Job. Mr Job did not review the earlier decision or the process by which it was reached.

Issue: Was dismissal was within the range of reasonable responses?

134. Was it reasonable for the respondent to take the view that the claimant was guilty of gross misconduct and if so was it reasonable for it to dismiss?

135. We bore in mind a number of points:

- The respondent's own procedure seems to point to a matter of this sort being treated as serious misconduct which is likely to lead to a final written warning. That conclusion flows from the section of the disciplinary rules we have cited above;
- Although it was clearly the case that LME had ongoing grumbles which were in effect revived by the 22 June 2019 incidents, the respondent had given the claimant a positive performance appraisal and she was an employee with some four years' service and a clean disciplinary record;
- The respondent had no grounds to conclude there was any misconduct in relation to the CCTV incident;

- Looked at as a one-off incident, although the failure to be contactable so that the engineer could be let in was not a minor incident, and we were told that it led to some, unquantified, cost, nor was it an incident that that seemed to us to be of such significance that it could be said on its own to be calculated or likely to destroy or seriously damage the relationship of trust and confidence. We accept that 'serious misconduct' must at the severe end shade into gross misconduct, but the facts we were presented with us did not seem to be reasonably capable of being so characterised. Although the words 'loss of trust and confidence' were frequently repeated by the respondent, we had no sense of what they meant by those words; they seemed in effect to be a mantra which they had been provided with by Peninsula.

136. The respondent clearly faced a difficulty in that LME no longer wanted the claimant to continue on its contract and it may have been that the claimant would ultimately have been fairly dismissed had the respondent given her a lesser disciplinary sanction but LME refused to have her back. However, that is not the path the respondent pursued. We were acutely conscious that we should not substitute our own views for those of the respondent, but we were unable to find that the decision to dismiss for misconduct was one which a reasonable employer could have reached

Issue: In relation to the reason for dismissal and the fairness of the dismissal, the claimant says that the following factual issues are relevant:

> *Did the respondent's Kyle Rokkas suggest to the claimant on 22 May 2019 that, following her diabetes diagnosis and request for adjusted shift patterns, she might want to work elsewhere and say that LME were not happy with the arrangement?*
>
> *This is said by the claimant to cast doubt on the asserted reason for the dismissal and/or suggest that the dismissal was predetermined.*

137. We did not accept the claimant's account of what had been said for the reasons we have already outlined. We accepted Mr Rokkas' evidence that he was still concerned that the claimant wanted a 9 – 5 work pattern which was not available at LME and that is why he raised the matter. We saw no evidence that LME or the respondent wished the claimant to leave because they were unhappy abut her working day shifts only.

Issue: Did a third party require the respondent to (a) remove the claimant from her workplace, (b) dismiss the claimant?

138. LME did require the claimant to be removed from their premises / contract but did not require that she be dismissed. That was not a matter which went to the fairness of the dismissal.

Issue: Did the respondent investigate or consider moving the claimant to another of its sites?

139. The respondent did not consider other roles for the claimant because they concluded she had been guilty of gross misconduct.

140. The issue of what roles might have existed for the claimant if LME continued to decline to have her return to the LME contract was explored to some extent in evidence. The respondent told us that there were no other managed services roles in London. The respondent's headquarters in Cambridge were too far for the claimant to commute to, a view she agreed with. However it was not clear to us whether there were any other roles which the claimant might have been suitable for. In order to properly consider the Polkey issue, we considered that we needed a better understanding of possible roles. We also wished to hear submissions from the parties on what the outcome might have been had the respondent sought to have the claimant reinstated to the LME contract and indeed whether it would have been realistic for the respondent to attempt to persuade LME to take the claimant back.

Direct Disability Discrimination – Section 13 Equality Act 2010

Issue: Was the claimant dismissed because of her disability?

141. We have found the principal reason for dismissal was misconduct. Were there facts form which we could reasonably conclude that the claimant's disability played a material role in her dismissal?

