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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111557/2019

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**Final Hearing in Glasgow heard by Cloud Video Platform (CVP) on
14, 15, 16, 19, 20 and 21 April 2021**

**Employment Judge: R McPherson
Members J Burnett
N Elliot**

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Mrs M Greenwood

**Claimant
In person**

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Independent Living Support

**Respondent
Represented by:
K Sonaik
Counsel
D James
Solicitor**

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The judgment of the Employment Tribunal is that;

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1. the claimant's claims in terms of s13 of the Equality Act 2010 (EA 2010) direct discrimination because of disability, do not succeed.
2. the claimant's claims in terms of s15 of the EA 2010, discrimination arising from disability, do not succeed.
3. the claimant's claims in terms of ss20 and 21 of the EA 2010, failure to make reasonable adjustments for disability, do not succeed.

4. The claimant's claims in terms of s26 of EA 2010, harassment related to disability do not succeed.
5. The claimants claim for wrongful dismissal does not succeed.
6. The Tribunal declines to make any recommendations in terms of s124(2) (c) of EA 2010.
7. The Tribunal declines to make any order in relation to any reference by the respondent in relation to the claimant.

REASONS

10 Introduction

Preliminary Procedure

1. The claimant's ET1 was presented **Friday 11 October 2019** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Tuesday 17 September 2019** and issue of the ACAS Certificate on **Thursday 3 October 2019**) against the respondents following termination of her employment with the respondent as a Tenancy Support Worker on **Monday 26 July 2019**, having commenced **Monday 21 August 2017**. The claimant brought a complaint for Wrongful Dismissal and discrimination in respect of protected characteristic of disability.
2. In advance of Preliminary Hearing on Thursday 30 January 2020, the claimant provided an Agenda with Further and Better Particulars of her claim.
3. At Preliminary Hearing on **Thursday 30 January 2020**, it had been identified that the claimants' claims were in respect of wrongful dismissal and in terms of s13 EA, s15 EA, ss 20 & 21 of EA 2010 and s26 EA 2010, identifying the allegations for each of those heads of claim.
4. The respondent provided amended ET3/grounds of resistance which were accepted by the Tribunal on **Saturday 6 March 2020**. The dismissal is

admitted, respondent asserts that the reason for dismissal was conduct, specifically gross misconduct and asserts there was a fair dismissal and they had not breached the Equality Act 2010 (EA 2010).

5. The protected characteristic is disability. By Judgment **Wednesday 5 August 2020** the Tribunal has determined that claimant is disabled in terms of s6 of the EA 2010, having a mental impairment (anxiety and depression) which has a substantial long term adverse effect on her ability to carry out normal day to day activities and was disabled person at all relevant times.
6. The respondent conceded that they had constructive knowledge of the disability, although not actual knowledge of its employees at any relevant time.
7. On **Tuesday 22 December 2020** Tribunal directed this 6-day hearing would proceed by CVP.
8. On **Sunday 3rd January 2021** the claimant provided a schedule of loss and response to amended grounds of resistance.
9. By letter from the Tribunal **Saturday 23 January 2021**, the parties notified were notified of the dates for this CVP hearing.
10. On **Wednesday 17 March 2021**, the claimant intimated that she was seeking compensation, recommendation, and a reference.
11. On **Tuesday 23 March 2021**, the Tribunal refused the claimants request for photographs to be excluded.
12. The evidential element of the Final Hearing commenced on **Wednesday 14 April 2021** and concluded on **Wednesday 21 April 2021**.
13. Following the evidential element of the Final Hearing, parties were permitted exchange their respective written submissions with each other, it being a matter of agreement and in accordance with the overriding objective that the

respondent would set their position out to the claimant in the first instance, addressing the claimant's claims of wrongful dismissal and in terms of s13 EA 2010, s15 EA 2010, ss 20 & 21 of EA 2010 and s26 EA 2010 and thereafter both parties provide final written submissions to the Tribunal.

5 14. The Tribunal's private deliberation took place at Members' Meeting on Wednesday 16 June 2021, final written submissions being available by that date and being the earliest mutually available date for the full panel of the Tribunal.

15. Issues for this Tribunal included:

10 16. **Time Limits**

16.1 It was not argued that the wrongful dismissal claim was out of time, however, given the date of ET1 the respondent argues that some or all the discrimination claims were out of time. It was in any event for the Tribunal to consider were any or all the claimant's existing complaints presented within the time limits set out in Sections 123(1)(a) & (b) of EA 2010.

a) Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

b) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Tuesday 18 June 2019**, is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

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c) Some claims may be argued to have been lodged out with 3 months less one day time limit (allowing for the operation of ACAS early conciliation). The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant

undergoes early conciliation with ACAS. In effect initiating early conciliation “*stops the clock*” until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, she will have at least a month from the date of the certificate to present her claim.

5 **Discrimination claims**

17. The discrimination claims asserted by the claimant were identified at the Preliminary Hearing on **Thursday 30 January 2020**, as set out in Note dated Thursday 5 February 2020 and issued to the parties on Friday 6 February 2020 (the January 2020 Note).
- 10 18. In respect of s13 EA 2010 **Direct Disability Discrimination** because of her disability, at 9(iii) to 9(v) of the January 2020 Note it was identified that the claimant asserts that the respondent discriminated by:
- (a) Holding an investigation into the claimant’s actions; and/or by
 - (b) Holding the investigation in the claimant’s absence; and/or by
 - 15 (c) Failing to refer the claimant to Occupational Health; and/or by
 - (d) Failing to follow the respondent’s capability procedure; and/or by
 - (e) Failing to investigate and resolve the claimant’s grievance; and/or by
 - 20 (f) Failing to follow the grievance procedure; and/or by
 - (g) Failing to provide the claimant with a grievance outcome in a timeous manner; and/or by
 - (h) The outcome of the disciplinary procedure/appeal being predetermined; and/ or by
 - 25 (i) Dismissing her
19. The issues in respect of those specific claims included:

- a. Was that treatment "*less favourable treatment*", i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
- 5 b. Does the claimant rely on hypothetical or actual comparators?
- c. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

20. In respect of s15 EA 2010 **Discrimination Arising from Disability**; at 9(xi) to 9(xii) of the January 2020 Note the issues were identified as:

10 20.1 did the respondent treat the claimant unfavourably (no comparator needed); by

- i. dismissing the claimant; and or
- ii. the respondent not following the capability procedure; and
- iii failing to provide the appeal outcome.

15 a. Did those thing(s) arise in consequence of the claimant's disability?

b. Did the respondent treat the claimant unfavourably e.g. *Did the respondent dismiss the claimant* because of something arising from her disability, e.g., sickness absence?

20 c. If so, has the respondent shown that the unfavourable treatment (*which is alleged and has been found by the Tribunal to have occurred*) was a proportionate means of achieving a legitimate aim? The Respondent being entitled to assert that it relies on something as its legitimate aim(s).

25 d. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

21. In respect of s20 and s21 EA 2010 **Reasonable Adjustments** for Disability; at 9(vi) – 9(ix) of the January 2020 Note the matters complained of were identified as being the respondent:

1. failing to postpone disciplinary meetings; and
- 5 2. failing to provide documents in good time; and
3. failing to refer staff to occupational health and
4. failing to follow its capability procedure; and
5. failing to investigate and resolve grievances; and
6. failing to follow its grievance procedure and by carrying out disciplinary
10 in a staff members absence; and

with the issues in relation to s20 and s21 being:

- a. Did the respondent know, or could it reasonably have been expected to know the claimant was a person with a disability at the material time?
- 15 b. A "PCP" is a "*provision, criterion or practice*". Did any PCP's relied upon put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, and in what respect what does the claimant say this was.
- 20 c. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- d. If so, were there steps that were not taken that could have been
25 taken by the respondent to avoid the disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges the respondent ought to have taken.

- e. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

22. In respect of s26 EA 2010 **Harassment related to disability**: at 9 (x) of the January 2020 Note the issues were identified as did the respondent engage in conduct as alleged by:

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- i. the way in which the claimant was allegedly spoken to in a meeting with Ms McMinn on 16 July 2019; and /or by

- ii. Ms McMinn allegedly telling claimant to *“ignore the phone if you can’t cope”*; and/or by

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- iii. Ms McMinn allegedly telling the claimant *“what do you want, a gold star”* on 15 March 2018; and/or by

- iv. Ms McMinn telling the claimant allegedly that *she was sick of the claimant coming in here* in May 2018; and or by

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- v. Ms McMinn allegedly telling the claimant to ignore colleagues who were upsetting her, on numerous occasions; and or by

- vi. Ms McMinn allegedly telling the claimant to clear her desk and accusing the claimant of being pedantic about her hours on 28 June 2019; and /or by

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- vii. Ms McMinn allegedly telling the claimant that she could not *“micromanage you”* on numerous occasions; and /or by

- viii. Ms McMinn allegedly saying *“had I made better notes you would have had a much quicker exit”* on 4 September 2019.

- a. If so, was that conduct unwanted?

- b. If so, did it relate to the protected characteristic of disability?

c. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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d. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (Whether conduct has this effect involves considering the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

10 23. Further Issues were, was the claimant wrongfully dismissed without notice.

24. The claimant seeks compensation, recommendation, and issue of a reference.

15 25. The Tribunal heard evidence from the claimant, Ms. Innes McMinn employee of the respondent and the claimant's Line Manager. Ms. Ivana Smedley employee of the respondent and who acted as HR manager, Ms. Wendy Copeland, Trustee member of the respondent Board, Mr Alistair Bryce Trustee Secretary of the respondent Board and Mr Russell Brown, Chair of the respondent Board.

20 **Findings in fact**

26. The claimant commenced employment with the respondent on **Monday 21 August 2017** as a Tenancy Support Worker, she worked Monday to Friday each week.

25 27. The respondent is a registered charity private limited company, overseen by several Trustees and which provides housing support and youth services in and around Dumfries and Galloway. The respondent had 14 employees staff operating from the office in which the claimant was employed. The respondent carried out sensitive work for the local authority which required handling sensitive personal data of clients and providing support for

vulnerable service users.

28. The claimant in her job application in May 2017, did not identify any physical or mental health condition that she had consulted her doctor about in the preceding 3 years.

5 29. The claimant did not have a separate office; however, she had a specific desk and allocated cupboard. While the claimant's area within the claimant's office was not open to public access it was not wholly restricted in that cleaning and similar staff would have access. The respondent had policies in place at the material time whereby non active files should not be kept
10 within the working areas and should be stored separately. Active files should be kept up to date and stored appropriately. The respondent's **Data Protection Policy**, set out that paper-based files were held in locked cabinets and were only accessible by the Support Worker, their Manager or a Care Inspector, with closed files kept in a closed storage area, and closed
15 files of over 1 year being destroyed. The claimant understood this policy and had received training on Data Protection issues and the importance of maintaining security of data belonging to service users.

