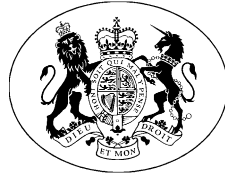

EMPLOYMENT TRIBUNALS

Claimant: Miss E L Hutchison

Respondent: UPS Ltd

FINAL HEARING

Heard at: Midlands (East) (in public; by CVP) **On:** 22 to 26 March 2021

Before: Employment Judge Camp Members: Ms J Dean
Ms J Hogarth

Appearances
For the claimant: Ms S King, counsel
For the respondent: Ms A Del Priore, counsel

RESERVED JUDGMENT

(1) The claimant's complaints of disability discrimination fail.

(2) The claimant was constructively dismissed. Her dismissal was unfair.

(3) If the remedy for unfair dismissal is compensation, subject to mitigation and to any other outstanding remedy issue:

a. no reduction is to be made to the basic award and to any compensatory award pursuant to section 122(2) and section 123(6) of the Employment Rights Act 1996;

b. a so-called 'Polkey reduction' is to be made to any compensatory award as follows:

i. no reduction to compensation for losses relating to the period from the effective date of termination of employment – 25 August 2019 – to 20 September 2019 (3 weeks after the date of a planned disciplinary hearing);

ii. a reduction of 20 percent from 21 September 2019 onwards;

c. there will be no increase or reduction to compensation pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

(4) **ORDER:** Within 10 days of the date this is sent to them, the parties must provide their dates of unavailability over the next 6 months so that a 1 day remedy hearing can be listed. Within 42 days, the claimant and respondent must either: confirm they have entered into a binding settlement agreement; put forward their proposals, agreed if possible, for case management orders for the remedy hearing.

REASONS

Introduction

1. The claimant was employed by the respondent courier and package delivery company from 29 September 2014 until her resignation with effect on 25 August 2019. She was employed as Preferred Customer Associate (PCA) Clerk in the respondent's Nottingham Customer Centre. Her role was dealing with calls and emails from the respondent's higher spending customers.

2. At all relevant times the claimant had a disability in accordance with the Equality Act 2010 ("EQA"), namely vestigial migraine and vertigo.

3. Following early conciliation from 13 September to 13 October 2019, the claimant presented a claim form on 12 November 2019 claiming disability discrimination and constructive unfair dismissal.

4. Although on paper there are complaints about other things as well, the claim is essentially about the claimant's resignation and the events leading up to it. This is not to say that all the claimant's allegations about other things have no substance to them, merely that those with merit relate to what happened well before the claim; and we think there is almost no chance that there would have been any Tribunal claim but for what led the claimant to resign. In particular, the allegations of disability discrimination are either misplaced or significantly out of time.

5. The claimant resigned a few days before a disciplinary hearing where she was facing allegations of gross misconduct: of cutting off and ignoring customer telephone calls. An attempt has been made to connect the claimant's disability to the disciplinary process, but no such connection exists in reality; the two have nothing to do with each other, however indirectly. It has also been suggested that there was no proper basis for disciplinary action against the claimant and that it was instigated in bad faith, when – manifestly – there was and it wasn't. What we do agree with the claimant on is that the investigation and disciplinary process was badly mishandled, particularly in terms of what was communicated to her, to such an extent that she was constructively unfairly dismissed.

6. There is a summary of our decision at the end of these Reasons.

Claims, issues & law

7. As well as the constructive unfair dismissal complaint, the disability discrimination claims that remain before the Tribunal are:

   7.1 two complaints of unfavourable treatment because of something arising in consequence of disability under EQA section 15;

   7.2 three complaints of breaches of the duty to make reasonable adjustments.

8. In relation to each complaint, the individual held wholly or largely responsible for the alleged discrimination is the claimant's line manager's line manager, Mr M Kieme, a PCA Manager.

9. There is an agreed list of issues[1], to which we refer and which should be deemed to be incorporated into these Reasons. When we refer to issues by number and letter – e.g. "issue 1.2 (a)" – we are referring to paragraphs of that list. That list includes remedy issues. With the parties' agreement we have dealt with all of the remedy issues listed in relation to the unfair dismissal claim the claimant has won. The list does not include the question of whether reinstatement or re-engagement should be ordered, nor that of how much should be awarded as a basic or as any compensatory award. Those are questions for a remedy hearing, if one is necessary.

10. Apart from remedy issues relating to complaints that have not succeeded (which we haven't dealt with because it is unnecessary to do so), where we don't deal with an issue in the list of issues, it is because the claimant has withdrawn that part of the claim.

11. We note that an attempt has been made on the claimant's behalf to add to her claim an allegation that she was the victim of a discriminatory conspiracy to oust her from her employment. This is not an allegation that is before the Tribunal. It formed no part of the claimant's case prior to this hearing; certainly it is not an allegation made in her claim form, nor in the 'Scott schedule' she provided in April 2020 that she was given permission to rely on by Employment Judge Adkinson at a preliminary hearing on 17 April 2020, nor in the list of issues. Moreover, it has no basis in fact; it seems based purely on fanciful speculation by the claimant (and, possibly, her legal team).

12. Finally in relation to the issues, we note that parts of the claimant's witness statement and of her counsel's, Ms King's, written closing submissions are devoted to what happened after the claimant resigned. All of that was almost entirely irrelevant even in theory, it did not feature in the list of issues, and it was totally irrelevant in practice. We shall not spend any significant time on it in these Reasons.

13. In terms of the law, the parties seemed to be in agreement, except in relation to the time limits applicable to the reasonable adjustments claims. We shall deal with the law on time limits separately, when we consider time limits issues.

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[1] The "Revised Agreed List of Issues", emailed to the Tribunal by respondent's counsel on 21 March 2021.

14. Putting time limits to one side, the law is contained in the relevant legislation, in particular sections 95, 98, 122 and 123 of the Employment Rights Act 1996 ("ERA"), section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") and sections 15, 20 and 21 of the EQA, and is accurately reflected in the list of issues.

15. In relation to the [EQA] section 15 and reasonable adjustments claims, we note Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, at paragraphs 15 to 29, 41 to 47, 57 to 68, 73, and 79 to 80.

16. Turning to constructive unfair dismissal, dismissal includes an employee terminating, "*the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*": ERA section 95(1)(c). What this means was definitively decided by the Court of Appeal in Western Excavations v Sharp [1977] EWCA Civ 165, in the well-known passage beginning, "*If the employer is guilty of conduct which is a significant breach…*" and ending, "*He will be regarded as having elected to affirm the contract.*"

17. The claimant relies, as the "*significant* [a.k.a. fundamental or repudiatory] *breach*", on an alleged breach of the so-called 'trust and confidence' term by a course of conduct said to have begun in April 2015 and with a 'last straw' on 23 August 2019. This is an allegation that the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. Any breach of that term is repudiatory. This serves to highlight what a high-threshold test it is: "*destroy or seriously damage*" is the wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.

18. As was explained by Lord Steyn in Malik & Mahmud v BCCI [1997] ICR 606 at 624, although it is possible for the trust and confidence term to be breached by conduct the employee is unaware of, such conduct cannot be the basis of a constructive dismissal claim. This is because the employee must resign in response to the breach in order to have been constructively dismissed.

19. This is – to an extent – a 'last straw' case. An essential ingredient of the final act or 'last straw' in a constructive dismissal claim of this kind is that it is an act in a series the cumulative effect of which is to amount to the breach of the trust and confidence term. The final act need not necessarily be blameworthy or unreasonable, but it has to contribute something to the breach, even if relatively insignificant. Following a breach or breaches of the trust and confidence term, affirmation (referred to at the end of the passage from Western Excavations v Sharp from above) of the contract does not prevent an employee from later relying on those same breaches as part of a course of conduct amounting to a repudiatory breach; so long as there is subsequently something that adds to them. See Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493 and Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

20. In Wright v North Ayrshire Council UKEATS/0017/13, the EAT emphasised that in a constructive dismissal case, the repudiatory breach of contract in question need not be the only or even the main reason for the employee's resignation. It is sufficient that it "*played a part in the dismissal*"; that the resignation was, at least in part, "*in response to the repudiation*"; that "*the repudiatory breach is one of the factors relied upon*" by the employee in resigning. This is the one and only part of the test for whether someone is constructively dismissed in relation to which it is appropriate to look at matters subjectively, from the employee's point of view.

21. On the so-called Polkey issue (4.1 and 4.2 in the list of issues), we note Polkey v AE Dayton Services Ltd [1987] UKHL 8 and paragraph 54 of the Employment Appeal Tribunal's decision in Software 2000 Ltd v Andrews [2007] ICR 825.

22. In relation to ERA sections 122(2) and 123(6), we have sought to apply the law as set out in paragraphs 8 to 12 of the decision of the EAT in Jinadu v Docklands Buses Ltd [2016] UKEAT 0166_16_3110.

The Facts

23. We had witness evidence from:

    23.1 for the claimant, the claimant herself and from Miss Marriott, a former colleague of the claimant's. Miss Marriott's main role in the factual background to this case is that it was she who told the claimant, just before the claimant's resignation, that (as set out in issue 3.1(19)), a "*Call Centre Co-Ordinator,* [called Mr Holmes, told] *all staff on the floor that* [the claimant's] hours had been given to [a colleague called Mr Shepard] as "*no one ever comes back after being suspended and raising a grievance*";

    23.2 for the respondent, Mr Kieme; Mrs E Bucknall, the claimant's Team Leader from early 2019, and someone who had (before the events that led to the claimant's disciplinary process) a friendly relationship with the claimant and often gave her lifts to work; Mr D White, the respondent's UK Brokerage Manager, who handled the claimant's grievance.

24. There was a hearing 'bundle' of 564 pages, numbered 1 to 562. We were taken to, and had time to read, only a fraction of the pages in it.

