EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms I Barakat		**Alvis & Company (Accountants) Ltd**

Heard at: London South Employment Tribunal **On:** 9, 10, 11, 12 and 13 August 2021

Before: Employment Judge Hyams-Parish
Members: Ms K Omer and Ms A Sansome

Representation:
For the Claimant: Ms J Goodway (Solicitor)
For the Respondent: Mr K Davis (Consultant)

JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claim of direct disability discrimination (s.13 EQA) fails and is dismissed.

(b) The claim of failing to make reasonable adjustments, namely, to allow the Claimant to work from home from time to time when required (s.20 EQA) is well founded and succeeds.

(c) The claims of victimisation (s.27 EQA) are well founded and succeed.

(d) The claims of disability related harassment (s.26 EQA), namely, criticising the Claimant about her sickness absence and for failing to empathise with her colleagues, are well founded and succeed. The two remaining claims of harassment fail and are dismissed.

(e) The claims of unfavourable treatment because of something arising in consequence of disability (s.15 EQA) are well founded and succeed, with the exception of the claim relating to being given a 'poor' appraisal, which fails and is dismissed.

(f) The claim of unfair dismissal is well founded and succeeds.

(g) The claim of wrongful dismissal is well founded and succeeds.

(h) The Respondent's contract claim fails and is dismissed.

REASONS

CLAIMS AND ISSUES

1. By two claim forms presented to the Tribunal on 24 August 2019 and 11 October 2019, the Claimant brings the following claims against the Respondent:

   1.1. Direct disability discrimination (s.13 Equality Act 2010 ("EQA"))

   1.2. Unfavourable treatment because of something arising in consequence of disability (s.15 EQA)

   1.3. Disability related harassment (s.26 EQA)

   1.4. Victimisation (s.27 EQA)

   1.5. Indirect discrimination (s.19 EQA)

   1.6. Unfair dismissal (s.98 Employment Rights Act 1996 ("ERA"))

   1.7. Wrongful dismissal

2. The Respondent also brings its own contract claim against the Claimant.

3. Prior to the hearing, the parties had prepared a list of issues. At the start of the hearing, these were narrowed down by the Claimant, who also withdrew the s.19 EQA claim. This s.19 EQA claim was therefore dismissed upon withdrawal.

4. The following represents the final position agreed between the parties, with clarification added by the Tribunal, as discussed with the parties during the hearing:

Direct disability discrimination

(a) Was the Claimant treated less favourably than the Respondent treated, or would have treated, others?

The Claimant relies on the following less favourable treatment:

(i) The Respondent dismissing the Claimant, including this being in breach of her employment contract.

(b) If the above was less favourable treatment, was the treatment *because* of the Claimant's disability?

Failing to make reasonable adjustments

(c) Did the Respondent apply the following PCP:

(i) Trainee accountants were not allowed to work from home on a regular basis.

(d) Did the above PCP put the Claimant to the following substantial disadvantage in comparison with a non-disabled person?

(i) The Claimant was more likely to suffer the effects of her disability in the morning and, as a result, she had difficulty travelling to the office. The Claimant's punctuality and attendance were negatively impacted because of the requirement for her to attend the office and also start work by 9am, and this in turn resulted in the Claimant receiving a lower bonus, receiving reduced pay while on sick leave, being told that she must show empathy to her colleagues covering her work, and disciplinary action being commenced.

(e) Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage?

The reasonable adjustment the Claimant believes the Respondent should have made, is as follows:

(i) Allowing the Claimant to work from home on occasions.

Discrimination arising from disability

(f) Did the Respondent treat the Claimant *unfavourably* as follows:

(i) Giving the Claimant a poor appraisal in July 2018 [because of her sickness absence].

(ii) Giving the Claimant a low bonus payment in 2018 [because of her sickness absence].

(iii) Issuing the Claimant with two written warnings without any disciplinary hearing or right to appeal, on 7 and 20 December 2018, [for failing to call the office by 9.30am].

(iv) Requiring the Claimant to show empathy towards her colleagues for covering her work when she was on sick leave and being constantly reminded of this and that her colleagues had covered her work (including on 12 April 2019 and on 10 May 2019) [because of her sickness absence, having a seizure and its side effect].

(v) Allowing the Claimant's colleagues to make critical comments about her attendance at work [because of the Claimant's sickness absence, having a seizure and its side effects].

(vi) Criticising the Claimant's work performance caused by and/or related to her disability, for example on 20 February 2019 and 19 March 2019 [because of the Claimant's sickness absence, having a seizure and its side effects].

(vii) Commencing a formal disciplinary process/investigation on 25 March 2019 [because of the Claimant's sickness absence, having a seizure and its side effects, her inability to call in at 9.30am, and need to attend medical appts].