30. The Data Protection Policy described that "*A personal data protection breach means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data... The
20 GDPR introduces a duty on all organisations to report certain types of personal data breach to the relevant supervisory authority; in this case the Information Commissioner's Office... ILS will do this within 72 hours of becoming aware of the breach, where feasible. If the breach is likely to result in a high risk of adversely affecting individuals' rights and freedoms, ILS will
25 also inform those individuals without undue delay... ILS must also keep a record of any personal data breaches, regardless of whether required to notify them.*"

31. The claimant's Line Manager at all material times was Innes McMinn. The
30 claimant had regular, and more frequent meetings with Ms McMinn than other colleagues who Ms McMinn line managed.

32. The respondent policies at the relevant time included a **Fair Treatment at Work policy** which broadly set out that the employees are entitled to expect fair and reasonable treatment at work from their colleagues, managers, and the Trustees, and that if some felt that they had been unfairly treated or discriminated they were entitled to make use of the appropriate ILS procedures. It set out that confidentiality of the concern will be maintained wherever possible, and that the policy covers harassment, bullying and victimisation and the policy was based on the individual's perception of their treatment. It set out that employees are entitled to be treated with respect and dignity and that respondent would not tolerate any harassment or bullying on grounds of protected characteristics including disability.
33. The respondent's **Disciplinary Policy**, in operation at the material time, described the procedure for formal investigation and set out that *"In most circumstances where misconduct or serious misconduct is suspected, it will be appropriate to set up an investigatory hearing. This would be chaired by the appropriate Senior (Manager/Trustee), who would be accompanied by another Trustee."* It did not provide that such a Hearing could be chaired by a single Trustee with an independent notetaker. It set out a non-exhaustive list of misconduct which could be gross misconduct, warranting a Final Warning, Demotion or Dismissal. It set out that the list is non exhaustive and that on all occasions that full and proper investigation must take place prior to the issuing of a Final warning, Demotion or Dismissal, including breaches of confidentiality, prejudicial to the interests of ILS; refusal to carry out a management instruction which is within the claimant's capabilities, and which would be seen to be in the interests of ILS; and breaches of confidentiality /security procedures.
34. The respondent's **Lone Working procedures** in operation at the material time set out that Managers would set up an adequate system for recording home and out of office visits, ensure it was kept up to date daily, for example by staff reporting to the office; their location and general movements for the day as required as a part of a risk assessment.

35. On **Friday 21 September 2017**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn at which the claimant gave a limited indication of non-work-related matters and in relation to work confirmed that it seemed okay so far. The claimant signed the reverse of such records.
- 5 36. On **Thursday 2 November 2017**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, at which the claimant confirmed that a psychology appointment for non-work-related health matters had gone well. The claimant raised concerns about fellow employees sitting about and chatting and Ms McMinn confirmed that she would act appropriately.
- 10 37. In 2018 Ms Copeland was appointed a Trustee, joining existing Trustees including Mr Bryce and Mr Brown, Mr Brown having been a Trustee since 2015 and Chair since 2016.
- 15 38. On **Friday 2 February 2018**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, at which the claimant agreed she would complete a complete a Wellness Action Plan (WAP) being provided via Ms McMinn to assist in relation to non-work-related matters. The claimant confirmed there was good atmosphere in the office and that she was enjoying the 9- 5pm routine.
- 20 39. On or about **Thursday 15 March 2018**, during a one-to-one meeting, in which discussion had taken place around tasks which the claimant had been allocated and completed, Ms McMinn commented with words to the effect "*do you want a gold star*". Ms McMinn's view was that the claimant was seeking praise for doing her role, when in Ms McMinn's view no such praise was called for. The claimant did not raise any specific issue at that time.
- 25 40. On **Wednesday 9 May 2018**, the claimant's GP recorded the claimant describing "*some stress at work... some personality clash*". This did not relate to Ms McMinn but rather the claimant's perception around interaction with a separate fellow employee.
- 30 41. On **Tuesday 15 May 2018**, the claimant attended a return-to-work meeting with Ms McMinn after a 4-day period of absence from Tuesday 8 May to

Monday 11 May 2018, for what was described as work stress, during which Ms McMinn became aware that the claimant was prescribed anti-depressant medication in relation to non-work-related matters.

- 5 42. On **Wednesday 16 May 2018**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, at which the claimant agreed she would complete a complete a Wellness Action Plan (WAP) being provided via Ms McMinn to assist in relation to non-work-related matters. In addition, it was recorded that the claimant would diarise a full file check and attend training on Thursday 28 June 2018 on "*using paperwork, when/where/how to store*".
- 10 43. In or around **May 2018**, during a meeting in which the claimant raised issues around her perception of a fellow employee with whom the claimant encountered personality clashes, Ms McMinn responded with a degree of exasperation using words to the effect that she was sick of the claimant coming into her office to complain about fellow employees. Ms McMinn had previously advised the claimant to seek to ignore colleagues with whom she did not get on.
- 15 44. On **Thursday 28 June 2018**, the claimant attended a cross regional development day, at which the team welcomed the new Administrator Ms Smedley, and Ms Minn provided a PowerPoint on data protection procedures and provided training using paperwork, when/where/how to store files.
- 20 45. On **Wednesday 18 July 2018**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading Work Life balance non-work-related matters were recorded and that the claimant was "*learning not to be the rescuer and provide positive support*". The only claimant work concern was recorded as noise levels in the office.
- 25 46. On **Wednesday 29 August 2018**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading Health & Safety at Work it was recorded that that claimant would complete a Wellness Action Plan (WAP), that the claimant struggled to take lunch breaks, recorded a "*discussion answerphones when busy*" Ms Smedley could "*take the message*"
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or let the call to answer machine .Under heading Other with was recorded that the noise in the office was getting better and that there was “*supportive environment in office*”.

47. On **Wednesday 26 September 2018**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading Current Workload it was recorded that the claimant was taking a few clients on, she did not feel stressed out and was passing responsibility back to clients. Under Health & Safety at work it was recorded that the claimant was getting on well with everyone. It also recorded claimant’s non-work-related matters.
48. On **Tuesday 9 October 2018**, the claimant’s GP described following a period of non-work related matters that the claimant felt ready to come off anti-depressants, with the GP describing a reduction over the next 3 months.
49. On **Wednesday 28 November 2018**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading Health & Safety at Work it was recorded that claimant felt fine at work, and in relation to non-work-related matters under Work/Life balance that “*Life a lot less stressful Life is good and preparing*” for more difficult non-work-related times ahead.
50. On **Tuesday 28 January 2019**, the claimant completed a MIND Guide to Wellness Action Plan (**the January 2019 Wellness Plan**) provided by Ms McMinn, and which was signed by both the claimant and Ms McMinn. Under heading Early Warning Signs, the claimant did not describe work. Under heading If the employer notices early warning signs – what should be we do? Ms McMinn recorded that the claimant’s position was “*ask if I’m okay*”. Under heading What support could be made available, it was recorded as “*open ... conversations with manager support from certain colleagues*”. Under heading what steps can you take if you start to feel unwell, the claimant recorded “*take a walk/fresh air*” Ms McMinn set out that that the claimant should not “*take on referrals when busy*”.
51. On **Tuesday 28 January 2019**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading current workload it

was recorded that the claimant planned to close several cases and that she will not do work while she was off sick. Under heading Feedback from File Check it was recorded that the claimant would get the S Drive folder sorted. Under Work Life Balance it was recorded that the claimant was feeling better and non-work-related matters were *“more settled”*.

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52. On **Wednesday 29 April 2019**, the claimant underwent appraisal, with Appraisal form signed by the claimant. Under Review of Year claimant comments, it was recorded that the claimant stated that she was back into the habit of taking on referrals before closing others off. It described that she had worked with Ms Taylor, the respondent Quality Assurance Lead, to identify clients to be allocated to another worker, and that she agreed that she did not rescue clients anymore and on-board information was one of her strengths. Under Health and Safety, it was described by Ms McMinn that a baffle board had been purchased which made concentration easier for the claimant at her desk. Ms McMinn described that due to personal difficulties that year the claimant’s mental wellbeing was a concern, but the claimant used supervision and took advice from her manager. Ms McMinn described that the claimant could demonstrate a range of emotions over a short period and described concerns about the claimant’s emotional resilience. For the claimant under this heading it was set out that the claimant disagreed that it was the client group that causes her stress, as she could deal with them *“It is the things around the office that stresses her out and she will approach”* Ms McMinn about them.

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53. On **Wednesday 1 May 2019**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading Health & Safety at Work it was set out that the claimant was reducing medication which was having an effect on moods *“needs to slow detox and she’ll be fine... Driving”* partner’s car *“parking has lead to lateness”*. Under the heading Other it recorded that *“Grievance will be submitted if... my colleagues start to impact on my performance”*.


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54. On **Tuesday 18 June 2019** the GP recorded non-work-related matters as

cause of feeling low, depressed.

55. On **Monday 24 June 2019**, the claimant attended a Staff Support & Supervision Meeting with Ms McMinn, under the heading Current Workload it was recorded that the claimant identified 20 active cases, 1 was due to close and there was a lot going on with her clients and she would get no more referrals until her client numbers were down. Under Training it was recorded that discussion had taken place around managing recording under tasks taking longer within a relatively new database known as Better Futures. Under Health & Safety at Work it was set that the claimant sits in wee room downstairs for break out.
56. On **Friday 28 June 2019**, the claimant was due to depart on a fortnight holiday. The claimant attended in the afternoon at the respondent offices, and after asking Ms McMinn if she liked the claimant's haircut, described that she had taken an extra hour (beyond lunch) to have a haircut and asked to allocate that hour against having worked an extra 30 minutes beyond 5pm on the previous two days. Ms McMinn's response was, in her own view in retrospect, "*a bit nippy*" describing to the claimant that she was tired of the claimant being so pedantic about hours and commented that the claimant should do what she needed to do and stated "*and go when you're done, personally I just want to tidy up my desk and go home. We will discuss this in your next supervision when you return form holiday*". It was Ms McMinn's view that no one had asked the claimant to work to 5.30pm and she had no evidence of such working to 5.30pm, Ms McMinn arranged to stay until the claimant left that evening around 5.25pm, which Ms McMinn considered followed the respondent's Lone Working Policy. Ms McMinn considered the claimant to have breached the Flexible Working Policy by not asking for prior approval for the hair cut appointment time.
57. Further on **Friday 28 June 2019**, while discussing the claimant's plan for annual leave, Ms McMinn described that on the claimant's return she wished to discuss aspects of the claimant time keeping records.
58. On **Thursday 11 July 2019** Ms McMinn issued an email (**the 11 July 2019**

5 **email**) to the respondent Trustees, copied to Ms Smedley as the
respondent's administrator and effective HR. It set out that Ms McMinn had
been in her post for 2.5 years and "*had not brought that much trauma*" to the
Trustees "*today, however ... please see attached*" she described that she
would speak to Ms Smedley who was on leave till the following Monday "*for*
6 *advice. Off the record-I've given her*" the claimant "*an exceptionally fair crack*
of the whip but I'm done now... would never have employed her in the first
place if it hadn't been for April Wilson pleading with me- won't be defying my
gut instinct ever again. Wendy and Russell this is the one you were
10 *concerned about at interview for Quality Assurance Role. I'm going to use*
my master manipulation skills to get her out the door but in case that fails it
will need to be disciplinary which I have neither the time nor will for. Enjoy!!