142. We were unable to find any such facts. We consider in turn a number of matters the claimant pointed to.

143. The claimant suggested that there had been unwillingness to put the claimant on day shifts only and there was evidence that LME and the respondent were unhappy with the situation and reluctant to allow it to continue.

144. We found no evidence of that. The change to the claimant's shifts was dealt with promptly and sympathetically. It was reasonable not to make the change permanent given the GP certificate and the fact that it was a new diagnosis.

145. The claimant pointed to the timing. Her three months of days shifts was due to be reviewed shortly. In fact we could see no great coincidence of timing but even if there had been we were entirely satisfied that LME was genuinely unhappy about the incident because of what had occurred and raised its unhappiness with the respondent who had no choice but to take action.

146. The claimant pointed to a failure to get an occupational health report. Again we could see nothing suspicious about that. They were not a large employer with an occupational health facility. The suggestion was made by Peninsula as a course to be considered if the change to shifts was problematic. In fact the respondent accepted the GP certificate and acceded to the claimant's request not to work night shifts. The failure to get an occupational health report at this stage was neither unreasonable nor does it lead to an inference that the respondent had any kind of animus against the claimant because of her disability.

147. Similarly the emails which were sent by LME about the claimant's shifts did not seem to us to reveal anything more than that fact that a 9 – 5 shift pattern would not work for LME because of its requirement for 24/7 cover.

148. Looking at all of the facts in the round, we were simply unable to find any facts from which we could reasonably conclude that the claimant's disability was a material reason for her dismissal. The burden of proof therefore did not pass to the respondent and we dismissed this claim.

Disability Related Discrimination - section 15 EqA 2010/Perceived Discrimination

Issue: Did the respondent treat the claimant unfavourably. The unfavourable treatment relied on is dismissal.

149. The claimant was dismissed and that is clearly unfavorable treatment.

Issue: Did the following things arise in consequence of the claimant's disability:

A requirement to make temporary or permanent adjustment to the claimant's shift pattern

150. The evidence from the claimant and her GP, as accepted by the respondent, was that the claimant had diabetes and needed to regularise her sleep pattern. The need to change her shifts clearly arose from her diabetes.

Issue: The claimant going on a break at a time when the engineer arrived and not interrupting her break to deal with the communications about the engineer's arrival;

151 We concluded that this portmanteau characterization of the events of 22 June 2019 did not arise in consequence of the claimant's disability. The claimant accepted she could have taken a break earlier. She eventually took a break at the time she did in part because of a variety of symptoms, some of which appear to have been connected with her diabetes. However, there had been some seven hours in which she could have taken a break before 4:30 if she had read the handover email. There was no disability-related explanation provided to us as to why the claimant had not searched for and read the handover email.

152. Having gone on a break, there was no evidence at all that connected the claimant's disability with her failure to answer her phone calls or messages. The claimant provided the Tribunal with the explanation about the harassing hairdresser, an explanation we did not really understand, but which was entirely unrelated to disability.

153. So although, we accepted that the claimant felt the need for a break at 4:30 in part because of her diabetes-related symptoms, the reasons why she had put herself in a position where she had to take a break then, or having taken a break then, did not

make any arrangements to deal with the engineer's visit, were unrelated to her diabetes, on the evidence we heard.

Issue: The need for the claimant going on an uninterrupted break after more than 8 hours of work

153. There was no evidence that suggested to us that the claimant required the *uninterrupted* break because of her disability. She did not, for example, suggest that she needed to sleep or had had to go out to urgently find food,

Issue: Was the unfavourable treatment because of the need to change the claimant's shifts?

154. There was simply no evidence from which we could conclude that the respondent resented the temporary change of shifts or would have been unwilling to make the change permanent had that been the effect of further medical advice.

155. We considered whether the failures in the disciplinary process might provide evidence from which an inference could be drawn. However it seemed to us that the likely explanation for those failures was that Mr Warren did not know how to run a fair process and was probably keen to find he could dismiss the claimant in circumstances where the client LME did not want her back and there was no obvious alternative role for her.