(viii) Criticising the Claimant for taking early lunchbreaks to attend medical appointments [because of having a seizure and its side effects, and the need to attend medical appointments].

(ix) On 12 April 2019 and on 10 May 2019 criticising the Claimant's actions following her epileptic fit at work on 22 October 2018 [because of the Claimant having a seizure and its side effects].

(x) Not investigating fully the Claimant's grievance concerns, particularly her complaint that her colleagues were moaning about her because of her sick leave and being told about this by the directors [because of the Claimant's sickness, having a seizure and its side effects].

(xi) Criticising the Claimant for raising a complaint that her colleagues were moaning about her sickness absence [because of the Claimant's sickness, having a seizure and its side effects].

(xii) Dismissing the Claimant [because of the Claimant's sickness absence, having a seizure and its side effects, her inability to call in at 9.30am, and need to attend medical appts].

(g) Did the "something" in each of the square brackets at paragraphs (f)(i) to (f)(xii) above, *arise in consequence of disability*?

(h) Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent was the need to manage client calls and deal with urgent client matters.

Victimisation

(i) Did the Claimant do the following protected acts?

(i) On 26 March 2019 the Claimant submitted a formal complaint alleging discrimination. The Respondent became aware of this on 3 April 2019 when it was included in the preliminary investigation report.

(ii) The Claimant submitted a further email on 10 April 2019 alleging disability discrimination and noting that she was considering submitting Employment Tribunal disability discrimination claims.

(iii) The Claimant submitted her first employment tribunal claim.

(j) Was the Claimant subjected to the following detriments?

(i) The Respondent's email of 12 April 2019 in which the Claimant was criticised for raising complaints of discrimination and being threatened with disciplinary action as set out at paragraphs 38 and 41 of the Grounds of Complaint for the first claim.

(ii) The Respondent's email of 12 April 2019, in which the Claimant was unreasonably criticised as set out at paragraphs 39 and 40 of the Grounds of Complaint for the first claim.

(iii) The Respondent's email of 12 April 2019 in which the Claimant was threatened with an application for a deposit order in respect of the Respondent's legal costs if she submitted a claim against them as set out at paragraph 41 of the Grounds of Complaint for the first claim.

(iv) Being informed on 23 April 2019 that she would not be paid for the period from 3 to 11 April 2019 as set out at paragraph 42 of the Grounds of Complaint for the first claim.

(v) Being invited on 10 May 2019 to attend a disciplinary hearing and being invited to attend the hearing on a day that the Respondent knew was covered by a GP sick certificate.

(vi) Failing to deal with the Claimant's grievance submitted on 10 April 2019.

(vii) Failing to hold a grievance hearing and failing to investigate fully the Claimant's complaints.

(viii) Failing to postpone the disciplinary hearing until the Claimant was well enough to attend.

(ix) Conducting a disciplinary hearing, including with allegations that the Claimant had complained of discrimination and the allegations being grossed up.

(x) In the dismissal letter, criticising the Claimant for complaining of discrimination.

(xi) Concluding that the Claimant was guilty of gross misconduct and that her conduct and attitude amounted to a breach of trust and confidence.

(xii) Dismissing the Claimant.

(xiii) Failing to pay any notice pay to the Claimant.

(xiv) Failing to hold the appeal hearing scheduled for 9 September 2019 and a failure to set a new date as at the date of the second claim.

(k) Was the Claimant subjected to the above detriments because the Claimant did the protected acts?

Harassment

(l) Was the Claimant subject to the following unwanted conduct?

(i) Constantly criticising the Claimant about her disability sickness absence, including telling her that her colleagues had complained and taking no steps to prevent others from complaining about her — for example in July 2018, when she returned from sick leave in

or about early December 2018 (as noted at paragraph 15 of the Grounds of Complaint of the first claim), 20 February 2019 and Mr Mason's comments about her sickness absence as set out in the preliminary report dated 3 April 2019.

(ii) Requiring the Claimant to show empathy towards her colleagues when she returned to work in or about early December 2018 (as noted at paragraph 15 of the Grounds of Complaint of the first claim) and reminding her about this including in the Respondent's email of 12 April 2019 in which it was stated "*It is about your lack of empathy towards your colleagues who have had to take on additional work in circumstances outside their control*".

(iii) Inappropriate handling of the meeting by Keith Davis, on behalf of the Respondent, on 1 April 2019, as set out at paragraph 33 of the Grounds of Complaint of the first claim.

(iv) Treating the Claimant's disability as an attitude problem as set out at paragraph 40 of the Grounds of Complaint of the first claim and threatening disciplinary action.

(m) Was the above conduct related to the Claimant's disability?