15 59. Attached to the **11 July 2019 email**, was a 3-page document for the Trustees
from Ms McMinn (**the 11 July 2019 document**), describing that Ms McMinn
had become concerned around the claimant's attitude to work "*Over the last*
few months" Ms McMinn set out that, the claimant had raised concerns around
Ms McMinn's management ability and while she had been advised to raise
such concerns with the Trustees the claimant had not done so. Ms McMinn
20 set out that she felt that her management of the claimant had been
"*exceptionally fair; in fact, I spend a disproportionate amount of time*
managing and worrying about" the claimant "*than all other staff combined and*
I cannot continue to do this".

25 60. The 11 July 2019 document described several alleged incidents:

- on **Friday 15 May 2019** while Ms McMinn was off work and while there
were visitors at the respondent office, including from the local authority,
it was suggested a report was available and described that claimant
had been shouting, with a copy of a note taken by Ms Smedley (the
Note of matters on 15 May 2019). The Note of matters on 15 May 2019,
30 set out a description when it was suggested that the claimant had
raised her voice around issues surrounding her colleagues taking

informal smoking breaks while the claimant considered she could not take a lunch break. It described that the claimant had advised that she was unable to see a client who attended without an appointment, the claimant describing having a prior commitment to meet an external agency, with the claimant thereafter describing to the client that the claimant had forgotten to diarise the appointment and she would see the client the following day. The Note of matters on 15 May 2019 set out that the claimant had been advised to raise her concerns in writing but that the claimant had been reluctant to do so, and that the claimant had intimated upon returning to the office after her external agency appointment that she was intending to resign and spoke about several her colleagues.

- on **Wednesday 17 June 2019** it was suggested that Ms McMinn had occasion to send the claimant home at mid-day as she was upset and the claimant had described that she was behind in her work at that time, Ms McMinn set out that she suggested that the claimant ask colleagues to assist her. It was described that the following day the claimant had prepared to attend a gym class in the building at 4.00pm and left the building around 4.35. This is, it was suggested, the cause of an email to all staff reminding of adherence to work hours.

- On **Friday 28 June 2019** (although set out as July, it was described as the last day before the claimant took a fortnight holiday) it was indicated that the claimant had arrived at in the building around 4pm and described that she had taken an extra hour to have a haircut, asked Ms McMinn if she liked her hair(cut) and asked to take a further hour off work as she had worked to 5.30 the previous 2 nights. Ms McMinn described her own response as being *“a bit nippy and described saying that she was tired of”* the claimant *“being so pedantic about hours, do what you need to do and go when your done, personally I just want to tidy up my desk and go home. We will discuss this in your next supervision when you return form holiday”*. Ms McMinn described that she stated to the claimant that no one had asked the claimant to work

to 5.30pm and set out, in the document, that Ms McMinn had no evidence of such working to 5.30pm. Ms McMinn described that owing to the respondent Lone Working Policy she had remained thereafter with the claimant till 5.25pm. Ms McMinn described that she considered the claimant to have breached the Flexible Working Policy by not asking for prior approval for the hair cut appointment.

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61. The 11 July 2019 document further set out, that in Ms McMinn's view, time management had continuously been an issue for the claimant, as she has taken too much responsibility and then was unable to manage. Ms McMinn further described that both she and Ms Smedley had to offer additional support to help the claimant organise record keeping, by highlighting what was missing and described they do not have resources to continue to support a worker in this manner.

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62. The 11 July 2019 document also set out that the claimant had a history of demonstrating what was described as a "*highly emotional behaviour*" and described as a first incident when Ms McMinn was unable to attend a conference on Friday 15 March 2018 due to what was the claimant's alleged emotional condition, Ms McMinn acknowledged that 2018 was a very difficult year personally for the claimant with many hours of compassionate support and colleagues assisting her. Ms McMinn set out that she had not seen any improvement in the claimant's emotional resilience. Ms McMinn set out, that it was her view that the claimant spent an overly proportionate amount of time with some clients and suggested that the claimant had to be reminded in the past to offer the same service to all.

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63. Finally in the 11 July 2019 document Ms McMinn set out comments regarding 4 specific (named) client engagements by the claimant.

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64. The claimant returned to work by **Tuesday 16 July 2019**.

65. During **Tuesday 16 July 2019**, Ms McMinn, requested a short 5 minute a meeting with the claimant in Ms McMinn's office. During that meeting she asked the claimant how she felt to be back at work. The claimant responded,

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to the effect, that she considered Ms McMinn's behaviour towards her immediately prior to that leave had been unfair. Ms McMinn responded with words to the effect that she was sick of what she, at that point, regarded as a war of attrition between the two of them and provided 2 separate letters (A & B below) to the claimant. Ms McMinn advised that copies would be available to the claimant when she returned home that evening.

A. **Letter 1** -Letter from Ms McMinn dated **Wednesday 10th July 2019** advising the claimant that an Investigation had been opened regarding issues around Poor time keeping; Breaches of Lone Working Policy; Management of Current Workload; Management of Behaviour in the office. It set out that the investigation would be completed by close of business **Monday 15 July 2019**, and the claimant would be informed of outcome, and that if there was a case to answer she would be invited to attend a formal Disciplinary Meeting. The claimant was on annual leave from **Monday 1 July 2019** to **Monday 15 July 2019**.

B. Letter 2 - a letter from Mr Bryce, **Monday 15 July 2019**, respondent's Trustee Secretary inviting the claimant to attend an Investigation Meeting **Friday 26 July 2019** at ILS's office with Mr Bryce (ILS Trustee), Jack Broom (ILS Trustee), Ms Copeland, (ILS Trustee) and Ms Smedley (ILS Administrator) as note taker. It set out that Mr Bryce was in the process of conducting an investigation into allegations regarding the claimants: Poor time keeping; Breaches of Lone Working Policy; Management of Current Workload; Management of Behaviour in the office. It described that she could be accompanied by a trade union representative or a colleague, however the companion would not be able to answer questions on behalf of the claimant. It set out "*Please understand at this present point in time, this is not a disciplinary meeting, however may turn into one. If you are unable to attend the meeting please contact Wendy Copeland as soon as possible, so that alternative arrangements can be made*".

66. On **Monday 22 July 2019**, the claimant's GP recorded for the first time under Minor Past history "*Bullied at work*". The GP recorded the claimant as being "*tearful and unable to talk as line manager behaving very badly*". The GP recorded it had been described that the claimant "*had been put under investigation- had taken permission from her Q&A manager for hair appointment - was on holiday and the line manager has started an investigation – was asked to leave*".
67. From **Monday 22 July 2019** the claimant's GP provided a Fit Note (the July 2019 Fit Note) which set out that the claimant was unfit for work until **Monday 5 August 2019**, with the cause described as "*stress, bulled at work*", the claimant did not subsequently return to work. The GP Fit Note issued to the respondent, set out in handwritten comment that the GP's view was that an Occupational Health Assessment was appropriate, although the copy retained by the GP did not set that out. The claimant notified both Ms McMinn and Ms Smedley by email, setting out she had been to her GP that day, he had signed her off for 2 weeks would and she would hand in the Fit Note for Ms McMinn's attention. She confirmed that she had no appointments for that day and would send to Ms McMinn and Ms Taylor a list of appointments for the next 2 weeks so that her allocated service users could be contacted.
68. Later, on **Monday 22 July 2019**, the claimant emailed Ms Copeland requesting that Ms Copeland call her, describing that she required to "*discuss with someone. I've been to my GP today and been signed off for 2 weeks. I emailed and then contacted*" Ms McMinn "*she wanted to know if I will still be attending the meeting Friday. I advised her I will contact the trustees direct. I'm struggling to trust anyone at ILS. The information I requested is not correct and I was shocked to see that the minutes had been diluted and key points I made not included. I honestly feel that I am being hung out to dry. It's affecting my mental health to the point I am unable to eat or sleep. Gp really concerned...Have sleeping tablets. Its really difficulty with my partner being in America till next week. I really would appreciate it if you have time to call*".
69. On **Wednesday 24 July 2019**, in the morning, the claimant emailed Ms

Copeland, setting out that in view of the claimant's exemplary employment record with the respondent, the claimant did not "*feel able to contribute fairly to the meeting scheduled for Friday 26 July for the following reasons: lack of specific information/records regarding – Poor time keeping, breaches of lone*
5 *working policy, management of current workload and management of behaviour in the workplace – can you please provide me with all specific details for these allegations*" and requested copies of all the relevant respondent Policies and Procedures "*which I do not have I need time to read them*".

10 70. Ms Copeland responded later that morning on **Wednesday 24 July 2019**, and advised that collectively the Trustees had agreed that the meeting would go ahead as originally planned and described that "*this is your opportunity to bring your concerns and explain things from your perspective*" and set out that Ms Smedley would be able to provide copies of all relevant policies concluding
15 "*Let me know if you require her contact details*".

71. The collective decision of the Trustees had been led by Mr Bryce. Mr Bryce was concerned that the claimant was a few weeks away from achieving the necessary 2 years continuous qualifying service for unfair dismissal. Mr Bryce considered that a delay would give rise to the claimant qualifying for 2 years' service and what he considered would be the impact of unfair dismissal
20 litigation risk to the respondent's operation.

72. On **Thursday 25 July 2019**, the claimant rang her GP and the GP recorded in the records for the first time; Minor Past history "*stress at work*" and the history as submitted a sick note- emailed saying could not attend the meeting
25 – tearful- they have emailed saying meeting will go ahead, the GP prescribed diazepam to help the claimant cope. The GP recorded being told "*they would like to know where and when*" and suggested trying "*the tablets and see whether helps- and now as she is signed off work for this period, she is not expected to be in any meeting anyway*".

30 73. On **Thursday 25 July 2019**, the claimant emailed a written grievance to Ms Copeland for the Trustees and requested that a full and thorough investigation

takes place prior to the investigation for the breach of code conduct as she set out that she firmly believed that the outcome of her grievance would have a direct impact upon the investigation. The claimant described that she had raised numerous concerns with Ms McMinn who had failed to act, leaving the claimant feeling unsupported. She set out the terms of her grievance including:

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i. In a discussion in December 2018 when she sought support from Ms McMinn who *“snapped back’ What do you want a gold star?”*

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ii. She had raised concerns regarding the conduct of a colleague (named later in the grievance) with service users making herself and (unnamed) colleagues feel uncomfortable. The claimant described that upon raising her concerns with Ms McMinn she was advised to *“just ignore her”*.