25. We were also, on day 4 of the hearing, provided with a transcript of a very small part of a recording the claimant's brother had secretly made on the day of her grievance hearing. Suffice it to say that reading it, and listening to that part of the recording (which we also did as we were invited to do so), did not assist us with our decision-making.

26. Written closing submissions from counsel, totalling 19 pages on the claimant's side and 18 on the respondent's, were helpfully provided at the start of the final day of the hearing.

27. What follows now is a summary of the important facts. Many of our findings on significant things that are in dispute are made as part of our decisions on the issues –

see from paragraph 55, below. We have not in these Reasons tried to mention or deal with every single event or difference that either side has put before us. Our focus is on what is necessary purely to make and to explain our decision.

28. By way of background, please see the Cast List and Chronology[2], both of which are part of our findings of fact. The Chronology is not agreed as such, but there is nothing relevant in it stated as fact which we understand to be materially inaccurate or in dispute.

29. Following periods of sickness absence, most of which were attributed to migraines and/or vertigo / dizziness, an Occupational Health report of 14 July 2015:

    29.1 noted that the claimant had been diagnosed with vestibular migraines and had had significant symptoms, affecting her speech, ability to concentrate and ability to communicate by telephone when at work, which could come and go at any time;

    29.2 advised, "*that currently the disability criteria under the remit of the Equality Act 2010 are not likely to apply, though this may change in the longer term should Ms Hutchison's symptoms persist. it is difficult to foresee what adjustments Ms Hutchison's manager could consider implementing at this time to assist her … it may not be practical for her to continue working until such time she has completed her medical investigations and her symptoms have improved significantly.*"

30. For reasons that are unclear, there was no further occupational health referral until 2019. During the second half of 2015 and during 2016 and into 2017, the claimant had various periods of sickness absence attributable to her disability, including between 23 July 2015 and 10 December 2015 and intermittently between 4 August 2016 and 6 January 2017. After each period of sickness absence, there were return to work meetings, sometimes involving Mr Kieme.

31. There were some other 'review' meetings as well, involving the claimant, Mr Kieme and HR. At one such meeting on 24 February 2017, it was agreed that the claimant would permanently work 3 days a week and have two 30 minute and three 10 minute breaks each working day. 6 weeks later, it was noted that she was happy with this arrangement and that her performance had improved. However, there were a number of further periods of sickness absence related to her disabilities during the rest of 2017 and in 2018, including most of the period from 16 August to 21 October 2018. On 10 September 2018, the claimant's working pattern was changed to five days a week, 8 am to 12.30 pm.

32. On 20 December 2018, there was an incident, referred to as the "coffee incident", that was mentioned in paragraph 3.1(4) of the list of issues as part of the alleged breach of the trust and confidence term. The gist of what happened is that the claimant took obvious exception to being reminded by her then line manager, Ms H Perkins, that she was not allowed to go into the canteen to get a coffee except during one of her rest

[2] We note that this is itself a 6½ page document, which reinforces the point made in the previous paragraph about stopping these Reasons getting excessively long.

breaks, as the claimant had just done. Because of her reaction, Mr Kieme called the claimant into an informal meeting, there and then, with him and Ms Perkins. During the meeting the claimant became distressed and suffered a panic attack. Mr Kieme called the claimant's brother to come and take the claimant home and said he would have her referred to occupational health for an updated report.

33. For no apparent good reason, the occupational health appointment was not until 8 April 2019. There was an occupational health report of 10 April 2019 from a Dr Robinson, to which we refer. Amongst other things, the doctor expressed the opinion that the claimant had a disability under the EQA and that the respondent should consider conducting a stress risk assessment and making adjustments including, "*During more minor episodes of migraine Miss Hutchison will be better suited to dealing with email correspondence, rather than continuing with telephone work which can be stressful*". No stress risk assessment was ever carried out.

34. In or around early June 2019, one of the respondent's customers complained that an unidentified PCA Clerk was ignoring and cutting off their calls. Mrs Bucknall investigated, focussing at first on PCAs other than the claimant who she thought were likely culprits, but who, upon investigation, seemed not to be guilty. She began investigating the claimant around 25 or 26 June 2019. The main tools she used for investigating were: looking at the claimant's average call time; listening in on the claimant's calls, which she was able to do without the claimant knowing what she was doing (albeit PCAs knew that managers were able to and sometimes did this as part of normal quality control and appraisal processes and the claimant knew that Mrs Bucknall would be listening in on some of her calls at some stage around 27 June 2019 for that purpose). While listening in, Mrs Bucknall could also, from where she was sitting, see roughly what the claimant was doing in terms of pressing buttons on her phone. To explain how the phone system worked and what Mrs Bucknall could see and hear:

    34.1 unless a PCA had, by pressing a button, put themselves on "not ready", calls would automatically come through to them, but when a call came in, the PCA ought to know it was there because there was an indicator on their phone screen;

    34.2 when listening in to calls, Mrs Bucknall could hear both the caller and the PCA and what was going on around the PCA, picked up from the microphone on their headset;

    34.3 to end a call, the PCA would press a button on their phone.

35. In terms of average call time on the days investigated, the claimant's was significantly below average. This was consistent with the claimant cutting off callers rather than dealing with their queries.

36. On 26 and 27 June 2019, Mrs Bucknall, listening in on the claimant's calls, heard things consistent with the claimant ignoring and cutting off customers. On 2 July 2019, Mrs Bucknall and Mr Kieme heard and saw the claimant ignoring customer calls, including

a customer saying "*Hello*" repeatedly[3] and being ignored, and heard and saw calls being cut off as the claimant pressed a button on her phone.

37. We have no good reason to doubt Mrs Bucknall's evidence about this. No plausible motive has been put forward for her to make it up. There is literally no evidence that Mrs Bucknall (or anyone else) 'had it in' for the claimant; in Mrs Bucknall's case, the truth was quite the reverse. She considered the claimant to be a friend and was shocked and upset by what she believed she had discovered. We shall go into this a little more later in these Reasons, when considering the claimant's allegation of a discriminatory conspiracy against her.

38. It seems to us that, based on Mrs Bucknall's evidence, there were only two possibilities: the claimant was guilty of ignoring and cutting off calls; there was an intermittent fault to do with her headset and/or with her telephone and/or other equipment. We can quite understand why Mrs Bucknall and Mr Kieme did not blame the equipment given that:

    38.1 most of the time, the claimant was not ignoring or cutting off calls and she hadn't complained of any problems;

    38.2 Mrs Bucknall, listening in on the claimant's calls, could hear both the claimant and the customers who were cut off;

    38.3 the claimant ought to have been able to see when she had a call from the screen on her phone and therefore ought to have known if she had a call that she could not hear;

    38.4 the claimant seemed to be knowingly cutting off calls by pressing the button on her phone.

39. Coincidentally with her investigations, Mrs Bucknall carried out an assessment of the claimant's performance by listening in on and 'marking'[4] 10 of her calls on 27 June 2019. This was something that was regularly done by managers – what we referred to in paragraph 34 above as the respondent's normal quality control and appraisal processes. (We were taken to a number of the 'Feedback & Review Sheets' on which these assessments of the claimant were recorded. They show that she was a high performing member of staff, something none of the respondent's witnesses disputed). Part of the reason Mrs Bucknall chose 27 June 2019 as the day to carry this out was that the claimant was having a bad day with her disability and had informally expressed to Mrs Bucknall concerns that her condition was adversely affecting the quality of her telephone calls. The Feedback & Review sheet for this day shows that in Mrs Bucknall's view, the difficulties the claimant was having "*did very little impact to her quality*" and that overall, "*this was a good result*". In common with other Feedback & Review Sheets

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[3] It was suggested by Ms King in cross-examination and in submissions that this meant the caller was continuously saying the word "hello" for the duration of the call; it does not necessarily mean this; it most likely means that the caller was doing what most of us would do if we got through on the phone to someone but they didn't say anything – saying hello every 5 to 10 seconds or so.

[4] By which we mean giving her a mark out of 100%.

relating to the claimant completed by Mrs Bucknall and other managers, there is some effusive praise for the claimant.

40. Also around this time, HR – in the form of a Ms S Mudzamiri – had belatedly got around to sorting out a meeting formally to discuss the occupational health report of 10 April 2019. From what little evidence there is around this meeting and its organisation, it looks like there were difficulties finding mutually convenient dates. It was originally to have taken place on 28 June 2019. A day or two (or possibly three) before – there is a factual dispute about this, which we do not need to resolve as it makes no difference at all to our decision – Ms Bucknall telephoned the claimant to tell her about it. The claimant wanted her brother to accompany her and arranged for him to attend. The meeting was then postponed from 28 June to 1 July 2019. It was attended by the claimant, her brother, Mr Kieme and Ms Mudzamiri. As best we can tell on the evidence, everyone agrees that the meeting itself was agreeable and successful; there is no discernible complaint about it.

41. On 2 July 2019, the claimant was without prior notice called into a meeting with Mr Kieme and Mrs Bucknall and was told she was facing allegations that she had deliberately cut off customer calls, something which was potentially gross misconduct, and that she was suspended. There was a brief conversation about the allegations and it has been referred to as an investigation meeting, but suspension meeting is more accurate. The claimant denied that she was aware of the relevant calls coming through.

42. The main dispute relating to this meeting is over whether Mr Kieme made a particular comment (issue 3.1(9)). This will be considered later in these Reasons.

43. It is not clear whether the claimant herself raised faulty equipment as a possibility on 2 July 2019, but Mr Kieme must have been alive to it because, as he told us in his oral evidence, he spoke to a telecoms engineer about it. It was never investigated. This is something else we will come back to later.

44. There is a dispute about whether the claimant's suspension was confirmed in writing.

45. By a letter dated 5 July 2019, the claimant was invited to a disciplinary hearing on 10 July 2019. The hearing was going to be with a Mr A Tadd, who was Inside Sales & AE Academy Segment Manager. We refer to that letter, which speaks for itself. Issues 3.1(11) to (13) relate to it.