(n) Did the above conduct have the *purpose* of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(o) If not have the above *purpose*, did it have the *effect* of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(p) If it had the *effect*, was it reasonable for it to have done so?

Unfair dismissal

(q) What was the reason, or principal reason, the Respondent dismissed the Claimant?

The Respondent relies on conduct (gross misconduct). The Claimant contends that the real reason was her sickness absence (capability) and the fact that she did a protected act.

(r) Was the above reason a potentially fair reason within the meaning of s.98(1) and (2) of the Employment Rights Act 1996?

(s) Did the Respondent act reasonably in treating the above reason for dismissal?

The Claimant alleges that the dismissal was procedurally and substantively unfair. Procedural complaints relate to a failure to properly investigate and dismissing the Claimant for matters which she did not know about and was not put on notice of.

Wrongful dismissal

(t) Under the terms of the Claimant's employment contract, was the Respondent entitled to dismiss the Claimant without notice?

The Respondent relies on a breach of the implied term of mutual trust and confidence.

(u) Was the Respondent entitled to dismiss the Claimant before 31 December 2020?

Employer contract claim

(v) Did the Claimant act in breach of her employment contract?

The breach of contract claim relates to the cost of employing a replacement quickly. The breach of contract is a breach of the implied term of mutual trust and confidence.

(w) If so, what losses have been suffered by the Respondent and which method of calculating remedy would be fair and reasonable in the circumstances?

5. The Respondent conceded that the Claimant was at all material times a disabled person within the meaning of the EQA. The Respondent further conceded “knowledge of disability” for the purposes of the s.20 and s.15 EQA claims.

THE HEARING

6. The parties had agreed a timetable which the Tribunal was happy to adopt.

7. Aside from the agreeing the final list of issues, there were no other preliminary matters to deal with.

8. The morning of the first day was spent reading witness statements and relevant documents in a document bundle which extended to 644 pages.

9. During the hearing, the Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondent:

(a) James Bolger, director.
(b) Brian Mason, director.

10. The Claimant started giving evidence on the afternoon of the first day, completing her evidence at 15.36 on the second day. Mr Bolger started his evidence on the third day at 10.32 and completed his evidence at 16.25 on the same day. Mr Mason started his evidence at 10.13 on the fourth day and completed it at 10.38 on the same day.

11. The parties were then given an hour to prepare their closing submissions. Both representatives provided written submissions, which were supplemented with oral submissions. The Mr Davis started his submissions at 11.53 and finished at 12.40. Ms Goodway started her submissions at 12.47 and finished at 13.03.

12. The parties were released until 2pm on the fifth day whilst the Tribunal spent the rest of the fourth day and the morning of the fifth day in chambers. An oral decision was given to the parties at 2pm on the fifth day with reasons. Following the decision, a date was given for a remedy hearing and directions were given for the preparation of that hearing.

13. These written reasons are provided at the request of the Respondent.

BACKGROUND FINDINGS OF FACT AND CHRONOLOGY

14. All findings of fact were reached by the Tribunal on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

15. References to numbers in square brackets below are to pages in the hearing bundle.

16. The Respondent is a firm of accountants. Mr Mason and Mr Bolger are both directors of the company. At the time the Claimant was dismissed, the Respondent employed 13 staff.

17. Until her dismissal, the Claimant was employed by the Claimant as a trainee accountant. She commenced her employment on 20 June 2016.

18. Trainee accountants are employed under a fixed term contract to allow them to complete their training and the necessary exams to achieve qualification. After the training is complete, assuming they complete it successfully and are to be retained, trainees then become employed on a standard contract of employment.

19. A copy of the Claimant's [22] training contract was included in the bundle. Provisions relevant to this case are as follows:

> ***1. DURATION OF EMPLOYMENT***
>
> ***1.1 Your employment commenced on 20 June 2016 and shall continue (subject to earlier termination as provided in this Agreement) until 31 December 2020.***
>
> ***1.2 You agree to exclude any right to a statutory redundancy payment and any claim in respect of unfair dismissal under the Employment Rights Act 1996 if the fixed period expires without being renewed or further renewed.***
>
> ***7. HOURS OF WORK AND OVERTIME***
>
> ***Your normal working hours are as follows:***
>
> ***Monday to Friday: 9.00 am to 5.30 pm with 1 hour off for lunch.***
>
> ***You are required to work such hours as are necessary to complete satisfactorily your duties, which may require you to work beyond normal working hours. You will not be entitled to receive payments for any overtime worked.***
>
> ***8 TIMEKEEPING***
>
> ***You are required to attend the office as specified under paragraph 7. If unable to do so you are required to notify the office immediately.***
>
> ***11. ABSENCE DUE TO SICKNESS OR INJURY***
>
> ***11.3 If you cannot attend work because of sickness or injury you must, unless there is some good reason on the contrary, advise your manager of the reason for nonattendance, by 9.30 am on the first working day of absence. Failure to do so may result in sickness pay not being paid.***
>
> ***13. DISCIPLINARY AND DISMISSAL PROCEDURE***
>
> ***The disciplinary procedure provides for warnings to be given for failure to meet the Employer's standard of job performance, conduct (whether during working hours or not) and attendance, or breach of any of the Terms and Conditions of Employment.***
>
> ***13.1 Brian Mason or James Bolger may effect dismissal and suspensions. Suspension (on full pay) may be effected where the Employer is considering invoking the disciplinary procedure.***
>
> ***13.2 The Employer has the right to terminate your employment at any time as follows:***
>
> ***a) by giving you 2 months' notice in writing if in its sole discretion, it decides that you lack the capability to progress to membership of***