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iii. What she described as *“this issue”* was documented in her first appraisal with Ms McMinn who had commended the claimant for handling the situation using her *“people skills”* and described that she had also raised such issues in supervision but stated that this was not documented.

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iv. The claimant described what she considered was the stress of having to work in a hostile environment which she described she highlighted regularly to Ms McMinn, with a specific named colleague, it was alleged, often reducing the claimant to tears and calling the claimant *“vile names”*

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v. The claimant set out that when raising, as she saw it concerns regarding a work colleagues’ behaviour with a service user, Ms McMinn responded that she was sick of the claimant *“coming here complaining about your colleagues, and not getting on with your colleagues”*.

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vi. On approaching Ms McMinn with a (unspecified) matter which the claimant considered to be a further serious concern, Ms McMinn

responded to the effect she had not got time to micromanage the claimant.

5 vii. When the claimant approached her manager "*occasionally with concerns regarding one particular client*" Ms McMinn responded that it was the "*nature of the job and you can't choose who you support*". The claimant described that the specific client behaviour was subsequently managed by a criminal justice social worker

10 viii. The claimant described that on several occasions she had highlighted the amount of time "*4 or 5 members of staff were taking smoking breaks*", Ms McMinn simply responding that she would have some peace while they were outside and when the claimant further described that she was left to answer the phone, Ms McMinn replied "*let it ring*".

15 ix. The claimant described that there was an incident in the office when the claimant "*acted in an unprofessional way buy using inappropriate language. I realise that this was not acceptable*", however, she described that this was due to how she was feeling following the unprofessional treatment from Ms McMinn and described that it was having an enormous impact of her mental health. She described that Ms McMinn had asked to speak to her and the claimant had found it
20 strange that Ms Smedley had been present as a note taker. The claimant set out that she disputed the accuracy of the Note of matters on 15 May 2019 which had by that time been provided to her.

25 x. On Thursday 27 June 2019, the claimant set out that she had made a request to the respondent's Quality Assurance Officer Ms Taylor that she could have some time to go to the hairdressers on Friday 28 June and was advised she could take an additional hours after her lunch break. The claimant thereafter described that she worked extra hours and suggested that she use that time for her hair appointment rather than annual leave, she was advised to speak to Ms McMinn whose
30 response she described as intimidating and unprofessional. The claimant described that on her return to work after her holiday Ms

McMinn was extremely hostile, aggressive, and intimidating and shouted that she was sick of the war of attrition between them. The claimant set out that Ms McMinn gave her two envelopes and stated that the claimant had *“sat her 12 months ago telling me how stressful this job is”* and that her partner *“moved up in 6 months’ time you would consider getting a different job. Maybe that time had come and you should think about moving on with your life”*. The claimant describes that she felt devastated and when she spoke to Ms Smedley, she had said that Ms McMinn should not have said that.

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10 xi. The claimant set that she had received outstanding appraisals and supervision and apart from the occasion that she regretted that she had had no conversations about her performance or behaviour. The claimant described that she was treated unfavourably compared to colleagues and *“firmly believe that these have been engineering as result of my managers personal dislike of me and support her desire for me to leave the business. I request that a full and thorough investigation into my grievance take place prior to the investigation for the above breach of code of conduct as I firmly believe that the outcome of my grievance will have a direct impact upon the investigation”*.

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74. On **Thursday 25 July 2019**, Ms Copeland emailed the claimant back, in late afternoon, thanking her for the letter detailing the grievance confirming that it had been shared with the Trustees and *“we are in agreement that tomorrow provides you with the opportunity to share your concerns and to be assured that your points will be fully investigated. Tomorrow will also give you an opportunity to comment on the issues that were detailed in the investigation dated 15 July. We trust that we’ll see you tomorrow at 1pm at ILS offices”*.

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75. On the morning of **Friday 26 July 2019**, the claimant emailed Ms Copeland and advised *“I have spoken with my gp again yesterday and she has strongly advised that due to my current mental health I must not attend the meeting if I do not feel well enough”*. The claimant referenced her email on

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5 Wednesday 23 July, to the effect that she had advised that she did not feel well enough, due to her mental health, to attend the meeting and asked that it be rearranged to give the claimant time to prepare once she felt well enough, and that she had asked that due to having 4 people present she would find this intimidating, and requested that only Ms Copeland and what she described as an independent notetaker be in attendance for same. She commented that she was disappointed by the reply insisting that the meeting go ahead regardless of being informed that that the claimant did not feel well mentally or physically to attend and without reference to her “*reasonable requests*”. She described that “*I reiterate and stress that I unable to attend the meeting Friday, 26 due to my mental health, which has exacerbated in the last week. My gp has increased my medication and prescribed extra sedatives*”. The claimant concluded that she was “*asking in good faith and as a reasonable request that they make a reasonable adjustment, as per the Equality Act 2010, and rearrange the meeting till I am well and I have support from my partner, so I can represent myself fairly and thoroughly*”.

76. On **Friday 26 July 2019**, Ms Copeland prior to the commencement of the meeting, replied by email stating that she understood the claimant’s concerns, that as a Trustee she required to consult her fellow trustees around the policy and could not make such decisions on her own. She set out “*I understand your reasons for not attending today and I’ll be in contact early next week with an update. In the meantime I can only wish you well and reiterate what advice you received from your GP*”.

77. The Trustees who were in attendance for the meeting decided as they had before, and for the same reasons, not to postpone the meeting of Friday 26 July 2019.

78. Shortly to the commencement of the meeting on Friday 26 July 2019, Ms Smedley, who was assisting Ms McMinn seek some client document discovered a volume of paperwork within the claimant’s unsecured desk area. The paperwork included confidential client documents which had not been stored appropriately. The documentation covered around 50 clients.

Ms Smedley pulled the documentation out on the floor and Ms McMinn arranged to take 2 photographs at 10.42 and a third photograph of 16.21 (taken after the paperwork was sorted into order). The photographs showed the volume of the confidential material. The Trustees in attendance at the meeting were made aware of what had been discovered and saw the file of confidential client papers which were identified to them as having been found in the claimant's workspace.

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79. The meeting proceeded to focus on the discovery that day of that confidential client paperwork within the claimant's desk area. While the paperwork had not been securely stored in compliance with the respondents Data Protection Policy, the location within the claimant's desk area did not identify that any accidental or lawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data had occurred.

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80. Separately and on **Sunday 28 July 2019** Ms McMinn set out her comments in relation to the claimant's grievance and set out her position in relation to the discovery of the paperwork. (Ms McMinn 28 July 2019 response to grievance) Ms McMinn set out that she talked more with the claimant than other staff "*We have regular conversations about her health and well being as well as*" non-work-related matters "*and incidents at work. I do not accept bullying and intimidation in the workplace*" she described that the claimant was "*more than capable of displaying similar behaviours in the workplace unfortunately I did not record these conversations*". She described that a Trustee "*recently instructed me to take better notes and I will, if I had taken better notes I anticipate a quicker exit for*" the claimant.

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81. In Ms McMinn's 28 July 2019 response to grievance, she set out that she accepted that she had said that she was tired of the claimant coming into her office complaining about colleagues.

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82. In Ms McMinn's 28 July 2019 response to grievance, she set out in relation to 8th bullet point of the claimant's grievance that the claimant's "*recollection of this conversation is completely different from mine*". Ms McMinn set out that she had described that all clients were entitled to the same service

regardless of whether the allocated worker liked them or not and described that as part of the role with partnership with Criminal Justice, the claimant would have met them at those offices or at ILS office. Ms McMinn described that upon reading the claimant's recollections *"I went to look for this client's files to see if he did pose a risk but cannot find it; we found two pieces of work in an unsecure desk, along with another 50 client's personal information. All ILS staff are trained on Data Protection and GDPR"*.

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83. The claimant who, at that point, was due to be absent from work until Monday 5 August 2019 was not asked for any comment, by email or otherwise, regarding the discovery of what Ms McMinn set out on Sunday 28 July 2019 as the pieces of work along with another 50 client's personal information.

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84. On **Monday 29 July 2019**, Mr Bryce issued letter to the claimant setting out that the claimant had been dismissed for gross misconduct (the July 2019 Dismissal letter), heading the letter Disciplinary and Grievance matters. Mr Bryce set out that the claimant had been invited to attend a meeting on Friday 26 July 2019, regarding potential issues which had been identified around her actions in relation to timekeeping, potential breaches of the Lone Working Policy, management of her workload with ILS, and concerns about her behaviour in the workplace. He noted that the claimant had been in correspondence with Ms Copeland about the meeting and had ultimately emailed her to advise that, after consulting with her doctor, the claimant would be unfit to attend.

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85. In the July 2019 Dismissal letter, Mr Bryce noted that separately, after receipt of invitation to attend the Investigation Meeting but prior to the meeting date, the claimant had lodged a formal grievance regarding Ms McMinn, expressing concern around suggested lack of support and suggested bullying and intimidating behaviour on her part. He described that Ms Copeland had confirmed that the subject matter of her grievance would be investigated and would be explored further with the claimant at the meeting arranged for Friday 26 July, but which the claimant was unable to attend.

86. In the July 2019 Dismissal letter, Mr Bryce described that on Friday 26 July 2019 he had the opportunity to meet with Ms Copeland and J Groom (fellow Trustee) to discuss the situation regarding the claimant's position with ILS.

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87. In the July 2019 Dismissal letter, Mr Bryce set out that information had been obtained by Ms Copeland prior to that meeting "*regarding the matter of the claimant's grievance and significant information had also come to light which gave us serious cause of concern regarding your workplace performance. A huge volume of documentation was located within your office cupboard, as paperwork was being sought to allow other staff to deal with the business of ILS services users. That documentation, once examined, related to more than 50 different service users. Paperwork for some 20 service users was amongst the bundle of documents which was more than a year old and should, in accordance with ILS policy have been destroyed. In addition, a number of half-finished forms were present, it was unclear whether these had been proceeded or whether applications which should have been made on behalf of serviced uses had been followed up or progressed at all.*"

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88. Mr Bryce concluded the 2019 Dismissal letter, stating that it was matter of regret that the claimant's time with ILS had been brought to an end in this way and set out that "*The seriousness of the difficulties which have been identified involved clear breaches of confidentiality in relation to document storage, which gives rise to serious concerns around GDPR and obvious failures to follow ILS rules, regulation and procedures in respect of document management and protecting the confidentiality and interest of our service users, I have no alternative but to confirm your summary dismissal at this time.*"

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89. On **Friday 09 August 2019**, the claimant issued written Appeal (the August 2019 Appeal) to Mr Brown. The grounds of appeal were set out as:

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1. **Wrongful dismissal and breach of contract.** The claimant described her view that the respondent Disciplinary policy and ACAS Code of

conduct had not been followed, that that there were 3 clear stages, Investigation, Disciplinary and Appeal “*all of which should be chaired by an impartial manager*”. She described that she was invited to an Investigation Meeting with Ms Copeland who was leading the Investigation on Friday 26 July 2019 and while she could not attend the investigation meeting and it went ahead in her absence.