46. On 8 and 9 July 2019, the claimant and Ms Mudzamiri exchanged emails that were mainly about the claimant's dissatisfactions with the disciplinary process and in which she requested various bits of information. It was decided that the disciplinary hearing would be postponed and that the claimant would raise a grievance. She did so on 14 July 2019. Her grievance was very broadly along the lines of her eventual Tribunal claim.

47. A grievance hearing with Mr White took place on 31 July 2019. The claimant was accompanied by her brother. There are handwritten notes and a verbatim transcript. Issue 3.1(14) concerns something said by Mr White during the hearing.

48. On 21 August 2019[5], the claimant received a letter dated 15 August 2019 inviting her to a reconvened disciplinary hearing on 22 August 2019. This was subsequently put back to 29 August 2019.

49. On 23 August 2019, Mr White completed his grievance outcome letter. It appears to us that Ms Mudzamiri failed to post it to the claimant. She did not get it until after she resigned.

50. Also on 23 August 2019, the claimant was told by colleagues, including Miss Marriott, that Call Centre Co-ordinator, Mr D Holmes, had been telling staff that the claimant's hours had been given to a Mr Shephard as "*no one ever comes back after being suspended and raising a grievance*". Miss Marriott gave evidence to this effect. The respondent's only evidence about the alleged comment was hearsay evidence to the effect that Mr Holmes had denied saying this.

51. It cannot seriously be disputed that Miss Marriott did indeed tell the claimant Mr Holmes had made the comments attributed to him and that that was what Miss Marriott believed he had said. What possible motive would she have had for making this up? We note that when the claimant resigned she referred to Mr Holmes's comment and this shows it clearly was something she had been told by Miss Marriott. In the absence of any particular reason to think that Miss Marriott misheard or misunderstood what Mr Holmes said, we find that he did make the alleged comment.

52. We do accept that Mr Holmes was mistaken, but that is not important; what is potentially important is what he said. Although he was the same grade as the claimant, his position as Call Centre Co-ordinator gave him additional status and he had some management or quasi-managerial responsibilities, meaning a comment like this was not to be treated in the same way as a rumour spread by gossip between PCAs.

53. The claimant resigned by an email of 25 August 2019, to which we refer.

54. There is one thing that happened after the claimant resigned that it is appropriate for us to mention at this stage. On 28 August 2019, following receipt of the claimant's resignation email, Ms Mudzamiri wrote to the claimant stating (amongst other things), "*As discussed on* [sic] *our earlier conversation the disciplinary hearing was not going to lead to dismissal as this was just an opportunity for you to be able to request information and give your own account*". This would potentially be significant if we were to decide that this had been discussed in a conversation before the claimant resigned, particularly if that conversation had taken place in, say, early July 2019. However, in the absence of any evidence from Ms Mudzamiri, let alone detailed evidence about the timing and content of the alleged conversation, or of agreement from the claimant that such a conversation took place, we are not prepared to make such a decision.

[5] There is an email from the claimant of that date referring to having received the letter "today".

Decision on the issues – disability discrimination – reasonable adjustments

55. We shall now give our decisions on the issues in the list of issues, one by one, quoting directly from the list of issues and making further findings as necessary along the way.

    1.2. Did R apply the following PCPs:

    (a) "PCP1" – The R had a policy of requiring staff in the role of PCA Clerk to answer telephone calls when required to do so, in addition to replying to e-mails throughout her employment, (denied, in that R will say the true PCP was more nuanced);

    (b) "PCP2" - The R is alleged to have had a policy, or practice of arranging, and/or holding meetings at short notice with staff, (admitted); and

    (c) "PCP3" – the R had a policy, and/or practice of assessing the performance of PCA Clerks by having regard to their "average call time", and/or their "not ready time" such that it would commence disciplinary proceedings on the basis of the shortness of their average call time, (denied).

56. The respondent did have PCP1. PCA Clerks did have to both answer telephone calls when required to do so as well as deal with emails. Calls took priority, and understandably so: the respondent could not have people sitting on hold waiting for their calls to be answered.

57. In suggesting that "*the true PCP was more nuanced*", the respondent is mixing up whether it had this PCP with whether it made an adjustment for the claimant in relation to this PCP. Its own case on the facts, properly analysed, is that it had a general practice along the lines of PCP1 but that it (allegedly) adjusted it for the claimant.

58. So far as concerns PCP3, during the hearing, particularly in closing submissions, an attempt seemed to be being made to amend PCP3 to take out or gloss over the last phrase: "*such that it would commence disciplinary proceedings …. call time*". But PCP3, as set out in the list of issues – no more and no less – is the PCP the claimant was given permission to rely on by Employment Judge Adkinson at the hearing on 17 April 2020. The reference to commencing disciplinary proceeds is integral to it; it appears to be part of the claimant's attempt to make a disability discrimination claim that connects with her disciplinary process.

59. There is, however, a phrase missing from the end of PCP3 as written in the list of issues, after "*average call time*": something like "*and/or the length of their average not ready time*".[6]

60. In relation to PCP3, "*average call time*" is self-explanatory. "*not ready time*" is time during which a PCA designated themselves as not ready – unable, in other words – to take calls. They might designate themselves as not ready for all kinds of reasons,

[6] This was not highlighted during the hearing, but is not, we think, controversial.

including for perfectly good reasons, such as completing a task related to a call they had just taken from a customer.

61. The respondent did not have PCP3. There is no evidence of the respondent ever taking disciplinary action against anyone for having short average call times or high not ready times, let alone of anyone being dismissed for it. At its highest, in accordance with Mr Kieme's oral evidence: if someone had consistently well below average call time for no good reason, this might indicate a performance issue (i.e. they couldn't be providing good customer service with such short calls) or a conduct issue (such as ignoring and disconnecting calls); if someone had excessive not ready time for a very bad reason – such as the PCA reading a book instead of taking calls – there could be disciplinary action. But the respondent did not have any general practice of commencing disciplinary proceedings on the basis of low average call times or high not ready times *per se*, and certainly never suggested any such thing in relation to the claimant. The claimant was not subjected to disciplinary proceedings because she had lower than average call times; having low average call times was not, in and of itself, misconduct. Instead, the fact that she had lower than average call times was evidence suggesting she was or might have been doing something else that was misconduct, namely ignoring and cutting off customer calls. Thus, not only did the respondent not have this PCP, even if it did have it in general, it did not apply it to the claimant and it did not cause her the alleged or any substantial disadvantage.

1.3. If so, did the PCPs put C at a substantial disadvantage in comparison to persons who are not disabled? The pleaded substantial disadvantages are:

• An exacerbation of C's stress and worry that she could suffer from vestibular migraines and/or the effects of her vertigo.

• An exacerbation of the symptoms of vestibular migraine/vertigo, namely: severe pain; visual distortions; inability to concentrate; dizziness; inability to communicate; and black outs.

62. We deal first with the alleged disadvantage in relation to PCP1 [concerning having to deal with both telephone calls and emails].

63. We have carefully looked through the claimant's witness statement and our notes of her oral evidence. There doesn't seem to be any evidence at all – not even an assertion from the claimant – to support the suggestion that PCP1 exacerbated her stress and worry about suffering migraines or vertigo. Nowhere does she say anything to the effect that the prospect of having to answer calls as well as deal with emails caused her to fear that she would suffer an attack.

64. We accept that the claimant was constantly concerned that she might have an attack, but not, on the evidence, that she had a particular concern about this to do with the prospect of having to deal with phone calls (and/or emails).

65. Turning to the second bullet point, we agree that there is no substantial evidence of the claimant suffering an acute episode of migraine / vertigo as a result of PCP1. There is, however, ample evidence – not least the respondent's own evidence that they accepted

this was the case and made an adjustment for it and the occupational health report of April 2019 – that when the claimant had a more mild episode, she usually found it more difficult and sometimes found it impossible to take phone calls. She told us about how she was sometimes able to 'push through' and carry on working, but at other times was not and had to take a complete break from work – or at least from telephone work. We think this amounts to an "*exacerbation of the symptoms of vestibular migraine /* vertigo". In any event, that the claimant's case in relation to this – that she was sometimes physically unable to take telephone calls because of her disability – has been clear and consistent and, prior to and throughout this hearing, well understood by the respondent.

66. The relevant suggested reasonable adjustment in the list of issues (issue 1.4.(a)) is permitting the claimant to respond to email enquiries only. Doing this would undoubtedly have avoided this disadvantage, i.e. alleviated the claimant's difficulties.

67. The respondent's case, and only real defence to this complaint other than time limits, is that it made an appropriate reasonable adjustment, in that (in Mr Kieme's words, from paragraph 45 of his witness statement), it "*was agreed for Emily to work on emails only (as opposed to telephone calls as well) when she was having a bad day or when she requested this*". There is, however, no documentary evidence supporting what the respondent says about this; and if the respondent were right we would expect such evidence to exist and to have been put before us. Since she raised her grievance, the claimant has consistently alleged that she asked for just such an adjustment to be made, but that it was not made. The respondent has therefore known since mid-2019 that this was part of her case and has had plenty of time to find and preserve this evidence. We would expect there to be something about the adjustment supposedly made somewhere in the records the respondent kept on the claimant. The respondent definitely did have call logs showing in detail how many calls the claimant was taking every 15 minutes which could prove or disprove the respondent's assertion that it made this adjustment. We have some of them in the bundle – relating to the end of June and the start of July 2019 – but what we have support the claimant's case: that there were never any significant periods of time when she was not taking calls and was permitted to deal with emails only.