ACCA. Lack of capability will be demonstrated by any of the following:

i) poor performance at work, provided you have received two prior written warnings and reasonable time for improvement; or

ii) failing any or all of the ACCA examinations twice; or

iii) failing all or any of the ACCA examinations once when you have also shown poor performance at work and provided you have received one prior written warning and reasonable time for improvement.

b) by giving you 2 months' notice in writing if you have committed misconduct falling short of gross misconduct, provided you have received two prior written warnings and reasonable time for improvement (or one written warning and reasonable time for improvement in cases involving misconduct which is more serious but still falls short of gross misconduct).

c) by summary dismissal if you have committed gross misconduct.

13.3 The following are non-exhaustive examples of gross misconduct justifying summary dismissal:

a) theft of the Employer's or another employee's property;

b) drunkenness or intoxication with drugs on the Employer's premises or on a site at which the Employer operates;

c) fighting on the Employer's premises or on a site at which the Employer operates;

d) breach of confidentiality concerning the Employer's confidential information;

e) wilful damage to the Employer's property;

f) refusal to obey the reasonable orders of a superior;

g) failure to attend for work without reasonable cause;

h) conduct likely to bring the Employer into disrepute.

i) an order of ACCA's Disciplinary Committee removing you from the student register (subject, if applicable, to an affirmation of that order by the Appeal Committee.

20. The Claimant has suffered with epilepsy and chronic migraines since she was a child. The chronic migraines are related to her epilepsy. The likelihood of the Claimant suffering a seizure or chronic migraine is much higher in the morning. Indeed the Claimant said that she could not remember ever having had a seizure later in the day, e.g. afternoon or evening. This was confirmed by the Claimant's consultant, who seemed to

suggest that the risk of seizures in the morning were, at least in part, due to sleep deprivation and the fact that, by that point in the day, medication was not as effective. He recommended that a later start time for work was preferable, when her medication would have greater effect.

21. Both parties accepted that the Respondent knew about the Claimant's epilepsy at around six months after the Claimant started work, although the Claimant said in evidence that the Respondent knew she was suffering from chronic migraines before then.

22. During the Claimant's employment with the Respondent, she began to have epileptic seizures, having had a long period without them. This coincided with a change to the Claimant's treating consultant, together with changes to her medication. Some of the seizures experienced by the Claimant were minor; some of them resulted in time off work.

23. The Claimant said that her working relationship with Mr Bolger and Mr Mason was fine until July 2018. Whilst she accepted that the Respondent had highlighted areas of performance that needed improvement during her appraisal in July 2017, these being her recovery rate, timekeeping, and professionalism, she believed this was only to be expected given that she was still in training and there were many aspects of the job she was still learning and would need to improve in.

24. Prior to July 2018, whilst the Claimant sensed that her employers may not always have been happy about absences which became necessary due to the effect of her epilepsy, she did not discover the extent of this disapproval and unhappiness until her appraisal in 2018.

25. The Claimant's 2018 appraisal meeting was held on 11 July 2018. The Claimant went into that meeting feeling positive and believing that she had made improvements in the areas identified the previous year. She said her recovery rate had increased to over 100%, but Mr Bolger qualified this in his evidence by stating that this, together with the recovery rates for fellow trainees, had been artificially inflated due to the nature of the particular work they were doing at the time. He said that a more accurate assessment of the Claimant's recovery rate for the year to which the appraisal related, was just below 79%.

26. The appraisal turned out not to be what the Claimant had expected. In particular, she was very concerned by the discussion about her sickness absence. There were limited notes of this process available for the Tribunal to consider. One document the Tribunal was shown, appeared to be a form prepared by the Respondent which was intended for the Claimant to insert her own comments. It contained various headings, one of which said "*Sickness record. Lost days = lost profit and potential bottlenecks in work production*".