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2. **Failure to consider her request to delay the investigation meeting scheduled for Friday 26 July 2019.** She described that she had repeatedly requested for the investigation meeting be delayed due to the claimant’s mental and physical health and provided a Fit Note and described additional medical advice to Ms Copeland. She described that she was not offered any reasonable adjustment such as a meeting off site, sending in written representations or asking a representative to attend on her behalf. She set out that the Fit Note had suggested that ILS arrange for her to see an Occupational Health practitioner, however, this had not been acknowledged.

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3. **Grievance Policy Not Followed.** She described that she had submitted a grievance against Ms McMinn which she requested be investigated prior to her own as she believed that the outcome would have a direct impact on the investigation regarding herself. She noted that it appeared that while acknowledged, she had not received an outcome which she described as a further breach of the ACAS code.

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4. **Reasons for Dismissal.** She described that she was unclear as to the reasons for dismissal and what actions/behaviours were deemed to be gross misconduct. She described that she had recently received an outstanding appraisal and excellent supervisions. She described that while the note alluded to issues dating back at least 12 months (which she disputed) she not been previously made aware to provide an opportunity to improve. She queried why she did not have any live disciplinary warnings. She described that Gross Misconduct can be a single act which fundamentally breaches the contract of employment

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and questioned therefore why she had been dismissed on multiple issues which had not been sent to her as specific allegations of gross misconduct.

5 5. She further described that the reason to dismiss had been made prior to the investigation meeting on Friday 26 July 2019, and she believed that her request to delay was declined as the respondent wished her dismissal date to be prior to her employment reaching 2 years on Wednesday 21 August 2018 "*which would enhance*" her rights as an employee. She set out that was evidenced in the refusal to delay the meeting, the respondents' "*ignorance of*" her GP's request to involve Occupational Health "*and lack of policy adherence also suggests this*". She described that the reasons for dismissal according to the notes, demonstrated that her grievance backed up what Ms McMinn had said but that the respondents had chosen to believe Ms McMinn, without having investigated the claimant's grievance.

90. In the August 2019 Appeal, the claimant further set out a request for all information which ILS held describing it a Subject Access Request for the entire content of her Personnel File, copy of her contract of employment, all appraisals and supervision documentation, any meeting notes where she had been informed of any issues with her work/behaviour, minutes of meetings where she had been an attendee, all evidence discussed and considered within the investigation meeting on Monday 29 July 2019 which led to Mr Bryce's decision to summarily dismiss her.

91. The claimant concluded the August 2019 Appeal describing that she was on holiday until 21 August, she out of the UK, as she was in the US, and requested that the appeal meeting takes place after her return and to provided her with reasonable time to prepare and study the documents she had requested.

92. On **Tuesday 13 August 2019**, the claimant issued an email communication to Mr Brown describing that she had not received acknowledgement to her

email on Friday 6 August 2019 setting out her appeal.

93. On **Wednesday 14 August 2019** Mr Brown confirmed that he had now received the terms of the claimant's August 2019 appeal. He explained that he had not received the email issued Friday 6 August 2019; that he had been unable to respond to an email he had received from an unfamiliar email address on Monday 12 August 2019, but that he was now in receipt of the appeal. He set out that, as the respondent policies provide that an appeal be arranged within 20 days working days of the appeal, he was proposing that the appeal take place on Friday 6 September 2019 which he considered gave the claimant time to return from her holiday and prepare for the appeal. He requested that the claimant confirm if that proposed date was suitable to the claimant.

94. Mr Brown provided a copy of this response, to Ms McMinn and Mr Bryce separately on Wednesday 14 August 2019.

95. Mr Bryce responded to the copy of Mr Brown's email on **Wednesday 14 August 2019** describing his view that he was not sure that there was anything else to give the claimant, noting that he prepared a Minute that was approved by the Trustees present on Friday 26 July 2019. Mr Bryce described that *"So far as other "evidence" is concerned Jack, Wendy and I all saw the file of papers that had been found in Michelle's workspace and I understand that Ivana took photographs at the time they were all uncovered. There is a note from Innes about the content of what was found. It may be worth recording that as part of the discussion on the 26th to avoid dragging Innes in to this any further. The positive is she only complains about the fairness of the dismissal and does not have qualifying time for a claim to the Tribunal. I cannot see there is anything wrongful about the dismissal given that she is not entitled to claim anyway for unfair dismissal, and she seems to be confusing the two concepts."* Mr Bryce's description of Ms McMinn's note was in relation to her response to the grievance on Sunday 28 July 2019. Mr Bryce was not involved following upon his July 2019 Dismissal letter beyond this email, and although he offered to meet with Mr Brown, that

offer was not progressed.

96. On **Sunday 25 August 2019**, the claimant sent an email to Mr Brown setting out that she had not received the information she had requested in her appeal and described that he had agreed that her manager would send it to the claimant to give sufficient time to prepare, she described *“as 5 working days have passed I am requesting that you advise when you will be forwarding it”*.
97. On **Tuesday 27 August 2019**, Mr Brown emailed the claimant describing that he had met with Ms McMinn briefly to access any paperwork he would require to deal with the appeal. He confirmed the date Friday 6 September 2019 and location of the appeal. He set out that it was his understanding, at that time, that that the claimant had all relevant paperwork for her appeal but that he would check thoroughly and contact the claimant the following day.
98. On **Wednesday 28 August 2019**, the claimant responded to Mr Brown’s email setting out that he had not yet received access to all information which ILS held about her. She describing that she was resubmitting a Subject Access requesting; the entire content of her Personnel File, copy of her contract of employment, all appraisals and supervision documentation, any meeting notes where she had been informed of any issues with her work/behaviour, minutes of meetings where she had been an attendees, all evidence discussed and considered within the investigation meeting on Monday 29 July 2019 which led to Mr Bryce’s decision to summarily dismiss her, and a copy of all ILS Policies and procedures. She described that she had not received anything since she had put in *“the Subject Access Request on 9 August 2019, then subsequent re-sent on Monday 12 August 2019. This delay is causing me considerably increased stress and my mental health is being affected detrimentally”* and she requested that she be provided with those documents by the end of that week *“to give me a week to prepare for my appeal meeting”*.
99. On **Thursday 29 September 2019**, Mr Brown responded to the claimant

5 setting out that he had been reliably informed that in the week before she had been signed off, she” *had access to her personnel file for almost six hours with the opportunity to copy any items that you wanted* , it *“included a copy of your Contract of Employment and all appraisal and supervision documentation. It seems that you did remove items for the purpose of reading, or copying, as the file required to be put back in order”*. He described that she was sent a copy of the Minute of the Meeting held by the 3 Trustees on Friday 26 July 2019 which she had not been able to attend. He noted that the Minute reference to *“a huge volume of documentation which had been found”*. That discovery was significant”. He described that while the request was for all ILS policies and procedures there were many which were not relevant to her case, but they would that afternoon forward what was relevant to the appeal. He described *“I must remind you that there is no specific obligation on yourself or ILS to produce a witness, witnesses must be notified to the other party by Monday 2 September and that any witness statement she would be intending to present required to be submitted no later than Wednesday 4 September 2019”*. He described that it was his intention to record the appeal hearing, which would then be typed up and a copy provided to her.

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100. On **Friday 30 September 2019**, the claimant emailed Mr Brown thanking him for the respondent’s Policies and Procedures. She confirmed that she had briefly looked through her personnel file to obtain information in relation *“to the investigation for breach of conduct on 26 July 2019 during working hours”* and described that at the time she had only required information relevant to that that investigation and requested *“all Personnel data which ILS holds”* in relation to her and requested that this be provided as a matter of *“urgency to give a fair and reasonable time to prepare for her appeal “* on Friday 6 September 2019.

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101. On **Monday 2 September 2019**, the claimant emailed Mr Brown thanking him for arranging the content of her file to be sent which she had received that day and describing that she was missing; details of the investigation and

outcome of her grievance submitted 25 July 2019 against Ms McMinn, evidence of documents found in her desk leading to her dismissal, copy of witness statements leading to investigation and dismissal. She described that she wished copies of all information ILS had used in its decision to summarily dismiss her including all evidence they intended to use at the appeal. The claimant further asked that as she had no trust in any employees at ILS if her partner could attend as her representative.

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102. On **Tuesday 3 September 2019**, Mr Brown responded to request for documentation setting out that he understood that the further paperwork was sent out on Monday 2 September 2019 and that he anticipated that it would arrive that morning. He further described that he did not have a problem with the claimant's request that her partner attend with her describing that he would expect that the claimant would want him for moral support. He described that the idea of a trade union representative was to act as her representative and to present the case. He set out that *"I may have made the wrong assumption in respect of your partner so please let me know if he will be presenting your case or will be there for moral support"*.

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103. Ms McMinn did not speak to the claimant on Wednesday 4 September 2019. Ms McMinn did not say to the claimant, on this day that had *"I made better notes you would have had a quicker exit"*.

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104. On **Friday 6 September 2019**, the claimant attended scheduled Appeal hearing chaired by Mr Brown. Mr Brown had not previously involved the in the meeting on Friday 26 July 2019 and had not been the decision-making process which resulted in that meeting to proceed. Mr Brown was unaware of the claimant's anxiety and depression. During the Appeal and while the claimant appeared at times stressed it was not apparent to Mr Brown that she suffered from the condition of anxiety and depression, such stress as she exhibited was in Mr Brown's view attributable to the seriousness of the occasion. In Mr Brown's view Ms McMinn's email of 11 July 2019 was in inappropriate terms. At the outset of the appeal Mr Brown expressed comments to the effect that contingent on the outcome he would expect the

claimant to return items which had not yet been returned including keys to the respondent's office, mobile phone and ID badge.

5 105. The claimant had not been provided with the 3 photographs from 26 July in advance and Mr Brown had not viewed the 3 photographs in advance. They were however available at the appeal. The photographs showed a significant volume of paperwork which it was suggested, Ms Smedley, had been retrieved from the claimant's desk space with the 3rd photograph showing the paperwork sorted into some order. The claimant was able to identify relevant matters from the photographs. She denied that the paperwork had been so
10 retrieved. The claimant accepted that storing such paperwork in the manner described would have amounted to a serious breach of the respondent's data protection policies including having regard to the vulnerable nature of the respondent client base.