68. Our conclusion on this is that although the respondent might in theory have been willing for the claimant to deal with emails if there was no one waiting to have their phone calls taken, in practice, there always was someone waiting and their needs took priority. In any event, we are not satisfied that the respondent ever gave the claimant significant periods of time when she was permitted not to take any calls at all. Any adjustment the respondent made in theory therefore did not in practice avoid the disadvantage.

69. The final issue in this complaint made about PCP1 (other than time limits) is: would it have been reasonable for the respondent to have to take the step of permitting the claimant, when necessary, to deal with emails only? We think it would. The respondent has not put forward anything of substance to support their assertion that it would have been impracticable, or would have caused significant customer-care problems, or would have led to excessive workload for the claimant's colleagues, or anything of that kind. There are, for example, no data supporting any assertion that taking this step

would have led to unacceptable waiting times for callers or would otherwise compromise the respondent's business.

70. We think the respondent essentially decided on principle that it would not make the necessary adjustment. Although the respondent is the best judge of what is right for its own business, if it is going to refuse to make what on the face of it is a reasonable adjustment, it needs some evidential basis for this refusal and in this instance we are not aware of any.

71. We shall now consider PCP2 – which concerns having meetings at short notice and which the respondent accepts it had – and the alleged substantial disadvantages.

72. In relation to the first alleged disadvantage – stress and worry about having a migraine / vertigo episode – we are not satisfied that the PCP she relies on caused this substantial disadvantage. Some of her oral evidence around this was a little confused, but by the end of it, it was clear that even on her own case she had no problems just with having short notice of meetings, nor with all or most short-notice meetings with Mr Kieme. What she had a problem with was particular meetings with Mr Kieme and HR that took place behind closed doors. This was because of what she genuinely came to perceive as a critical attitude towards her performance; a perception that was not objectively based, but came from her fear that the amount of sickness absence she was having would lead to the respondent wanting to 'get rid' of her (something that never actually happened). In addition, she didn't want more notice of such meetings for its own sake, but so that she could arrange for her brother to accompany her. This, in turn, was not because the amount of notice given of meetings made a difference to how much she feared having a migraine / vertigo attack, nor, really, that having her brother with her made a difference to this. It was because she felt Mr Kieme behaved better towards her at meetings if her brother was present than if he wasn't.

73. The suggestion – the second bullet point under issue 1.3 – that lack of notice of meetings caused substantial disadvantage because it exacerbated symptoms of migraine / vertigo has no real evidence to support it. The claimant did not in her evidence identify any particular meetings of which she was given short notice that she said led to an attack of migraine / vertigo, let alone establish a pattern sufficient to prove causation. The best evidence about the incidence of migraine / vertigo attacks we have is Dr Robinson's statement, in his occupational health report of 10 April 2019, that, "*Miss Hutchison informed me that her last significant episode of vestibular migraine …. was in October of last year.*" There was no evidence before us of an episode, and certainly not one connected with being given short notice of meetings, between the date of that report and the claimant's resignation. It is noteworthy that the meeting in December 2019 which has featured as a significant part of her case, and which in her evidence she said would "*haunt her forever*", did not result in a migraine/vertigo attack, despite it causing her so much anxiety that she had a panic attack.

74. We also note that the claimant's specific complaints about particular meetings connected with this part of her reasonable adjustments claim concern only two meetings that she has actually identified that were problematical for her: the meeting in December 2019 at which she had a panic attack and the meeting at which she was

suspended on 2 July 2019. The latter was problematical not because she was given short notice of it but because of its content and outcome. The claimant was not happy about her initial invitation to a disciplinary hearing, but that meeting never took place, and by the time it was going to take place, she had had 7 weeks or so to prepare for it.

75. The final point to make on this reasonable adjustments claim before we come on to limitation / time limits is that the claimant's main proposed adjustment – giving the claimant 7 days notice of all meetings – is wholly unrealistic and would never have been a reasonable step for the respondent to have to take. Taking the December 2019 meeting as an example, this was not a formal, planned meeting but was intended as an informal chat, the need for which arose unexpectedly in light of the claimant's behaviour on the day. Managing the claimant, and the employment relationship, would very quickly become unworkable if 7 days', or even 1 day's, notice had to be given of meetings like that.

76. In summary, subject to time limits issues:

    76.1 the reasonable adjustments claim based on PCP1 [telephones & emails] would partly succeed;

    76.2 the claim based on PCP2 [arranging meetings at short notice] fails mainly because it did not cause the claimant to suffer the alleged substantial disadvantages in comparison with persons who are not disabled;

    76.3 the claim based on PCP3 [commencing disciplinary proceedings based on unsatisfactory average call time and/or not ready times] fails mainly because the respondent had no such PCP.

Reasonable adjustments & time limits

77. Taking the dates of early conciliation and of presentation of the claim form into account, the earliest possible 'cut-off date' for limitation purposes is 14 June 2019, i.e. any complaint about something that happened before then potentially faces time limits difficulties.

78. We note the wording of EQA section 123. How that section is to be applied in relation to a reasonable adjustments claim is set out in the judgment of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, in paragraphs 14 and 15 of the decision, to which we refer.

79. We have to identify when, assessing things from the claimant's point of view, the respondent might reasonably have been expected to comply with the duty to make reasonable adjustments in connection with PCP1. Essentially, time only started to run against the claimant when the respondent's acts and omissions became inconsistent with the notion that the respondent was going to comply with the duty.

80. On the claimant's own case, as set out in paragraphs 9 and 10 of her witness statement, within a matter of days of a return to work from sickness absence in January 2016, despite earlier promises, she, "*was expected to take calls and meet stat targets as*

normal" and "*whenever*" she requested the necessary adjustment, this was refused by Mr Kieme. In her oral evidence, she suggested that she had made such requests of Mr Kieme throughout her employment and that he refused every time. In the list of issues (issue 3.1(1)), it is alleged that the respondent first refused to make the adjustment from April 2015.

81. Based on the claimant's own evidence, then, the respondent ought to have made the adjustment, and gave every indication that it had no intention of complying with the duty to make reasonable adjustments, from April 2015 onwards. On any reasonable view, the claim has been presented years outside the primary 3 month (plus any early conciliation extension) time limit; this would be so even if we gave the claimant the benefit of the doubt for a year or more after April 2015.

82. In oral submissions, Ms King for the claimant sought to argue that this failure to comply with the duty to make reasonable adjustments was "*conduct extending over a period*" (EQA 123(3)(a)), ending after the cut-off date. But as is clear from Kingston upon Hull City Council v Matuszowicz [2009] EWHC Civ 22, a repeated or continuous refusal or failure to do something in breach of the duty to make reasonable adjustments is not "*conduct extending*" as a matter of law.

83. We therefore have to decide whether it would be "*just and equitable*" to extend time so as to allow this reasonable adjustments claim to proceed, in accordance with EQA section 123(1)(b). In deciding this, we have sought to apply the law as summarised in paragraphs 9 to 16 of the EAT's decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, taking into account the observations made by Underhill LJ in paragraphs 37 and 38 of the Court of Appeal's decision in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

84. The difficulty the claimant faces is that it is for her to persuade us that it would be just and equitable to extend time and that she gave no evidence at all on this point. Why she did not do so, given that she has been professionally represented throughout and that time limits have always been flagged up as an issue, we cannot say; but we did not feel it was our place to ask her questions about time limits given the absence of relevant information in her witness statement, particularly when respondent's counsel, Ms Del Priore, had – presumably quite deliberately – not cross-examined her in relation to this.

85. In short, we do not know why the claimant did not make a claim sooner. Speculating, we can imagine all kinds of reasons why this might have been the case, but, unfortunately for her, she has not put them forward. Equally, there is nothing in the evidence making it more unfair to apply the primary time limit in her particular case than it would be to apply it in most cases. In those circumstances, we are not satisfied that it would be just and equitable to allow this reasonable adjustments claim to proceed.

86. For these reasons, even though the respondent was in breach of the duty to make reasonable adjustments for the claimant's disability, her reasonable adjustments claim based on PCP 1 (issue 1.2.(a)) fails because of time limits.

87. Very similar considerations would apply to any otherwise valid reasonable adjustments claim to do with giving notice of meetings. The claimant's case is that the respondent applied the relevant PCP to her throughout her employment and that the duty to make reasonable adjustments was breached in this respect for years. If that was so, then, given the absence of any suggestion that the claimant thought the respondent was considering making an adjustment, or anything of that kind, such a claim would be out of time too, applying much the same reasoning as was just applied to the claim based on PCP1.

Discrimination arising – EQA section 15

2.2 Was C treated unfavourably in the following ways:

a) Did R's 'scrutinise C's conduct'?

b) Did R commence disciplinary proceedings against C 'arising from the circumstances in which her call times were shorter than other call centre employees'?

2.3. If so, was C treated as alleged because of something arising in consequence of her disability? In particular:

b) It is admitted that C had greater than average not ready times. Did this arise in consequence of her disability? Insofar as C was treated unfavourably as alleged, was this a material reason why?

c) Was C unable to meet call targets? (R denies this). If so, did this arise in consequence of her disability? Insofar as C was treated unfavourably as alleged, was this a material reason why?

88. Issue 2.3.a) is no longer relevant; the claimant has withdrawn that part of her claim. The extent to which issue 2.3.c) is being pursued is unclear. In relation to issue 2.3.b) the respondent has all but conceded[7] that the claimant's greater than average not ready times arose in consequence of her disability and we are satisfied that they did.