27. The Tribunal preferred and accepted the Claimant's evidence as to what was discussed at the meeting. Importantly, the Tribunal accepted that the Claimant's absences were discussed and that what was said could reasonably be viewed by the Claimant as criticism of the time that she had taken off. The Tribunal accepted that other areas of performance were discussed, including punctuality and completion of time sheets and time recording. Unlike most appraisals, there was no final grading or assessment given to the Claimant. No final document was produced, and no objectives appear to have been set for the year going forward.

28. At about this time, decisions were being made by the Respondent as to bonuses. The Claimant's bonus award was discussed at her appraisal meeting. The Tribunal was shown a document setting out the factors taken into account when deciding on the level of bonus to be awarded, which included sickness absence. The Claimant said, and that the Tribunal accepted, that Mr Bolger told her that her bonus was being "*slashed*" because of the number of days she had taken off sick. In an email sent to Mr Bolger following the discussion about her appraisal, she referred to Mr Bolger's reference to "*sick days slashing her bonus*".

29. The Respondent accepted that no allowance had been taken for sick days taken due to the Claimant's disability. However, Mr Bolger said in evidence that attendance was a very "*insignificant factor*"; it was one factor out of nine. The Tribunal rejected this evidence and concluded that, certainly as far as the Claimant was concerned, it played a significant part in the decision making. The Claimant was awarded £750, which compared to awards of £7,000 and £5,000 given to fellow trainees. The Tribunal concluded that the lower figure given to the Claimant was significantly affected by levels of sickness absence, which were caused mostly by her disability.

30. In evidence, the Claimant said that during her appraisal, Mr Bolger told her that colleagues had been making negative comments about the number of times she had been absent due to sickness. In his witness statement, Mr Bolger said the following at paragraph 16:

> ***Also, in July 2018, Iman took offence when colleagues complained about how her absences were impacting upon their own work. I understood how they felt but I asked them to manage the sudden and increased workload as much as possible. I appreciate that Iman felt that I should have told them words to the effect that their complaints were unjustified, but I had toto manage the situation on an evenly balanced basis.***
>
> ***In my view, Iman's colleagues had just as much entitlement as her to express how matters at work were affecting them and that, if their views were sincere, then they deserved consideration even if those views were not shared by Iman. In my opinion, Iman's colleagues***

> ***stepped up to cover for her during her periods of absence and I felt that I had to respect that.***

31. In an email the Claimant sent to Mr Mason and Mr Bulger on 12 July 2018 [51] she said [sic]:

> ***….I'm still trying to process this but in all honesty first and foremost I think it's inappropriate for my them to be bitching about me being off sick to my bosses and clearly Each other. The only time they should mention us is if it was impacting them, which it doesn't as nobody has to do any of my jobs due to my sick days.***
>
> ***The more I think about it the more I remember that I have actually told people much more than just I have epilepsy but much more so they're not clueless.***
>
> ***Regardless of how much I have told people, I have said enough to everyone for them to understand that I have a genuine and serious condition that will never go away this isn't new. They didn't know me so I don't want to seem like I'm just lazy and I know people talk so I told them a long time ago and had no problem doing so….***

32. The Tribunal accepted that negative comments were being made by colleagues about the Claimant and the amount of time she had had off sick. Those negative comments were not discouraged by Mr Bolger. Indeed, the Tribunal concluded that Mr Bolger felt that they were justified in making such comments, given that they were sharing the burden of additional work created by the Claimant's absences.

33. In the same email (referred to at paragraph 31 above) [51] the Claimant said that she could not attend an event at Ascot, due to be held on 13 July 2018, which the Respondent had organised for all staff, giving her reasons as follows:

> ***I really appreciate the day out to Ascot but with all due respect I don't think I can come. I'm so hurt/shocked/disgusted/upset at what people have said and I do not feel comfortable being around everyone in a non-work environment right now.***

34. On 18 July 2018, the Claimant took the decision to write to her colleagues by email to explain why she had needed to take so much time off. She informed them of the cause of the absences, being her epileptic seizures, explaining also that changes in medication had worsened the side effects.

35. On the morning of 22 October 2018, the Claimant had an epileptic seizure at home and burned herself on her leg with her hair straighteners. At the time, the Claimant did not realise she had had a seizure, and went to work. Later that day, whilst at work, the Claimant had another seizure which was witnessed by some of her colleagues, which lasted approximately ten minutes. When she came round, she did not wait for an ambulance as

advised by the Respondent, and drove home. She realised afterwards that driving was not the most sensible thing to do in the circumstances, but told the Tribunal that at the time, given what had happened, she was not thinking straight.