15 106. On **Monday 9 September 2019** the claimant emailed Mr Brown setting out that she considered that due to the stress she had been under she had omitted to ask why the respondent's "*Capability at Work policy was not utilised if there were issues relating to my workload and behaviour. ACAS advise it good practice to use if available*".

20 107. On **Thursday 12 September 2019**, Mr Brown emailed the claimant setting out that the transcript of the meeting had been completed and due to other commitments, he would be looking at correcting any transcribing errors and thereafter determining his view on Sunday 15 /Monday 16 September and that on that basis he would ensure that a copy of the transcript and his decision on the appeal would be with the claimant on Tuesday 17 September
25 2019.

30 108. Mr Brown issued the decision by letter dated **Friday 16 September 2019**, setting out that "*Whilst I do recognise that you probably felt under some pressure when we met, I do believe that you were given adequate opportunity to make your case*" and he felt that the transcript showed that to be the case. He set out that he had taken his time to consider the transcript

5 alongside the notes that he took on the day and described that “*having considered everything, I believe I must, again, make the point that I did at your appeal, that the discovery of a significant amount to paperwork was a very serious matter. I regret that I have to inform you that having taken into everything into consideration, my decision is to dismiss your appeal. I would again ask that you take immediate action to return your keys, mobile phone, ID badge and your diary to the ILS office*”.

10 109. As at the date of claimant’s termination she was receiving £366.25 net per week. She received a mileage allowance and was member of the respondent pension scheme.

15 110. Following the termination of employment, the claimant applied for a role with an alternate employer on 23 August 2018, which was offered subject to reference. The offer was withdrawn on the respondent confirming that the claimant had been dismissed for gross misconduct. The claimant applied for 8 alternate roles including as a Freelance Trainer, after 34 interviews she obtained alternate employment commencing 31 October 2019, from which the claimant, by working longer hours sustained no material wage loss. The claimant did not qualify for state benefits due to combined household income. The respondent did not lead evidence of alternate posts which the claimant could have applied for but did not.

20 111. The claimant was unable to continue in initial her post termination role following an incident at work but secured alternate employment and again while working longer hours than with the respondent sustained no material wages loss.

Submissions

30 112. Both the claimant and respondent provided written submissions. The Tribunal considered that it was appropriate for the respondent to provide its written submissions to the claimant in draft format to the claimant who was unrepresented to have the opportunity to set out her submissions thereafter. The respondent agreed to this model. Having provided its submissions, to

the claimant the respondent indicated that, after review of the claimant submission, it did not consider it necessary to revise its submission The Tribunal does not consider it necessary to set out the full term of each of the parties' submissions.

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113. **The claimant** in essence argued that the Tribunal should accept her position that the allegations around the photographs, the paperwork details are vague, it being set out that no records have been kept of the specific documents. The claimant further argued that had the documents been located as the respondent describes they would, in terms of their Data Protection Policy, have required to make a report to the Information Commissioner Office.

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114. The claimant sets out criticisms of Ms McMinn, credibility including noting in the 11 July 2019 email she stated she would use her master manipulation skill to get rid of the claimant and described that "*she has neither the time nor the will for*" a disciplinary and that email and its communication cast doubt on the credibility of all witnesses.

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115. In relation to Ms Smedley, it was argued that she was copied into that email and refer to the respondent's (adjusted) Grounds of Resistance, citing the claimant to having "*racially abused a colleague on their first day at work with the Respondent*" cast doubt on Ms Smedley's reliability. In addition, Ms Copeland was under the impression that Ms Smedley was the office manager, whereas Ms Smedley was an administrative assistant. The claimant invited the Tribunal to reject Ms Smedley evidence on the basis that, Ms Taylor with whom she asserted she found the paperwork was not called, while Ms McMinn and Ms Smedley were inconsistent around finding the paperwork.

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116. The claimant assert that Ms Copeland and Mr Brown had not seen specific notes of the paperwork which appeared to be referenced in communication 14 August 2018 between Mr Bryce and Mr Brown arguing that they set out that they would effectively tailor evidence by '*keeping her out of it*'. Ms

Copeland, it was argued, agreed that she only saw the paperwork on Ms McMinn's desk and Mr Brown upheld the appeal, based on the seriousness of the paperwork, without seeing physical paperwork or note and had only seen the photographs, for the first time, at the appeal along with the claimant.

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117. The claimant argued that Ms McMinn and Ms Smedley's evidence was inconsistent with circumstances McMinn set out in her note to the claimant's grievance "*Upon reading Michelle's recollections I went to look for this client's file to see if he did pose a risk but I cannot find it: we found two pieces of his paperwork... "*

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118. It was argued that the respondent witnesses bypassed and engineered policies and procedures, fabricated evidence, ignored reasonable requests and relied upon their knowledge of the claimant's fragile mental health and mental, to manipulate her out of the company.

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119. The claimant noted that Ms Copeland had accepted the documents could have been taken out of files without the claimant's involvement. The email between Mr Bryce and Mr Brown on 14 August 2019 cast doubt on Bryce's credibility and reliability as a witness to having seen alleged documents. Mr Bryce reiterated more than twice, that he had no further involvement with claimant and appeal after dismissal. The email, it is argued, highlighted he had significant involvement, giving advice, and was even willing to support Mr Brown on his day off in relation to the appeal.

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120. In addition, the claimant set in her email on 24 July 2019 she had highlighted mental health issues and requested that fewer Trustees be present and argued that ILS's **Fair Treatment At Work** policy required that 2 trustees be present with a note taker.

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121. The claimant also referred to **Glasgow City Council v Zafar** [1998] IRLR 36 (**Zafar**) noting that it was stated that they "*are satisfied that the treatment accorded to the applicant by the respondents fell far below the standards of a reasonable employer . . .*

"To treat someone in a way which falls far below the standards of the reasonable employer gives rise to a presumption that that person has been treated in a way different from the way in which others have been, or would be, treated."

5 *"It is also clear that such departure from normal or reasonable standards constitute less favourable treatment, so that the evidence discloses that the respondents have treated the applicant less favourably than they have treated or would treat others."*

122. The claimant argued that the respondents intentionally, and with the aim to
10 'get her oot', used the knowledge of the claimant's disability to engineer the circumstances and achieve the predetermined objective. Further it was argued, in effect, that respondent accepted that an effect of the meeting, in not being postponed, was that decision was made before the claimant had 2 year's continuous service. The claimant argued that Mr Bryce altered
15 arrangements for the meeting on Friday 26 June 2019, by having 3 Trustees present instead of 2, in order that claimant would feel intimidated due to her mental health and thus be at a substantial disadvantage than someone without her disability.

123. The claimant argued in conclusion that all her complaints should be upheld.
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124. **For the respondent** it was argued that it is for the claimant to properly formulate the specific of her claims and to prove each element. In relation to the reason for dismissal the respondent position is in short, the discovery of the paperwork within the claimant's desk space, which the claimant denied
25 she had left but accepted if she had would be a serious breach of the respondent Data Protection policies and which, in cross, the claimant accepted could amount to gross misconduct and permit summary dismissal, the respondent witness evidence Ms Copeland, Mr Bryce and Mr Brown identified that the reason for dismissal in their minds was the paperwork issue,
30 as confirmed in the dismissal letter with Mr Brown stressing in relation to the appeal that this really was the matter that trumped all else.

125. It was argued, on the evidence, the way the claimant managed her paperwork was not something that arose out of her disability, noting the claimant had not alleged this. Neither was it something related to her disability (for the purposes of a harassment claim).
- 5 126. Further the respondent argued that, what the claimant may consider was, unreasonableness is not discrimination in the manner she was dealt with, focussing on alleged failures in process and procedure, and the fact that the respondent was acting out of a desire to avoid the claimant reaching the 2-year qualification period for unfair dismissal and now complains that it was
10 her *'manager's personal dislike of me'*, which may or may not be true, but which relates to a personality issues, rather than her disability.
127. The respondent argued that what may be characterised as unfairness or unreasonableness cannot be treated as a substitute for discrimination and referred to **Glasgow City Council v Zafar** [1998] IRLR 36 (**Zafar**) "*the fact that, for the purposes of the law of unfair dismissal, an employer has acted
15 unreasonably casts no light whatsoever on the question of whether he has treated an employee less favourably for the purpose of the Act of 1976 (now the Equality Act 2010*", the Court of Appeal in **Bahl v Law Society** [2004] EWCA Civ 1070 (**Bahl**) and **Nelson v Newry and Mourne District Council**
20 [2009] IRLR 548, the presence of a rational basis for a decision was a *'strong factor tending to point away from'* discriminatory intent. The respondent argued that it was not a relevant consideration that the respondent, as confirmed by Mr Bryce, acted to pursue things swiftly to conclude matters before the 2-year qualification period.
- 25 128. The respondent argues that its witnesses were wholly credible, making concessions appropriately, while criticising the claimant as inconsistent and lacking in credibility on areas including where the claimant appeared to suggest a belief that Ms McMinn had engineered the dismissal of a non-disabled employee appeared to pull back from this position as it was unhelpful
30 to the claimant's argument.
129. The respondent argued that while constructive knowledge is sufficient for

claims related to failure to make reasonable adjustments, the claims of direct disability discrimination and discrimination arising, require actual knowledge of the disability on the part of the people accused of the relevant conduct for that disability to be a motivating factor or cause of the discrimination complained of. It was submitted that on the evidence, none of the Trustees involved had actual knowledge of her disability.

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130. On the evidence the respondent argues that the claims in respect of Direct Discrimination (holding an investigation into the claimant's absence, failing to refer the claimant to Occupational Health, failing to follow the capability procedure, failing to investigate and resolve the claimant's grievance, failing to follow the capability procedure, failing to investigate and resolve the claimant's grievance, failure to follow the grievance procedure, failing to provide the claimant with a grievance outcome in a timeous manner, failing to provide the claimant with a grievance outcome in a timeous manner, outcome of the disciplinary procedure/appeal being pre-determined; and dismissal itself) in so far as any established should all be dismissed, the evidence not supporting any conclusion that those acts were caused by the claimant's disability.

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131. On the evidence, the respondent argues that the claims in respect of failure to make reasonable adjustment, (including failure to provide the claimant with documents in good time, failure to refer to Occupational Health, failure to follow the capability procedure, failure to investigate and resolve the claimant's grievance, failure to follow the grievance procedure, carrying out the disciplinary investigation in the claimant's absence) the claimant did not establish a relevant Provision, Criterion, or Practice (PCP) relied on for the purposes of her reasonable adjustments claims, or the substantial disadvantage caused by it. The respondent relied on **Chapman v Simon** [1994] IRLR124 (**Chapman**), **A v B** [2013] UKEAT 0383/11/2301 (**A**), arguing that in respect of the disciplinary hearing her GP had in fact sought to facilitate her attendance.