89. Focussing for now on the "*something*" identified in issue 2.3.b), the first alleged instance of unfavourable treatment is, as set out above, the respondent scrutinising the claimant's conduct. In her written closing submissions, Ms King has to an extent argued this part of the claim as if this were an allegation about the respondent, over the years, monitoring the claimant's not ready time and noting with her when she missed her targets[8] (in the same way that the respondent kept an eye on all PCA Clerks and whether they met their targets). In fact, no broad allegation of that kind is before the Tribunal. The claimant's section claim 15 is set out in her Scott Schedule dated 3 April 2020. A formal amendment application was made, which was opposed, and which, after argument at a hearing, was granted by Employment Judge Adkinson. The

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[7] In her written closing submissions, Ms Del Priore wrote, "*did* [the claimant] *have greater than average Not Ready Time …. Did this* [arise] *in consequence of her disability? Arguably, yes.*"

[8] In fact not really targets at all, but guidelines.

allegation about scrutinising the claimant's conduct which he gave the claimant permission to amend her claim to pursue was a very specific one, relating to the investigation and disciplinary process and to three particular dates: 2 July 2019 – the suspension meeting; 8 July 2019 – the invitation to a disciplinary hearing (which was in fact provided to the claimant before that date; the date in the Scott Schedule is wrong); 23 August 2019 – the final invitation to the postponed disciplinary hearing. The claimant may not expand this claim without further amending her claim and she has not sought permission, still less been granted permission, to do so.

90. As already explained in connection with the reasonable adjustments claim, the respondent did not "*scrutinise the claimant's conduct*" around 2 July 2019 because of her not ready times. Mrs Bucknall investigated her (and others), including looking at her average call times, because of a customer complaint about someone ignoring and cutting off calls. Her not ready times had nothing to do with it. The same applies to the disciplinary process: she was subjected to disciplinary proceedings because Mrs Bucknall – and to a lesser extent Mr Kieme – saw and heard things that led them to believe that the customer complaint related to the claimant, and therefore that she was guilty of serious and potentially gross misconduct. We shall explain why we have rejected what is described in Ms Del Priore's written submissions – accurately – as a "*Discriminatory Conspiracy Claim raised in the face of the Tribunal*" in a moment.

91. If and to the extent the something in issue 2.3.c) is still relied on, it was never the case that the claimant was unable to meet targets, and so any claim based on that something fails. The claimant did find it harder to meet guideline average not ready times than others because of her disability, but was still capable of meeting them. If issue 2.3.c) were to be changed so that the start of it read something like, "*Did C find it harder than others to meet guideline average not ready times?*", that would make the issue cover the same ground as the complaint relying on the something in issue 2.3.b), which we have just rejected. There is no evidence that guideline average not ready times, or anything else that could be labelled a call target, had any connection with the disciplinary process.

92. A broader claim based on issue 2.3.c. would also face time limits difficulties, as, based on Ms King's written closing submissions – see paragraph 30 of them in particular – the claimant seems to want to make complaints about things that happened as long ago as 2015.

93. Our starting point in relation to the discriminatory conspiracy claim is that it is not before the Tribunal. We agree with what is stated in paragraph 5 of Ms Del Priore's written closing submissions in this respect. Even if it were before the Tribunal, we would reject it because, correctly analysed, it is based on nothing more than supposition and assertion and because it could not succeed unless we decided that various things are true which, on the facts of this case, are highly unlikely to be so.

94. The conspiracy claim is to the following effect: the respondent, acting principally through Mr Kieme and Ms Mudzamiri but with significant assistance from Ms Bucknall, wanted to get the claimant out of her job because she had more not ready time than others: "*The real issue in this case is not ready time. MK resented C for having more*

of it than a non-disabled member of staff. He did not think C was entitled to special treatment and had no intention of making the adjustments she needed"; "*Once OH confirmed C was officially covered by the Equality Act, MK did not want to come out and say that C's Not Ready times were the reason for getting rid of her, so he devised a sham case designed to disguise his real motivations*".[9] But over many years, at a time when the respondent did not acknowledge and recognise that the claimant was a disabled person, the claimant had not met the not ready guidelines / targets and had had frequent periods of sickness absence, many of the lengthy, without Mr Kieme or anyone else at the respondent even talking about instigating a performance management or attendance management process against her. If the not ready targets / guidelines were such an issue, surely action would have been taken well before 2019? As things stand, it is quite surprising to us, given the amount of sickness absence the claimant had and the fact that the respondent had not assessed her as being a disabled person, that an absence management process was never started during her employment. If her not ready time was of such importance to Mr Kieme that in 2019 he "*resented her*" for it and concocted and carried out the elaborate plan to force her out that the claimant alleges he did, the failure to start an attendance management process in previous years would be astounding.

95. In addition, why would the respondent decide that the time to 'get rid of' the claimant was:

    95.1 after receiving an occupational health report expressing the view that the claimant was a disabled person, which made it harder to dismiss her than it would have been from 2015 to 2018, and that there was not expected to be any "*need for any specific restrictions to the scope of* [the claimant's] *work*";

    95.2 when her work performance was being assessed as good or better, when she was seen as a high performer, and when her line manager was thinking that the claimant's disability was not significantly affecting the quality of her work?

96. All of the evidence points towards the claimant being a valued employee, with good performance. Neither Mr Kieme nor anyone else at the respondent had a plausible improper motive for wanting to dismiss her. And if Mr Kieme had capriciously decided that she should be 'got rid of' for no good or even bad-but-logical reason, why, in a company the size of the respondent, would Ms Mudzamiri of HR – who was not his report and beholden to him – be prepared to go along with his schemes?

97. In conclusion, the EQA section 15 complaints fail because none of the alleged unfavourable treatment was because of the only potentially viable "*something arising in consequence of disability*" relied on.

Constructive unfair dismissal

98. The things relied on as part of the alleged breach of the trust and confidence term are set out in the list of issues in sub-paragraphs (1) to (19) under paragraph / issue 3.1.

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[9] Ms King's written closing submissions, paragraphs 113 & 115.

We shall go through them now[10], making any further findings that it is necessary for us to make and deciding whether there was conduct that was without reasonable and proper cause and that, taken by itself or together with other conduct, was calculated or likely to destroy or seriously to damage the relationship of trust and confidence and so broke the trust and confidence term at the relevant time: when the claimant resigned.

(1) Refusal of C's request not to be required to work on e-mails and telephone calls at the same time prior to her occupational health referral in April 2019, on numerous occasions between April 2015 and April 2019

(2) Failure to raise with Occupational Health C's suggested adjustment of not being required to work on e-mails, and telephone calls at the same time

(3) Required C as a PCA Clerk to answer telephone calls when required to do so, in addition to replying to e-mails

99. These three paragraphs all relate to the respondent's refusal of the claimant's requests to be allowed to work on emails only when her condition was troubling her. We have already decided that this happened and that it was a breach of the duty to make reasonable adjustments. As such, it was potentially a fundamental breach of contract: of the duty not to discriminate unlawfully.

100. However, such a breach would have occurred years before the claimant resigned and by continuing to work for the respondent for all those years without raising a complaint or grievance about it, the claimant had affirmed the contract. Moreover, the claimant's own case is that the respondent acted in this way up to April 2019 and if there was an outstanding, unaffirmed fundamental breach of contract in April 2019, the claimant affirmed the contract by continuing to work, without raising a complaint or grievance until 14 July 2019.

101. This failure by the respondent, long tolerated by the claimant, did not, looking at matters objectively, have a significant impact on the relationship of trust and confidence in August 2019 and, in addition, we are not satisfied that it was a significant factor in the claimant's mind when she resigned.

(4) In December 2018, did Mr Kieme reprimand C in relation to the "coffee incident" in which C had been criticised for taking a coffee break?

102. The differences between the claimant's and Mr Kieme's accounts of precisely what occurred during the so-called coffee incident can be explained by their different perspectives. Those differences are not great in any event, and are much more to do with how things were said and came across than anything else; less about substance than about tone, which is highly subjective. We are not satisfied that the respondent, in form of Mr Kieme, said or did anything that, objectively assessed, was beyond the Pale and caused significant damage to the relationship of trust and confidence, even at the

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[10] Ignoring (8), which the claimant has abandoned.

time. It would be wrong of us to assume that he must have done from the fact that the claimant had a panic attack.

103. Also, Mr Kieme had reasonable and proper cause for taking the claimant to task, in that he was supporting Ms Perkins in enforcing a rule about not going into the canteen except during 'official' breaks that the respondent had, even if it was inconsistently enforced.

104. Further, this incident occurred 9 months before resignation and by then any effect on the relationship of trust and confidence was negligible.

> *(5) On 27 June 2019, was C invited to attend a meeting the next day, at 11:30am on 28 June 2019? R's case is that C was invited on 24 June 2019.*

> *(6) On 28 June 2019 was C invited to attend a meeting on 1 July 2019 with Mr Martin Kieme?*

105. Whatever else, the notion that part of the reason for the claimant's resignation in late August 2019 was being invited at short notice to a meeting 7 or so weeks earlier, with the meeting being postponed and rearranged once and then turning out – as it did – to be a positive meeting which the claimant does not complain about, to which her brother was permitted to accompany her, and which she came out of feeling positive (describing it in her witness statement as "*a* [real] *turning point for me*"), is almost preposterous. We do not accept there was the slightest connection between the timing of these invitations and her resigning.

106. Moreover, being given short notice of these two meetings did not impact on the relationship of trust and confidence at any time, to any extent. We have already noted that the real issue the claimant had with some meetings was not being given short notice of them *per se*, but not being able to have her brother accompany her to them.

> *(7) On 2 July 2019, was C called into a meeting without notice by Mr Kieme in order to suspend C? (admitted).*

107. This allegation is about two things only: lack of notice and the fact of suspension. The respondent had reasonable and proper cause for both and what subsequently led to a breakdown in trust and confidence was neither of those things in and of themselves.

108. Mrs Bucknall and Mr Kieme had themselves seen and heard evidence strongly suggesting the claimant was guilty of doing something – deliberately ignoring and cutting off customer calls – that, if she was guilty of it, would amount to very serious misconduct for which, in our view, the respondent could reasonably dismiss. Suspending the claimant at that point was a normal part of the respondent's processes, which were reasonable in this respect.