155. The treatment we were required to look at came about because of decisions by Mr Warren and Mr Job. The parties did not make any representations to us about whether, if LME had resented the shift change and that had played a role in its requirement that the claimant to be removed from the LME contract and that in turn had played a role in the claimant's dismissal, that would as a matter of law be sufficient to establish causation under section 15.

156. For completeness we considered whether there were facts on the basis of which we could properly infer that LME was motivated by the shift change. However there was simply no evidence that LME had any issue with the claimant working days only. How the respondent deployed employees to cover its contract with LME was presumably or limited importance to LME provided the shifts were satisfactorily covered on a 24/7 basis. The reference in the internal email to the 22 June matter being a 'last straw' seemed overwhelmingly more likely to refer back the various operational issues which LME had complained about and which were well documented than to anything to do with the shift pattern.

Issue: Can the respondent show the treatment is a proportionate means of achieving a legitimate aim? The aim relied on by respondent is protecting the business reputation

158. Because of our findings on other issues, we did not have to go on to consider this issue.

Issue: What steps did the respondent take following the claimant's diabetes diagnosis in relation to risk assessments and what consultations were there with third parties? E.g. HR.

159. We have set out in our findings of fact what steps the respondent took. Had we been required to consider the justification defence and look at proportionality, it might have been relevant for us to make findings about the adequacy of the steps taken by the respondent. The Tribunal members in particular, drawing on their experience in the workplace, were in any event not persuaded that anything had occurred prior to 22 June 2019 which should have triggered a risk assessment. Had the claimant in due course communicated her concerns about lone working, the view of the members was that any risk assessment would have been likely to emphasize the need for the claimant to remain in communication and to alert the respondent if she felt unwell or was taking a break.

Disability-related Harassment – section 26 Equality Act 2010

Issue: Did the respondent subject the claimant to unwanted conduct? The claimant relies upon the following:

a. The claimant's suspension

160. The suspension was clearly unwanted by the claimant.

Issue: Did the respondent subject the claimant to unwanted conduct? The claimant relies upon the following

b. The claimant's dismissal

161. Equally the dismissal was certainly unwanted.

Issue: If so, was the unwanted conduct in relation to the claimant's disability?

Suspension

162. We had a reasonable paper trail which showed how the suspension came about and what the reasoning for it was. The events of 22 June 2019 caused LME to call for the claimant's removal from the contract. It was clear to us from the correspondence that LME felt there had been too many issues with the claimant over the years relating to matters such as lateness and aspects of her performance.

163. Similarly, it was clear to us that the respondent then suspended the claimant in order to deal with the fact that LME had asked for the claimant to be removed from the contract, pending investigation and consideration of how to deal with that situation,

having been advised by Peninsula that suspension was appropriate. There was nothing in the motivation, the context, the suspension itself or how it was effected which seemed to us to relate to the claimant's disability.

164. In other words, there were no facts from which we could reasonably conclude that there was a relationship with disability, and even if there had been, the respondent had provided a cogent and complete explanation for the suspension which did not relate to the claimant's disability.

Dismissal

165. Similarly, on the facts we have found, there were no facts from which we could reasonably conclude that the motivation for the dismissal was disability, that the claimant's dismissal formed a material part of the context to the dismissal or the way in which it was effected.

166. Although the harassment claims failed for lack of relationship with disability, for completeness we also considered whether the treatment had the proscribed purpose or effect.

Issue: If so, did the unwanted conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Suspension

167. The respondent's purpose was not to have the prohibited effect but to deal with the situation which had arisen because of the events of 22 June 2019.

168. Did the suspension nonetheless have the proscribed effect? Any suspension is likely to be a shocking event. It seemed to us, however, that something more is required before it can reasonably be considered to violate dignity or create the relevant environment. That something might be the relationship with a protected characteristic itself, it might be the fact that the suspension was unreasonable, was carried out in a particularly public or unpleasant way and so forth.