36. The burn on her leg subsequently became infected and needed to be treated. This resulted in her being absent from work until 19 November 2018. From 19-30 November 2019, the Respondent allowed the Claimant to work from home as the Claimant was bored and wanted something to do. During this time, the Claimant found it difficult to fully concentrate on her work, due to the pain in her infected leg. Whilst the Claimant was able to use the Respondent's Xero accounts system, she did not have access to the remainder of the IT system, and it was therefore more difficult to record her time electronically. She was also faced with work that had piled up during her absence. For the above reasons, the Claimant said that her overall work performance was impacted.

37. On 3 December 2018, the Claimant returned to work on a full-time basis. However, she soon realised that she was still unwell. She was still recovering from the burns to her leg, which were painful. She was also going through a period when her epilepsy medication was being changed and she was experiencing side effects of the new medication she was taking.

38. The Tribunal accepted the Claimant's evidence that when she returned to work, she was made to feel guilty for being off work. She was told that her colleagues had complained because she was receiving special treatment. The Tribunal accepted the Claimant's evidence that Mr Bolger and Mr Mason criticised her for being ungrateful to her colleagues, and told her that she should "*show empathy*" and gratitude that they had covered the her work. The Tribunal accepted that the issue was raised a number of times.

39. On 7 December 2018, the Claimant had an epileptic seizure. As a result of the timing of the seizure, the Claimant could not report in sick, as required by the Respondent's policy. The Tribunal accepted that there had been a discussion between the Claimant and Mr Bolger and Mr Mason about her asking her parents to telephone in on her behalf if she was unable to attend work. This provision was, however, not part of the Respondent's policy, or contained in the Claimant's contract of employment. The Claimant said in evidence that on that day, she was not able to arrange for someone to call in on her behalf.

40. The next day, the Claimant was issued with an "*official written warning*" for not reporting her absence. This was not discussed with the Claimant beforehand, and she was not given the opportunity to make representations. There was no disciplinary hearing.

41. On 19 December 2018, the Claimant had a severe epileptic seizure and was taken to hospital by ambulance. Once again, she was not able to telephone her employer to say that she would not be able to attend work. The next day, on 20 December 2018, the Claimant was again issued with a written warning without being given the opportunity to make representations at a disciplinary hearing or otherwise.

42. On 14 February 2019, the Claimant sent Mr Mason a text [71] which included the following extract [sic]:

> ***I know you are unhappy with me, and I didn't realise until not being in the meeting with you all yesterday how bad it is. I know you want to have a meeting about this all and so do I as a colleague hates me and (another colleague told me this) and I would like to complain as I'm uncomfortable and now others notice the blatant rudeness and it's embarrassing plus I've been told some alarming rudeness and it's embarrassing plus I've been told some alarming info about me that none of them should know. Honestly dont mind re not being allowed to WFH today but about the not working hard comments I was taken a back. See u soon***
>
> ****formal complaint***

43. On 20 February 2019, Mr Mason wrote to the Claimant [75] as follows:

> ***Dear Iman***
>
> ***Firstly, I am sorry that you have been feeling unwell.***
>
> ***We have some concerns about your absences and, in particular, the effect that these are having on your colleagues and, unfortunately, also on some of our clients. You probably have some concerns too.***
>
> ***We wish to create an environment where you and we can discuss our respective concerns separately with an external and independent neutral.***
>
> ***Those discussions would be on a safe "without prejudice' and off the record basis Whatever you and we say to the neutral would not be disclosed to the other without their prior consent. Hopefully, through this route, he can help us to reach agreement on how our respective concerns can be resolved.***
>
> ***Our HR consultant has recommended Keith Davis, an accredited mediator of KDERC International Limited. We have never met Keith who, I understand, has never met you either.***
>
> ***Keith will be telephoning you shortly to agree a time and place to meet. Please feel free to discuss whatever concerns you wish with him and, as I say, these will not be disclosed to us without your consent.***

> ***To enable these discussions to have the best chance of success, can I suggest that you take one week's paid leave so that you can better focus on the matters involved.***
>
> ***We wish you well and hope to hear from you via Keith very shortly.***

44. The person referred to as Keith Davis, in the above email, is the same Mr Davis who appeared as the Respondent's representative at this hearing.

45. The Claimant met with Mr Davis on 25 February 2019 for an introductory discussion about the concerns she had about her employment. At this meeting, the Claimant said that she asked if she could start, and finish, work later.