109. Giving notice of a suspension meeting would be an odd thing to do. A disciplinary process has to start somewhere and it is entirely conventional, if it concerns potential gross misconduct, for it to start with a short, without notice meeting at which the employee is told that they are being suspended pending further investigations

potentially leading to a disciplinary hearing and are facing particular misconduct charges. Objectively, there would have been no problem with the respondent giving no notice of such a meeting and suspending the claimant if the contents of the meeting had been appropriate and the respondent had in other respects acted reasonably and properly.

*(9) On 2 July 2019 in the Suspension Meeting, did Martin Kieme warn C to "*be careful about your answers to my next questions as I already know the truth and there is no use in denying the allegations*"? (Denied). It is admitted that the allegation was put to C that she had ignored customer calls which were being put through to her to answer.*

110. We accept that the alleged comment, or something along the same lines, was said by Mr Kieme during the suspension meeting of 2 July 2019. The claimant has consistently, since July 2019, alleged that he said that there was "*no use denying the allegations*". In the grievance hearing on 31 July 2019 she mentioned that he had said "*be careful of your answer because we know the truth*" (according to the handwritten notes) or "*there is no point lying we know the truth*" (according to the transcript). Mr Kieme's version of events is not substantially different. He alleges he said: "*I asked her to be honest and said we had been listening to her calls*". Even if those were words he used, they are to the same effect as those alleged by the claimant, namely that he was sure of her guilt and so it was best that she 'came clean'.

111. The fact that that was what he meant, and that that was how it came across, is consistent with the fact that, as is clear from Mr Kieme's and Mrs Bucknall's evidence, they felt they had conclusive proof of guilt, and that they were disappointed and almost angry at the claimant for what they thought she had done.

112. The test for whether something amounts to a breach of the trust and confidence term is an objective one, but the claimant's subjective perspective is not completely irrelevant because it shows how the respondent's actions were perceived at the time by at least one person in her position. With that in mind we note that in the first of her emails to Ms Mudzamiri of 8 July 2019, the claimant wrote, with reference to the suspension meeting: "*the first thing that was said to me was to think clearly about my answer as they already know the truth. This was repeated more then once as it was made clear to me by* [Mr Kieme] *that he and* [Mrs Bucknall] *believed that I am guilty. … I am unsure of what the* [disciplinary] *hearing is for as* [Mr Kieme] *made it very clear that he had already determined that I was guilty.*" Unfortunately, Ms Mudzamiri made no real attempt to allay the claimant's concerns until after she resigned.

113. In conclusion, we are satisfied that the impression reasonably gained by the claimant from what had been said to her at the suspension meeting was that the respondent already thought she was guilty of what she knew to be a gross misconduct offence. This was the start of the course of conduct that cumulatively amounted to a breach of trust and confidence.

(10)It is accepted that the R did not investigate whether there were issues with C's telephone equipment by the point C resigned. It is accepted that one person's

phone was replaced, but the parties are in dispute as to whether the circumstances were relevant or comparable.

114. The fact that the telephone of one of the claimant's colleagues was replaced is a red-herring – her circumstances were quite different, in that she drew attention to the existence of a fault herself rather than suggesting that faulty equipment might be a factor after being accused of gross misconduct. However, the respondent failed to conduct a reasonable investigation prior to the disciplinary hearing. A reasonable investigation would have involved looking for exculpatory evidence, including looking into the possibility that there were issues with the claimant's telephone equipment.

115. It is also very difficult for someone who, like Mr Kieme, has decided on guilt to conduct a reasonable investigation; and Mr Kieme did not overcome this difficulty. He never conducted an investigation interview worthy of the name with the claimant. He was not interested in listening to any suggestion that she was not guilty because such a suggestion would not be "*honest*", so far as he was concerned.

116. In his oral evidence, when being questioned about why he made no attempt to check the claimant's telephone equipment, Mr Kieme volunteered some new information: he spoke to a telecoms engineer at the respondent and was told (something like) there was nothing that could usefully be done in terms of checking or testing the equipment. We are not satisfied that if Mr Kieme decided it would be futile to look into the question of whether defective equipment was a factor on the basis of this conversation (which we only have the vaguest evidence about and which we don't even know the timing of) it was an unreasonable decision. And it should not have been his decision to make but should instead have been for someone impartial.

117. In the same part of his oral evidence, Mr Kieme said something along these lines: that looking into equipment issues could have been part of the ongoing investigation which he passed on to others. But there were no others; there was no neutral investigating officer separate from the person deciding the disciplinary. And there was not going to be any ongoing investigation other than any such that was instigated by that person following, or as part of, the disciplinary hearing.

118. In the circumstances, what should have happened at or shortly following the suspension meeting, and what any reasonable employer of the respondent's size and resources would have done, was for someone – Ms Mudzamiri perhaps – to emphatically reassure the claimant that suspension was a neutral act, that there would be a fair investigation, that the opportunities for the claimant to ask for further things to be investigated were not exhausted, and that Mr Kieme and Miss Bucknall would have no say at the claimant's disciplinary in the eventual decision, which would be made by a completely neutral person. At no stage did human resources or anyone else do this or anything like it.

119. In the hearing bundle, there is a letter addressed to the claimant dated 4 July 2019 confirming the claimant's suspension. Had it been provided to her it would have provided some – but not all – of the necessary reassurance, although it disingenuously suggested she was being suspended "*pending investigation into an allegation of gross*

misconduct" when all of the pre-disciplinary-hearing investigation the respondent was intending to do had already been done. It also has to be said that where the manager who conducted the suspension meeting said something which communicated to you that the respondent believed you to be guilty as charged, receiving a letter a couple of days later stating, "*Your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct*" is unlikely to provide much comfort.

120. The claimant's case is that she never received the letter. The respondent's case on paper is that it was sent to her. However, the suggestion being made on the respondent's behalf was that it was hand-delivered to the claimant together with the letter dated 5 July 2019 inviting the claimant to attend a disciplinary hearing on 10 July 2019, a letter it is accepted she received. In her oral evidence, Mrs Bucknall confirmed she only ever delivered one envelope. The only person who might be able to say for sure what was in the envelope is Ms Mudzamiri, but she was not a witness before us. We are not satisfied that the suspension letter was ever provided to the claimant. The main reason for this is that it stated (we assume because a template letter was used that had not been fully adapted) that the allegation against her was that she was "*suspected of being at work while under the influence of alcohol*". We think that had the suspension letter been delivered to the claimant she would certainly have raised this as part of her grievance and she did not do so.

121. We – this Tribunal – know that suspension is a neutral act, or at least that it is supposed to be. We also know that a disciplinary hearing provides an opportunity for further investigations, and can be adjourned several times if that is what it takes to ensure fairness, and that the claimant could say to the disciplinary officer that she wanted further investigations to be carried out. But the claimant didn't know that and could not reasonably have been expected to know that, particularly given what Mr Kieme had said to her at the suspension meeting and the lack of a letter confirming and explaining her suspension.

> *(11) On 8 July 2019, did Mrs Bucknall hand deliver an invite to a disciplinary hearing to C's home? Was the envelope unsealed? R denies this happened on 8 July. R's case is that the envelope was sealed.*
>
> *(12) On 8 July 2019, did Mrs Bucknall provide C with an invite to attend a disciplinary hearing, and documents scheduled to take place on 10 July 2019, which amounts to an invite at short notice in the circumstances? (Denied).*
>
> *(13) On 8 July 2019 did Mrs Bucknall invite C to attend a disciplinary hearing, on the express basis that there were concerns about her average call times? (Denied)*

122. We note that it was, by the end of the hearing, agreed that 5 and not 8 July 2019 is the correct date in each of these paragraphs from the list of issues.

123. There are one or two things on which great emphasis has been placed by and on behalf of the claimant that are not, objectively, significant in relation to her constructive dismissal:

    123.1 the fact that she was given 5 days notice of the disciplinary – 5 days is not unreasonably short notice; as already explained, short notice of meetings was not a problem for the claimant so long as she was able to arrange for her brother to accompany her; the meeting was postponed anyway;

    123.2 the fact that the invitation to the disciplinary was hand-delivered by Mrs Bucknall (this was done simply to ensure the claimant got it before Monday, 8 July 2019) and that the envelope it was in may not have been sealed properly – we don't doubt that the claimant was genuinely distressed by this, but we assess it as having no impact on the trust and confidence term at the time of the claimant's resignation.

124. It is not the case that the claimant was invited to attend the disciplinary "*on the express basis that there were concerns about her average call times*". It was, or should have been, entirely clear to the claimant from the invitation to the disciplinary hearing dated 5 July 2019 that she was being disciplined for (as stated in the invitation letter) "*cutting customer calls*" and that the evidence about average call times was there purely to support the allegation that she was cutting calls[11].

125. The significance of the invitation to the disciplinary is twofold.

    125.1 First, the fact that it arrived so quickly after 2 July 2019 reinforced the – accurate – impression being given to the claimant that no further investigations were being undertaken.

    125.2 Secondly, the invitation letter did not in any way mitigate the impression that had been given to the claimant by what happened at the suspension meeting that there would be no further investigation, and that the evidence against her conclusively proved to the respondent's satisfaction that she was guilty of gross misconduct, for which she would be sacked. It stated in terms that what she was accused of was gross misconduct and that a possible outcome was dismissal without notice. There was no suggestion that the disciplinary hearing, planned for 10 July 2019, might not be the end of the process, and that there might be further investigations and hearings afterwards, or that she could ask for further investigations to be undertaken. The only thing in the letter about possible additional evidence concerns documents: "*If there are any further documents or any other evidence that you wish to be considered at the hearing, please provide copies of these documents as soon as possible. If you do not have these documents, please provide details in order that they can be obtained.*" What the claimant wanted more than anything else was not documents, but an investigation of her telephone equipment, and she would reasonably have assumed from the letter that that was not an option.