132. On the evidence, the respondent argues that the claims in respect of

5 harassment, the respondent argued that that claimant had not established that the conduct complained of amounted to unwanted conduct with the purpose or effect of violating her dignity, creating an intimidating, hostile, degrading, humiliating or offensive atmosphere and did not establish that the
10 conduct complained of '*related to*' her disability and that applied to; the way Ms McMinn spoke to the claimant in the meeting on 16 July 2019, Ms McMinn the claimant to ignore the phone if she could not cope, telling the claimant '*what do you want a gold star?*'; telling the claimant '*I'm sick of you coming in here*'; telling the claimant to ignore her colleagues; telling the claimant to clear her desk and of being pedantic about her hours; telling the claimant she could not '*micromanage you*' on numerous occasions and in respect of the last alleged comment relied upon it was argued that saying that '*had I made better notes, you would have had a much quicker exit*' was not said to the claimant and could not be relied upon for purpose or effect of creating an
15 intimidating, hostile etc environment.

133. On the evidence, the respondent argues that the claims in respect of discrimination arising from disability, that claimant had not established that the conduct complained did so arise, and that included, dismissing the claimant; not following the capability procedure, failure to provide the appeal
20 outcome (in respect of which the respondent notes that the respondent did provide an outcome in which the claimant's appeal was dismissed).

134. In respect of wrongful dismissal, the respondent submitted that actions in respect of the paperwork issue amounted to an act of gross misconduct, summary dismissal of the claimant was justified such that there can be no
25 wrongful dismissal.

135. In respect of limitation, it was submitted that in any event, many of the claimant's allegations are well outside the 3-month limitation period, and the claimant had provided no evidence in support of any application for permission to extend time and the claimant's claims should be dismissed due
30 to the lack of jurisdiction.

Relevant law.

Statutory basis of EA 2010 claims

136. The Tribunal does not consider it necessary to set out the statutory provisions of S13, s15, ss20 and 21 and s21 of the EA 2010.

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Time

137. In terms of s123 of the EA 2010, where allegations of discrimination stretch over a period, only part of which falls within the primary limitation period, the Tribunal requires to assess whether individual allegations together constitute an *“act extending over a period”* or else are to be treated as a series of discrete or isolated specific acts each with its own time limit.

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EA 2010 Relevant Law

138. In **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that *‘could conclude’* [The EA 2010 uses the words *‘could decide’*, but the meaning is the same] meant: *‘[...] that “a reasonable Tribunal could properly conclude” from all the evidence before it.’*

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139. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: *‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.’*

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140. The Tribunal notes the additional cases referred to by the parties.

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Conclusion on witness evidence

141. The Tribunal accepts the evidence of Mr Brown as compelling and straightforward. The Tribunal accepts the evidence of Ms Smedley and Mr Copeland and wholly straightforward. The Tribunal accepts the evidence of

Mr Bryce as straightforward. The Tribunal accepts the evidence of Ms McMinn as straightforward. The claimant gave her evidence honestly reflecting her view of the respondent and her recollection, the Tribunal however preferred the evidence of the respondent witnesses as being wholly straightforward to that of the claimant where there was any dispute of fact.

Discussion and Decision

142. In terms of s6 EA 2010 the claimant was disabled at the material time, and the respondent had constructive knowledge, arising from Ms McMinn's knowledge in so far as that may be relevant to s 15 EA 2010. Beyond Ms McMinn the respondent and those involved in the issues in the present claims did not have actual knowledge of the claimant's disability.

143. In respect of the claimants claims in terms of S13 EA 2010 **Direct Disability Discrimination** because of her disability the issues for the Tribunal were

a. Has the respondent treated the claimant as in a particular manner as asserted by the claimant?

b. Was that treatment "*less favourable treatment*", i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

c. Does the claimant rely on hypothetical or actual comparators?

d. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

144. The claimant gave notice of the events complained of in relation to s13 EA 2010 and those are set out in the Tribunal's Note of the Preliminary Hearing on Thursday 30 January 2020, dated Thursday 5 February 2020 issued to the parties on Friday 6 February 2020 (the January 2020 Note).

145. The events complained of, for the purpose of s13 EA 2010 are set out as

- i. Holding an investigation into the claimant's actions; and/or by
- ii. Holding the investigation in the claimant's absence; and/or by
- iii. Failing to refer the claimant to Occupational Health; and/or by
- iv. Failing to follow the respondent's capability procedure; and/or by
- 5 v. Failing to investigate and resolve the claimant's grievance; and/or by
- vi. Failing to follow the grievance procedure; and/or by
- vii. Failing to provide the claimant with a grievance outcome in a timeous manner; and/or by
- 10 viii. The outcome of the disciplinary procedure/appeal being predetermined; and/ or by
- ix. Dismissing her.

146. In relation to the respondent's decision to hold an investigation, that was prompted by the terms of the 11 July 2019 document issued by Ms McMinn, while Ms McMinn's covering email of 11 July 2019 expressed animosity towards the claimant that and the decision to decision to hold an investigation was not because of the claimant's disability and/or because of the protected characteristic of disability more generally. It arose directly out of what was Ms McMinn's animosity to. That animosity was not because of the claimant's disability and/or because of the protected characteristic of disability, rather it arose from Ms McMinn's perception that the claimant was someone who was requiring a greater degree of management engagement for reasons unrelated to the claimant's protected characteristic of disability.

147. In relation to the respondent's decision to hold the investigation in the claimant's absence, that was motivated by a concern that a delay would result in the claimant achieving 2 years continuous service and thus having what was perceived as the potential to claim unfair dismissal. It was not

"*less favourable treatment*", by the respondent as compared with other hypothetical comparators (or actual in not materially different circumstances. It was not because of the claimant's disability and/or because of the protected characteristic of disability more generally?

5 148. In relation to the respondent not referring the claimant to Occupational Health, that was not because of the claimant's disability and/or because of the protected characteristic of disability more generally, rather it arose because in the view of the respondent any such a referral would have been appropriate after either a greater period of absence than the claimant had, or otherwise
10 upon the claimant's return to work.

149. In relation to what the claimant asserts was the respondent's failure to follow capability procedure, any such failure was motivated by a concern that a delay would result in the claimant achieving 2 years continuous service and thus having what was perceived as the potential to claim unfair dismissal. It was
15 not because of the claimant's disability and/or because of the protected characteristic of disability more generally.

150. In relation to what the claimant asserts was the respondent's failure to provide the claimant with a grievance outcome in a timeous manner, there was no such failure. The respondent, in its July 2019 dismissal letter, set out
20 reference to the claimant's grievance and in its terms provided the claimant with an outcome. The respondent did not fail to provide the claimant with an outcome because of the claimant's disability and/or because of the protected characteristic of disability more generally.

151. In relation to what the claimant asserts as her compliant under s13 EA 2010
25 as being the outcome of the disciplinary procedure/appeal being predetermined, neither the outcome of the disciplinary not the appeal was the claimant with an outcome because of the claimant's disability and/or because of the protected characteristic of disability more generally. The circumstances of the appeal were overtaken by events, being the discovery of the documents
30 and the outcome of the appeal was not predetermined, it was a fair appeal.

152. In relation to what the claimant asserts as her complaint under s13 EA 2010, being that the respondent dismissed her, the respondent did not dismiss her because of the claimant's disability and/or because of the protected characteristic of disability more generally. The respondent's dismissed the claimant because of the discovery of documents on the morning of the disciplinary hearing of a quantity of confidential documents.
153. In summary, none of the instances relied upon was this because of the claimant's disability and/or because of the protected characteristic of disability more generally. While the claimant did not suggest any comparators either hypothetical or actual. While Ms McMinn exhibited exasperation in relation to the acts preceding her email to the respondent Trustees that was not borne out of claimant's disability and/or because of the protected characteristic of disability more generally, it reflected Ms McMinn critical view of the claimant's engagement with her colleagues. Ms McMinn's covering email of 11 July 2019 was an expression animosity towards the claimant not because of the claimant's disability and/or because of the protected characteristic of disability more generally.
154. The claimant gave notice of the unfavourable treatment relied upon in relation to **s15 EA 2010 Discrimination Arising from Disability** (no comparator is required) as set out in the Tribunal's Note at 9(xi) to 9(xii) of the Preliminary Hearing on Thursday 30 January 2020, of Thursday 5 February 2020 issued to the parties on Friday 6 February 2020 (the January 2020 Note) being
- b. dismissing the claimant
 - c. the respondent not following the capability procedure; and
 - d. failing to provide the appeal outcome.
155. The unanimous conclusion of the Tribunal is that none of those things arose in consequence of the claimant's disability.
156. The respondent did not treat the claimant unfavourably as complained of because of some disability related thing.

157. In particular, the respondent dismissed the claimant because of the discovery of documentation rather than because of any disability related thing.
158. Further the respondent did not elect to follow their own capability procedure because of some disability related thing.
- 5 159. The respondent did not fail to provide the appeal outcome. It provided the appeal outcome in its communication of **Friday 16 September 2019**.
160. The treatment relied upon not being unfavourable treatment, because of disability the question of whether it could have amounted to a proportionate means of achieving a legitimate aim does not arise. The dismissing of an employee for misconduct would, in the circumstances here, have been a proportionate means of achieving a legitimate aim, that legitimate aim including ensuring that client documentation is held in accordance with the respondent's protocols.
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161. The question of whether the respondent had shown that it did not know and could not reasonably be expected to know did not arise for the purpose of the issues in relation s 15 EA 2010. Had it done so the Tribunal would not have considered that the respondents had demonstrated that it could not reasonably be expected to know that the claimant had a disability from the knowledge of Ms McMinn.
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- 20 162. The claimant gave notice of her claims in respect of s20 and s21 EA 2010 **Reasonable Adjustments** for Disability, as set out in the Tribunal's Note at 9(vi) – 9(ix) of the Preliminary Hearing on Thursday 30 January 2020, of Thursday 5 February 2020 issued to the parties on Friday 6 February 2020 (the January 2020 Note) being
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- a. *of failing to postpone disciplinary meetings; and /or*
 - b. *failure to provide documents in good time; and/or*
 - c. *failure to refer staff to occupational health; and/or*
 - d. *failure to follow its capability procedure; and/or*

e. *failure to investigate and resolve grievances; and/or*

f. *failure to follow its grievance procedure and carry out disciplinary in a staff member's absence.*

5 163. In relation to the issue arising from the s20 and s21 claims of whether the respondent knew, or could it reasonably have been expected to know the claimant was a person with a disability at the material time, the unanimous decision of Tribunal is that, given McMinn's knowledge arising from the Staff Support & Supervision Meetings, the respondent would reasonably have been expected to know that the claimant was a person with a disability at the material time.

10 164. In relation to what "*provision, criterion or practice*" (PCP) were applied the Tribunal does not accept that the instance of failing to postpone the disciplinary hearing amounted to a practice.