169. There were no such features in this case, and we found that there was no proscribed purpose or effect.

Dismissal

170. Again it was clear that the respondent's purpose was not a proscribed one. Did the dismissal have the proscribed effect? This was a more finely balanced question. We considered that no 'environment' was created because the effect of a summary

dismissal is in effect to terminate the working environment so far as the particular employee is concerned. Did the dismissal violate the claimant's dignity? It was certainly unfairly carried out, in particular in relation to the significant unfairness of the disciplinary hearing, where the claimant was told she was dismissed before she had the opportunity to state a case.

171. Nonetheless, we considered that unfairness, without more, will not necessarily 'violate dignity'. We reminded ourselves that those are strong words. We entirely accept that a dismissal like the claimant's is likely to result in feelings of outrage and injury. We were not persuaded however that the claimant's dignity was affected, although again a relationship with the protected characteristic might have changed our analysis in respect of this issue as well.

172. For these reasons we did not uphold the claimant's harassment claims.

Wrongful Dismissal

Issue: Did the claimant's actions amount to a repudiatory breach of contract entitling respondent to dismiss without notice?

173. On the findings of fact we have made, it was not reasonable for the respondent to conclude that there was a repudiatory breach of contract. We reminded ourselves, that when looking at wrongful dismissal, we had to decide whether we considered the claimant's conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

174. We considered that the claimant had failed to explain to us in a satisfactory way why she had not searched for the handover email and why she had not answered her phone when she took her break. There was a dereliction of duty but it was not so serious that we considered it amounted to a repudiatory breach of contract. It simply was not in the same class as the types of behaviour which typically amount to gross misconduct.

175. The claimant was summarily dismissed without her contractual notice. The claim for wrongful dismissal is therefore upheld.

Contribution and Polkey

176. At the remedy hearing, we will hear the parties' submissions on contribution and the Polkey issue and any further evidence which may be relevant to the Polkey issue.

Remedy hearing and orders

178. If the parties are unable to agree the compensation due to the claimant, there will be a remedy hearing on **16 July 2021** by Cloud Video Platform.

179. If there is any further evidence the parties wish to adduce on remedy issues, they will send each other any documentary evidence by 4 pm on **24 May 2021** and any witness statements by 4 pm on **2 July 2021**.

Additional Case Management Orders for the Video Hearing

Contact Details for Joining Instructions

1. The tribunal needs to send joining instructions out to the parties by email. The current email addresses are as follows:
   Claimant: simon@armstrongslaw.co.uk
   Respondent: jonathan.munro@peninsula-uk.com

2. Each party must email londoncentralet@justice.gov.uk as soon as possible if the contact details change. **The email should say "FAO OF CVP CLERK" and give the case number and hearing date in the subject line.**

3. Each party is responsible for sharing the joining instructions with all legal representatives and any witnesses that they are calling to give evidence, as well as any other people wishing to observe the hearing as a member of the public.

Written Materials

4. By no later than 5 days before the hearing the parties must email a copy of the bundle, the witness statements, , and any other relevant document, or a link to a site from which they can be downloaded, to londoncentralet@justice.gov.uk .

5. The email should include **the case number and hearing date and say "FAO THE CVP CLERK" in the subject line.**

6. All written materials should be provided in pdf format and should be rendered text readable.

7. Each party shall be responsible for ensuring they have access to the same written materials that have been sent to the tribunal in a format appropriate to them.

Witnesses

8. All witnesses when giving evidence must have access to:

- Their own witness statement
- The witness statements of all other witnesses (as they may be questioned on these)
- The bundle

The documents must be clean copies, without any markings, highlighting, notes or bookmarks.

Employment Judge Joffe
London Central Region
04/05/2021

Sent to the parties on:
04/05/2021

For the Tribunals Office