[11] See paragraph 61 above.

126. The letter also referred to the respondent's disciplinary procedure. Reading that would not have reassured the claimant that there might be further investigations. The relevant part of it[12] states: "*Once a disciplinary matter arises, an independent investigation will normally be conducted as soon as reasonably practicable to establish the facts. In some cases it will be necessary to hold an investigatory meeting with the employee before proceeding to any disciplinary meeting. In others, no investigatory meeting will be necessary but, instead, information will be collated from other sources.*"

127. Reading that through the eyes of an employee in the claimant's position, what would be gleaned would be that as this was not a normal case where an independent investigation had been undertaken, and as the only meeting that might arguably constitute an investigatory meeting had already taken place, and as the information relied on by the respondent had already been "*collated*", the only thing left was the disciplinary hearing itself. The employee would not know the position was (as the respondent would have it) that although there would be no further investigation before the disciplinary hearing, that didn't matter because everything would be fully and properly investigated at the hearing and afterwards.

128. Paragraph 4.2(f) of the disciplinary procedure mentions the possibility of a disciplinary hearing being "*adjourned pending a disciplinary outcome to allow for further investigation*". The wording would not suggest to someone in the claimant's position that that would be usual or common, which seems to be the impression the respondent is trying to give us. It does not do so to us, notwithstanding our collective employment law and practice and industrial relations knowledge and experience.

129. Even had the claimant read the disciplinary procedure with the utmost care, then, she would have assumed there would be no further investigation.

130. We have unanimously come to the conclusion that there was a breach of the trust and confidence term here. We have done so after considerable debate between the three of us, and having fully taken into account the fact that simply unreasonable conduct – even conduct outside the so-called 'band of reasonable responses' – is not enough fundamentally to breach a contract of employment. The course of conduct that was without reasonable and proper cause and that was likely to destroy or seriously damage the relationship of trust and confidence was, in summary:

130.1 telling the claimant at the suspension meeting on 2 July 2019 (not in so many words, but still) that on the evidence that had been collected, the respondent considered her to be guilty of a gross misconduct offence;

130.2 making clear to the claimant that that evidence would not be added to by further investigations before the disciplinary hearing;

130.3 in particular, appearing unwilling to listen to anything the claimant had to say and to consider and investigate the possibility that she might be innocent and, most particularly, refusing to look into the question of whether faulty equipment could

[12] *Counselling, Disciplinary, Competency and Grievance Procedures* (7/2018), section 3(a).

be to blame and not giving the slightest indication that there was any intention of ever looking into that question;

130.4 having done these things, inviting the claimant to a disciplinary hearing with summary dismissal as a possible sanction without taking any steps to alleviate the impression previously given to her that there would be no further investigations, because the respondent had already decided her fate;

130.5 to conclude: making the claimant feel that whatever she said or did, she would be dismissed without notice at the forthcoming disciplinary hearing.

131. That breach of the trust and confidence term was complete when the claimant received the invitation letter of 5 July 2019, because it essentially confirmed all her worst fears.

132. Issue (14) concerns the grievance meeting of 31 July 2019. Before we deal with that, it is logical to deal with the question of whether the claimant affirmed her contract of employment during July (see issue 3.4 in the list of issues[13]). In short: she did not. By raising her grievance she made her dissatisfaction clear and was giving the respondent the opportunity to put things right. She is not a lawyer and did not, of course, put it in these terms, but implicit within her grievance and the emails she sent to Ms Mudzamiri was a reservation of her position and a threat that if the respondent did not put things right she might well resign. If she affirmed her contract by going through a grievance process, then virtually anyone who responds to a fundamental breach of their contract of employment by raising a grievance has done likewise. That cannot be right.

(14) During the grievance meeting on 31 July 2019, did Mr White ask C at whether the opinions expressed in her grievance were due to her being "sensitive as result of her anxiety"? so that C was made to feel at fault for raising her grievance due to her conditions? (Denied)

133. What Mr White actually said to the claimant is reasonably clear from the transcript. He did not say the precise words attributed to him. He did say things the gist of which was that her anxiety might well have affected how she perceived things; and he did express himself very clumsily, in a way the claimant could have taken exception to. There are a number of other aspects of the way in which the meeting was handled that we consider to be unsatisfactory. However, it is entirely clear to us, not just from the claimant's oral evidence but from things she said at the time – such as "*I wish you were my manager*" – that she came out of that meeting happy with the way in which it had been conducted and with what he had said to her. We do not think it was in her mind at all when she resigned. In her – admittedly brief – resignation email, the only thing mentioned connected with her grievance was a request to be informed of the outcome.

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[13] This paragraph of the list of issues refers to waiver as well as to affirmation. Waiver and affirmation are often confused and almost always, in my experience, when lawyers talk about waiver in the context of constructive dismissal, what they mean is affirmation. Waiver, in its correct, technical sense, is not an issue in this case.

134. To the extent the respondent prays in aid what was said at the grievance meeting in defence of the constructive unfair dismissal claim:

134.1 as there wasn't affirmation, it remained open to the claimant to accept the fundamental breach of contract we have decided was complete on 5 July 2019 by resigning;

134.2 a fundamental breach of contract cannot be repaired or rectified by the breaching party;

134.3 as the claimant knew, because he had told her, Mr White was not dealing with matters connected with the disciplinary and could not comment on it. (This was most unfortunate from the claimant's point of view as it was one of the main things she wanted him to deal with). Notwithstanding this, he repeatedly told the claimant things to the effect that it didn't sound as if she was likely to be dismissed. It was completely inappropriate for him to make these kinds of comments. For all he knew, there was overwhelming evidence against her that made dismissal a racing certainty. We are surprised that HR did not intervene to stop him from making such comments;

134.4 contrary to Mr White's recollection when giving oral evidence, he did not with any clarity say something to the effect that the disciplinary hearing would be an opportunity for the claimant to ask for further investigations to be carried out.

135. Finally in relation to the grievance hearing, we note that during it, the claimant said, "*Regardless of the disciplinary hearing, I can't go back now*" and other, similar things. Reading the whole transcript, and taking into account her oral evidence, we think she was in several minds at the time. We reject any suggestion that on 31 July 2019 she had a settled intention to leave her employment.

136. In summary, what happened at the grievance hearing was not part of a relevant breach of the trust and confidence term, but does not assist the respondent's defence to the claim either.

(15) On 23 August 2019, was C invited by Ms Mudzamiri to attend a disciplinary hearing on 29 August 2019? (Accepted).

(16) On 23 August 2019, C had not received the outcome of her grievance? (Accepted).

(17) On 23 August 2019, was R 'continuing to refuse to investigate her phone equipment for technical errors'? (denied that R refused. Accepted it had not been done).

(18) On 23 August 2019, did R 'not agree' to C's request of 8 July 2019 for all evidence and documents material to her disciplinary, with the effect that if she

attended her disciplinary hearing she would be doing so without evidence material to her case? (Accepted that certain things C asked for remained outstanding).

137. Before we move on to what the position was on 23 August 2019 and what led the claimant to resign, we have to ask ourselves whether the claimant affirmed the contract between the grievance meeting and then.

138. In our view, for as long as she is still awaiting and reasonably expecting the outcome of a grievance which relates to some real extent to the things that have caused the breach of trust and confidence, and is genuinely hoping it will be decided in her favour, someone in the claimant's position has not affirmed the contract.

139. We note that the claimant had been told by Ms Mudzamiri, in an email of 9 July 2019, that the grievance would be heard before any disciplinary procedure and that the disciplinary hearing would be "*put on hold until the grievance is heard and an outcome is given*". There is an ambiguity in the email (because it also states that the disciplinary hearing would not take place "*until you have been invited in for your grievance hearing*"), but the message communicated by it, and by the fact that the disciplinary process was put on hold for 6 weeks or so because of the grievance, was that the grievance and the disciplinary were substantially connected in some way; and that a positive outcome of the grievance could influence the disciplinary process in the claimant's favour. We mention this to counter any suggestion from the respondent that:

    139.1 because Mr White was not considering the rights and wrongs of the disciplinary proceedings, and because the breach of the trust and confidence term that we have decided is made out concerned the rights and wrongs of the disciplinary proceedings, the grievance is irrelevant to whether or not there was affirmation;

    139.2 the delay in resigning from 5 July 2019 to 25 August 2019 therefore constituted affirmation.

140. The next relevant thing that occurred was the claimant, on 21 August 2019, receiving the invitation to the reconvened disciplinary hearing. There were further exchanges of emails between her and Ms Mudzamiri at this point. The claimant's description in issues (17) and (18) of what the respondent, through Ms Mudzamiri, allegedly did on 23 August 2019 is inaccurate; the respondent is right about that. However, what happened does have some importance. The fact that the claimant was being invited to a disciplinary meeting before she had the outcome of the grievance, and the confirmation from Ms Mudzamiri that the evidence that was going to be used at the reconvened disciplinary hearing was the same as that which had been provided in July 2019, confirmed to the claimant that the position had not changed since then: that there had been no further investigation; that the grievance definitely would not have a positive impact; and that her disciplinary would be decided on the basis of the evidence from Mr Kieme and Mrs Bucknall gathered before she was even suspended and which she reasonably believed was considered to be proof positive of her guilt.

141. We don't think it is seriously being suggested by the respondent that the claimant affirmed the contract just by not resigning between 21 and 25 August 2019, but if it is,

we disagree. Simply discussing possible arrangements for the disciplinary hearing over a few days, at a time when the claimant was, evidently, still undecided as to what to do does not come close to constituting affirmation.

142. What might be called a 'side issue' arises to do with events from 31 July to 25 August 2019: the respondent's suggestion that the claimant surreptitiously secured a new job and had actually started work in the first half of August 2019. We think the respondent is wrong about this. The suggestion is based on the claimant's contract of employment for the job that she agrees she started in or around early September 2019, in which it is stated that, "*Your employment commences on 7th August 2020.*" There are also wage-slips.