15 165. The Tribunal does not accept that what the claimant complained of as failing to provide documents in good time amounted to a practice.

166. The Tribunal does not accept that the instance complained of failing to refer staff to occupational health amounted to a practice.

167. The Tribunal does not accept that the instance complained of allegedly failing to follow its capability procedure amounted to a practice.

20 168. The Tribunal does not accept that the instance complained of failing to investigate and resolve grievance amounted to a practice. The respondent investigated and provided its outcome to the grievance in its July 2019 dismissal letter.

25 169. The Tribunal does not accept that the instance complained of failing to follow its grievance procedure and carry out disciplinary in a staff member's absence amounted to a practice.

170. None of these amounted to a PCP as a general policy applied by the respondent.

171. In relation to whether any asserted matters relied upon put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, the unanimous conclusion of the Tribunal was that there was no such substantial disadvantage. The claimant in her discussions with her GP on Thursday 25 July was not considering that she would attend in any event, the GP had sought to facilitate the claimant attending in there meeting on 22 July 2019 by offering medication. On the morning of Friday 26 July 2019, the claimant's only proposal was that meeting be restricted to a single Trustee she nominated, Ms Copeland with the requirement that the respondent provide what the claimant set out as an "*independent notetaker*".
172. The Tribunal does not accept that the respondent failing to postpone the disciplinary hearing, put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, the unanimous conclusion of the Tribunal was that there was no such substantial disadvantage. The claimant had concluded in the period preceding the hearing on Friday 26 February that she would not be attending as she discussed with her GP, that was her decision not reflecting the advice of her GP who sought to facilitate her attendance.
173. The Tribunal does not accept that what the claimant complained of as failing to provide documents in good time put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, the unanimous conclusion of the Tribunal was that there was no such substantial disadvantage. The claimant was provided with all relevant documents for the appeal hearing. While the claimant was not provided with the photographs till the appeal hearing itself there was no substantial disadvantage in comparison with person who were not disabled on the facts in this case. The claimant's position was clear she denied that the documents were found as alleged. The provision of the photographs on the day of the appeal did not create a substantial disadvantage in comparison with persons who were not disabled.

174. The Tribunal does not accept that the instance complained of failing to refer staff to occupational health put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, the unanimous conclusion of the Tribunal was that there was no such substantial disadvantage. The respondent in these circumstances was entitled to wait to consider whether the absence would be longer term and or the claimant would be able to return to work to consider such a referral.
175. The Tribunal does not accept that the instance complained of allegedly failing to follow its capability procedure put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time, the unanimous conclusion of the Tribunal was that there was no such substantial disadvantage. There was no such material failure to follow any capability procedure.
176. The Tribunal does not accept that the instance complained of failing to investigate and resolve grievance amounted to a practice. The respondent investigated and provided its outcome to the grievance in its July 2019 dismissal letter.
177. The Tribunal does not accept in any event that the respondent, on the factual matrix, including the claimant's communications culmination in her email of Friday 26 July 2019, that respondent knew or could reasonably have been expected to know the claimant was likely to be placed at any such disadvantage as complained of.
178. Further, in relation to the question of whether there were steps that were not taken that could have been taken by the respondent to avoid the disadvantage, the Tribunal does not consider that that there were such steps on the factual matrix in the present claim. The claimant did not suggest until the morning of the Friday 26 July 2019 that the meeting be restricted to a single Trustee she nominated, Ms Copeland with the requirement that the respondent provide what the claimant set out as an "*independent notetaker*".

That was not a step which it would have been reasonable to expect the respondent to have taken at that time.

179. Finally, and in relation to the s20 and s21 EA claims the Tribunal does not consider that it would have been reasonable for the respondent to have taken any steps that it did not take. The Tribunal notes in this regard that matters on Friday July 2019 were overtaken by the discover of the documentation.

180. The claimant gave notice of her claims of **harassment related to disability** in terms of **s26 of EA 2010**, as set out in the Tribunal's Note at 9(x) of the Preliminary Hearing on Thursday 30 January 2020, dated Thursday 5 February 2020 issued to the parties on Friday 6 February 2020 (the January 2020 Note).

181. The issue for the Tribunal, was did the respondent (and in the present matter specifically Ms McMinn) engage in conduct as alleged being:

e. the way in which the claimant was allegedly spoken to in a meeting with Ms McMinn on Friday 16 July 2019; and/or by

f. Ms McMinn allegedly telling claimant to *"ignore the phone if you can't cope"*; and/or by

g. Ms McMinn allegedly telling the claimant *"what do you want, a gold star"* on 15 March 2018; and/or by

h. Ms McMinn telling the claimant allegedly that *she was sick of the claimant coming in here* in May 2018; and or by

i. Ms McMinn allegedly telling the claimant to ignore colleagues who were upsetting her, on numerous occasions; and or by

j. Ms McMinn allegedly telling the claimant to clear her desk and accusing the claimant of being pedantic about her hours on 28 June 2019; and /or by

k. Ms McMinn allegedly telling the claimant that she could not “*micromanage you*” on numerous occasions; and /or by

l. Ms McMinn allegedly saying “*had I made better notes you would have had a much quicker exit*” on 4 September 2019.

5 182. In relation to the first listed incident of harassment, which is said to have occurred on **Tuesday 16 July 2019**, Ms McMinn, during a short meeting with the claimant in Ms McMinn’s office, asked the claimant how she felt to be back at work. The claimant responded, to the effect, that she considered Ms McMinn’s behaviour towards her immediately prior to that leave had been
10 unfair. Ms McMinn responded with words to the effect that she was sick of what she, at that point, regarded as a war of attrition between the two of them and provided 2 separate letters to the claimant as set out above. Ms McMinn advised that copies would be available to the claimant when the claimant returned home that evening.

15 183. In relation to the harassment complaint which is said to have occurred on **Friday 28 June 2019** (telling the claimant to clear her desk and accusing the claimant of being pedantic); Ms McMinn on that date and in response to the claimant’s retrospective proposal around working time arrangement which include a reference to an extra ½ hour had been worked on the preceding
20 days, responded in a manner which Ms McMinn subsequently accepted was “*a bit nippy*” describing to the claimant that she was tired of the claimant being so pedantic about hours and commented that the claimant should do what she needed to do and stated “*and go when you’re done, personally I just want to tidy up my desk and go home. We will discuss this in your next supervision when you return form holiday*”. Ms McMinn did not tell the claimant to clear
25 her desk as alleged that day.

184. In relation to the claimant’s final asserted harassment complaint, that Ms McMinn, allegedly said “*had I made better notes you would have had a much quicker exit*” on **4 September 2019**, it is the Tribunal’s conclusion that the
30 claimant seeks to refer to the Ms McMinn’s 28 July 2019 response to grievance. In the circumstances, the Tribunal concludes that the respondent

had fair notice of that complaint, although the date was incorrect the Tribunal accepts that the claimant would not have been aware of the specific date upon which it was made. The Tribunal observes however that Ms McMinn did not address her comments to the claimant, the comments which, in effect, the claimant complains of, referred to Ms McMinn commenting that a Trustee had instructed her *"to take better notes"*. Ms McMinn continued that *"I will, if I had taken better notes I anticipate a quicker exit for"* the claimant.

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185. In relation to the remaining alleged incidents Ms McMinn had spoken to the claimant broadly as alleged.
- 10 186. In relation to each of the incidents the Tribunal accepts that the conduct was unwanted.
187. However, none of the incidents related to the claimant's protected characteristic of disability. In each instance Ms McMinn comments were reflective of her exasperation at what she perceived was an employee seeking greater engagement with Ms McMinn as Line Manager for non-disability related reasons than other employees.
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188. In relation to the question of whether conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, the unanimous decision of the Tribunal is that each occasion, both individually and cumulatively did not.
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189. The unanimous decision of the Tribunal is that the conduct complained of did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal in coming to this conclusion has taken into account the claimant's perception, the other circumstances of this case and whether it was reasonable for the conduct to have that effect.
- 25
190. The Tribunal does not uphold the claimant's claim for wrongful dismissed

without notice. The claimant was dismissed for gross misconduct, the respondent was entitled, in all the circumstances, to summarily dismiss the claimant as being responsible for a repudiatory breach of the contract of employment. The respondent both in the July dismissal letter and from the appeal hearing as set out in the letter of **Friday 16 September 2019** concluded that that the claimant's actions amounted to gross misconduct. Neither decision was prejudged. Mr Brown approach to the appeal and his consideration of the issues was both fair and reasonable. Mr Brown concluded that there had been a discovery of confidential documents which had not been stored appropriately by the claimant, the claimant's actions in relation to those documents amounted to gross misconduct and accordingly dismissed her appeal.

191. The decision of those Trustees who elected to progress to the disciplinary hearing without seeking the claimant's comments were, in the view of the Tribunal, poor in that the decision was motivated by a desire to avoid a delay, which the respondent considered could give rise to the claimant achieving 2 year's continuous service against with what was perceived as a risk of unfair dismissal litigation. The claimant had been in communication with the respondent during the first week of her Fit Note certified absence, following the discovery of the documents on Friday 26 July 2019 the respondent obtained comments from Ms Minn on Sunday 28 July 2019 and issued its decision to the claimant on Monday 29 July 2019. The Tribunal considers that the respondent could have sought the claimant's comments on the discovery of Friday 26 July 2019 of the documents seeking such comments within a short period. The respondent was not, however, required to delay its decision-making process against what it concluded was gross misconduct on the part of the claimant. The respondent's actions do not, however, amount to wrongful dismissal in all the circumstances.

192. The respondent asserts that some of the claimant's claims were out of time. The Tribunal notes that the claimant's ET1 was presented **Friday 11 October 2019** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Tuesday 17 September 2019** and issue of the ACAS

Certificate on **Thursday 3 October 2019**) against the respondents following termination of her employment with the respondent on **Monday 26 July 2019**. For the reasons set out above the question of whether any or all the claimant's existing complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 (EA 2010) do not arise. The Tribunal notes, however, that given the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Tuesday 18 June 2019** was potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it and dealing with those issues could have involved consideration of subsidiary issues including when the treatment occurred, whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis. Given the Tribunal's conclusions above the Tribunal does not consider it necessary to consider that matter further.

Recommendations

193. The claimant asserts in her response the Tribunal ought to make recommendations in terms of s124(2) (c) of EA 2010. There had been no notice of what any such recommendation was no evidence before the Tribunal as to the practicality of any such possible recommendation, in all the circumstances the Tribunal declines to make any recommendation.

Reference

194. The Tribunal declines to direct that the respondent issues any reference in terms other than it has already done.

Conclusion

195. The claimant's claims do not succeed.

196. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

5 197. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

10 Employment Judge: Rory McPherson
Date of Judgment: 30 June 2021
Entered in register: 02 July 2021
and copied to parties

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