143. The documentation as a whole is consistent – or not substantially inconsistent – with the claimant's evidence that she had started looking for a part-time job to do alongside her job with the respondent, had redoubled her efforts because she thought she was going to be dismissed, did a trial shift in early August 2019, but did not start 'properly' until after she resigned. Also consistent with that evidence is the part of the audio recording made on the day of the grievance hearing that, as mentioned above, Ms Del Priore asked us to listen to. What we heard was an entirely natural, private conversation between the claimant and her brother during which the claimant expressed a concern that she was going to be sacked, and that she was hopeful of being able to get a new job, albeit she would be paid less in it.

144. Amongst the many reasons why the idea that the claimant had secured new employment in early August 2019, and that this was why she resigned, makes little sense are:

144.1 why would the claimant resign from a job she had been doing for 5 years so she could take up a new job on less pay?

144.2 why would she wait until the end of the month to take up that job – why resign when she did?

(19) On 23 August 2019, did Call Centre Co-Ordinator, Mr Holmes tell all staff on the floor that C's hours had been given to Mr Shepard as "no one ever comes back after being suspended and raising a grievance"?

145. Earlier in these Reasons we made a finding that Mr Holmes did indeed say something like this to staff. We think that because, although not part of management, he had some quasi-managerial status – and, because of his job, had the ear of management in a way that the claimant and her fellow PCAs did not – he would be seen as speaking from a position of authority and knowledge. In the circumstances, although him making this remark would not by itself come anywhere near breaching the trust and confidence term, it added something to what was already there, and is capable of being a 'last straw', in that respect.

146. If we are wrong about this, we think the facts and matters set out in paragraph 140 above are equally capable of being last straws.

147. Even if nothing that happened in August 2019 can be a last straw as a matter of law, this does not matter, because there was a breach of the trust and confidence term in July 2019 that had not been affirmed by the time of the claimant's resignation.

148. In conclusion, when the claimant resigned the respondent was in fundamental breach of the contract of employment and the contract had not been affirmed after that breach.

149. The questions of whether the respondent had reasonable and proper cause for its actions and whether the claimant resigned in response to the repudiation of her contract are listed separately in the list of issues (issues 3.2 and 3.5) from the question of whether there was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. We have been dealing with reasonable and proper cause as an issue alongside that question rather than separately from it. The only thing we would add to what we have set out is to highlight the fact that although the respondent had reasonable and proper cause for putting the claimant through a disciplinary process and for suspending her, this does not mean it had reasonable and proper cause for everything it did along the way and for all of the ways it did everything.

150. So far as concerns why the claimant resigned, we are entirely satisfied that the main reason – and certainly a significant part of her reasons – was the breach of the trust and confidence term. She was therefore constructively dismissed.

151. It has been submitted on the respondent's behalf that the claimant resigned because she knew she was guilty and had been found out. We do not accept that submission. If there is one thing that is clear to us from the claimant's evidence, it is that she does not accept her own guilt. She would not, we think, be capable of sustaining from July 1999 through to now a convincing pretence that she thought she was innocent, as she has done. If she accepted her guilt, she would surely not have raised and pursued the grievance and would simply have left to take up a new job.

Fairness of dismissal

152. A fair constructive dismissal is a theoretical possibility. However, in the present case, it cannot sensibly be argued that this was a fair dismissal. Given that the reason for the breach of the trust and confidence term was not the disciplinary process, but particular things the respondent said and did as part of that process for which there was no reasonable and proper cause:

    152.1 dismissal was not for a potentially fair reason;

    152.2 even if for a potentially fair reason, it cannot have been fair in all the circumstances under ERA section 98(4).

Contribution & conduct

153. For a deduction to be made to any compensatory award in accordance with ERA section 123(6), blameworthy conduct by the dismissed employee must contribute to the dismissal. In a constructive dismissal claim, that means it must contribute to the

fundamental breach of contract on which the finding that there was a constructive dismissal is based.

154. Once again bearing in mind that the things constituting the breach of the trust and confidence term in the present case do not include the disciplinary proceedings themselves, or anything else that the claimant could be held even partly responsible for, it seems to us that the claimant did not contribute to that breach.

155. So far as concerns reducing the basic award under ERA section 122(2), the alleged blameworthy conduct relied on is what she was disciplined for: cutting customer calls. We agree with the respondent that if we accepted that the claimant had ignored and disconnected calls, that would constitute blameworthy conduct for which a significant reduction to the basic award would be appropriate.

156. However, the respondent has not satisfied us that the claimant was guilty, mainly for the following four reasons:

    156.1 first, there is no evidence of a technical kind ruling out equipment problems of some sort as a possibility;

    156.2 secondly, the particular factors which Mrs Bucknall told us caused her to think there was conclusive proof of the claimant's guilt were never put to the claimant either at the time or during this hearing;

    156.3 thirdly, the inherent probabilities of the situation way heavily against the claimant being guilty. She had been a conscientious employee for a number of years. She had no conduct issues, and it is not suggested by the respondent that she had ever been lazy or less than very diligent. For her to have cut customer calls would be completely out of character. In addition, the respondent alleges she did this on a day which she knew there was a good chance of Mrs Bucknall selecting as a day to monitor her calls (see paragraph 34 above);

    156.4 fourthly, we have just – in paragraph 151 above – decided that the claimant does not accept her own guilt. The human brain's capacity for self-delusion is often underestimated. Even so, we doubt the claimant would be capable of persuading herself that she had not deliberately cut off calls if she had.

Polkey

157. The only basis for making a Polkey reduction appearing from the evidence before us and that has been argued is the possibility that had the claimant remained in employment she would have been fairly dismissed following the disciplinary on 29 August 2019.

158. We think that a fair dismissal remained a possibility. However, in order for any dismissal to be fair, there would have to have been further investigations following the 29 August 2019 hearing and then a reconvened hearing. We think that would have taken at least 3 weeks from 29 August 2019. On that basis, no Polkey reduction should be made to any compensation relating to the period before 21 September 2019.

159. In relation to losses for the period from 21 September 2019 onwards, it seems to us that there must be some Polkey reduction. However, bearing in mind that the burden of proof is on the respondent in relation to the Polkey issue, we think the percentage reduction should be towards the lower end of the scale. This is on the basis that there are a number of imponderables, including, in particular, what the claimant would have said if everything had been properly put to her and what a technical examination of her telephone equipment would have revealed.

160. The Polkey issue is not one on which it is possible to make a scientific decision. There is rarely a single correct answer and any percentage figure we pick is necessarily going to be arbitrary to an extent, but, in circumstances where we are sure that there was a more than negligible chance of a fair dismissal had the claimant remained in employment, we have to pick one.

161. We have decided that reducing by 20 percent any compensatory award attributable to losses for the period from 21 September 2019 onwards would provide the claimant with compensation that is "*just and equitable in all the circumstances having regard to the loss sustained by* [her] *in consequence of the dismissal in so far as that loss is attributable to action taken by the* [respondent]" in accordance with ERA section 123(1).

TULRCA section 207A

162. Because the disciplinary process had not concluded, the claimant resigned at a time when there might or might not ultimately have been an unreasonable breach of the ACAS Code by the respondent. There is therefore no proper basis for increasing her compensation pursuant to TULRCA section 207A.

163. So far as concerns the possibility of decreasing compensation pursuant to that section because the claimant did not wait for the conclusion of the grievance process, this would not be appropriate either.

    163.1 Where an employer does things that fundamentally breach the contract of employment, the circumstances would have to be quite exceptional (and we cannot think what they might be) for it to be unreasonable for the employee to resign without first raising a grievance and following the grievance process through to its end.

    163.2 In the present case, the respondent refused to deal with the part of the grievance the claimant raised that concerned the disciplinary proceedings, which, based on our findings, is the only part that is relevant.

SUMMARY

164. The respondent breached the duty to make reasonable adjustments for the claimant's disability by not allowing her to work on emails only when her condition was particularly troubling her (see in particular paragraphs 56, 57 & 65 to 6967 above), but the complaint made in relation to this fails because of time limits (see in particular paragraphs 80 to 81, 84 & 85 above).

165. The reasonable adjustments claim relating to giving short notice of meetings fails mainly because the PCP relied on did not cause the claimant substantial disadvantage in comparison with persons who are not disabled: see in particular paragraphs 72 and 73.

166. The reasonable adjustments claim based on an allegation that the respondent had a practice of disciplining and dismissing staff who failed to meet 'not ready time' targets fails because the respondent had no such practice: see in particular paragraph 61 above.

167. The EQA section 15 complaints fail because the only alleged "*something arising in consequence of disability*" that did in fact arise in consequence of disability – the claimant having above average not ready times – did not cause dismissal, or the disciplinary proceedings, or anything else relied on as unfavourable treatment: see in particular paragraphs 89, 90 and 97. The claimant has put forward what amounts to a conspiracy theory in relation to this that is without foundation: see in particular paragraphs 93 to 95.

168. The claimant was constructively dismissed, the relevant fundamental breach of contract being, in outline, the respondent leading the claimant reasonably to believe that, before she had had a disciplinary hearing or even a proper investigatory meeting and without conducting a fair and proper investigation, the respondent had decided she was guilty of gross misconduct for which she was going to be dismissed: see in particular paragraphs 110 to 117, 121, 125, 130 to 132, 138, 145 to 147 & 150 above.

169. The constructive dismissal was unfair: paragraph 152 above.

170. Some remedy issues – ERA sections 122(2) and 123(6); Polkey; TULRCA section 207A – are dealt with in paragraphs 153 to 163 above.

24 June 2021

EMPLOYMENT JUDGE CAMP

Sent to the parties on:

25 June 2021

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For the Tribunal:

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