46. On 27 February 2018, Mr Bolger wrote to the Claimant [80] saying that they needed to obtain a medical report about her, before they could continue their discussions with Mr Davis. The letter ended by stating the following:

> ***4. In the meantime, and with effect from Monday, 4th March, we need you please to return to work on one of the following options:***
>
> ***5. you attend from 9 am to 5.30 pm on your current terms and conditions;***
>
> ***6. you attend from 10.30 to 5.30 pm with your salary being adjusted pro rata.***
>
> ***7. Please would you email me with your preferred option no later than 5pm on Friday 1 March 2019.***

47. On 1 March 2019, the Claimant gave her consent for her GP (Dr Walker) and specialist consultant (Dr Omar Malik) to be approached by the Respondent for a report about her. [85]

48. The Respondent wrote to the Claimant's doctors by letters dated 8 March 2019 [106-109] asking the following questions: -

> ***1. From your records, what medical conditions have been diagnosed in respect of Ms Barakat during the past five years?***
>
> ***2. Was epilepsy one of those conditions?***
>
> ***3. If so, when was it first diagnosed?***
>
> ***4. What medication (and dosage), if any, was prescribed and when?***
>
> ***5. How often and by what method was any such medication to be taken?***

> ***6. What are the more common side effects of any such medication?***
>
> ***7. What measures, if any, can eliminate or reduce any such side effects?***
>
> ***8. When was she last diagnosed at your practice?***
>
> ***9. What was the condition(s) then diagnosed?***
>
> ***10. Do you regard that condition(s) as a "disability" within the meaning of the Equality Act 2010 to the extent that it has a substantial and long-term negative effect on her ability to do normal daily activities?***
>
> ***11. Are you able to offer a prognosis relating to her condition(s) during the next, say, 5 years and, if so, what would that be?***
>
> ***12. Ms Barakat's primary functions are to prepare company accounts and tax returns to deadlines. This involves reviewing documentation and spending a substantial amount of time sedentary sitting in front of a computer screen processing information.***
>
> ***13. Do you consider that she may continue to carry out those functions, and between the hours of 9am to 5:30pm from Monday to Friday without risk to her health?***
>
> ***14. If not, what reasonable adjustments might be made to her working conditions including hours of work?***
>
> ***15. Does Ms Barakat's condition or medication prohibit her from driving a motor vehicle?***

49. On 13 March 2019, the Claimant wrote to Mr Bolger and Mr Mason [110] setting out her concerns about the adverse side effects of the new medication she was taking for her epilepsy. This email was sent to them in order to explain the increased level of sickness absence for the Claimant.

50. On 14 March 2019, Mr Mason wrote to the Claimant [113] asking the Claimant to chase up her doctor for the report that had been requested. The letter also said the following:

> ***..By way of reasonable adjustments, we had agreed to reduce your working hours (from 4th March 2019) and, sadly, this has not worked out.***
>
> ***As far as our business requirements are concerned, I have to try to mitigate the effect that the unpredictability and duration of your absences are having on our workload, clients and your colleagues. As you will appreciate, it is very difficult to manage these in the current circumstances.***

> ***Clearly, we both need to make further adjustments until we hear from your medical professionals.***
>
> ***Therefore, please can we discuss this at a meeting at these offices at 2pm on Monday 18 March 2019. This will not be a formal meeting as would be required by our Disciplinary and Dismissal Procedure. Depending on his availability, we may ask Keith Davis to join us an independent neutral if this might help us to agree the way forward.***
>
> ***I will review the above if the replies from your GP and specialist are received before 15 March 2019.***

51. On 18 March 2019, the Claimant attended a meeting with Mr Davis, Mr Mason and Mr Bolger, as requested, which was held at a coffee shop near the office. At this meeting, Mr Mason and Mr Bolger set out their concerns about the Claimant. The Tribunal accepted the Claimant's evidence that at this meeting Mr Mason and Mr Bolger also took the opportunity to tell Mr Davis how the Claimant's colleagues had been forced to take on additional work due to the Claimant's sickness absence, and that the Claimant had been ungrateful to them for this.

52. On 19 March 2019, the Respondent received a letter from a consultant neurologist treating the Claimant, a Dr Omar Malik [114]. In this letter, Dr Malik gave the following answers to questions posed by the Respondent:

> ***10. Epilepsy is regarded as a disability and is covered under the Equality Act.***
>
> ***11. This type of epilepsy is a lifelong condition and Iman is likely to always need treatment.***
>
> ***12. I see no reason why Iman would be unable to carry out her job as an accountant effectively. This includes reviewing documentation, spending time sedentary in front of a computer, preparing company accounts and tax returns and processing information.***
>
> ***13. I consider that she is perfectly capable of carrying out the above-mentioned duties. However, as her seizures are caused primarily by sleep deprivation and occur in the morning, a later start would be advisable, especially during any medication transition periods.***
>
> ***14. Iman is perfectly capable of working full hours, but a slightly later start would likely improve any punctuality and attendance problems.***

53. On 19 March 2019, Mr Davis wrote to Mr Bolger, Mr Mason and the Claimant [116] asking them to set out in writing every concern they had about each other. No deadline was given for receipt of this information. However, Mr Mason sent his and Mr Bolger's concerns the next day [117]. These were as follows:

> - ***Failing to complete timesheets daily and not complying with all reasonable requests to update them***

- ***Punctuality***
- ***Not having started professional training and exam process as per the training contract***
- ***Reliability to complete deadline driven work***
- ***Rebuild trust that Iman can work unsupervised***
- ***Inability to follow some reasonable instructions from management (eg when working from home whilst !man was recovering from her burn we gave a specific order of work to complete, which was ignored)***
- ***Taking lunch hour break at lunch time between midday and 2:30pm***
- ***Reduce the amount of cigarette breaks***
- ***Failing to prioritise more urgent tasks***
- ***Failing to telephone the office to advise of sickness days despite reminders***
- ***Reducing the general disorganisation***
- ***Making sure company accounts are filed on time, particularly for dormant companies. Late filings cost us late filing penalties greater than the fees we get for the work***

54. By 25 March 2019, Mr Mason emailed the Claimant [124] referring to the fact that the Claimant had not yet sent her list of concerns to Mr Davis. That email said as follows:

> ***I write further to the email from Keith Davis to us dated 19th March.***
>
> ***At our meeting with Keith Davis on 18th March we raised concerns most of which you said were unfair. In Keith's email of 19th March we were asked to set out our respective concerns by return to enable him to mediate these.***
>
> ***We replied on 20th March, but you have still not done so.***
>
> ***This makes it impossible for the mediation to proceed at this time.***
>
> ***However, the issues currently on the table are serious enough to warrant investigation.***
>
> ***Keith has been asked, as an independent neutral, to conduct the investigation.***
>
> ***Your cooperation is requested in two respects:***
>
> ***1. to assist in the investigation of our concerns; and***

> ***2. to now raise the concerns that you have so that these can also be part of the investigation.***
>
> ***With respect, it would be fair to ask you to raise your concerns to Keith on the record by return.***
>
> ***We are placing you on paid leave with immediate effect pending the outcome of the investigation.***
>
> ***Keith has referred us to the independent fact-finding investigation page of his firm's website.***
>
> ***You will see from this that you may be accompanied at any fact-finding meeting with Keith by any one companion of your choice and, should you not be able to attend any such meeting, please discuss the alternative discussion formats with him. These are offered to facilitate reasonable adjustments to his process. All such discussions are 'on the record' Thank you for sending a copy one of the replies to our recent request for information relating to your state of health. Keith will be asked to take into account all such information during his investigation which will conclude with a fully-explained report being sent to the three of us.***
>
> ***We trust that you will agree that this is a fair way forward in all the circumstances.***
>
> ***We hope that you will take this opportunity to address our respective issues. If you do not do so, which would be a shame, the investigation will have to continue with Keith doing the best he can on the information then available.***
>
> ***In the meantime, we wish you well and look forward to hearing of Keith's progress very shortly.***

55. On 26 March 2019, Mr Davis sent the Claimant, Mr Mason and Mr Bolger an email headed "*Independent Fact-Finding Investigation*" [128] confirming the remit of the investigation to be undertaken by him, which was to investigate the "*issues placed on record*" about each other. Mr Davis asked the Claimant to send her concerns so that they could be investigated. The Tribunal noted that whilst Mr Davis' role had turned from mediator to investigator, the purpose of the investigation still appeared to be to investigate the concerns <u>they both had about each other</u>, rather than this simply being an investigation into the Claimant's conduct. There was certainly nothing in the remit, sent by Mr Davis, or indeed the above email sent by Mr Mason to the Claimant, that the investigation was to be a disciplinary investigation, or that there was a possibility of disciplinary action being considered as a result of the investigation.

56. In response to the above-mentioned email from Mr Davis, on 26 March 2019 the Claimant sent the following concerns to Mr Davis as requested [sic] in the form of an email [131]:

• Indirect discrimination — the application of a provision, criteria or practice to everyone has a particular disadvantages for people with a disability, me, compared to people who do not have that disability e.g. sickness policy, sickness pay, sickness record, bonus affected by sick days, must call by 9:30 am even though I have seizures in the morning, and I am unconscious.

• Direct discrimination — Many examples. For example, perceived discrimination — I am treated unfairly because it is assumed I have a disability, and that this affects my ability to carry out day-to-day activities — for example, making an assumption without any basis that my epilepsy will mean I can't do a job as well as someone without epilepsy i.e. asking if I can process information and sit sedentary in front of a computer — beyond insulting.

• Discrimination arising from disability- I have been treated less favourably because of something connected to my epilepsy, you knew I had epilepsy and I do not believe there is a fair reason for this treatment.

• Failure to make reasonable adjustments many but for example allowing me to start and finish work later than other employees, if you usually have seizures first thing in the morning. I have been working there almost three years and no adjustment has been made till now. Furthermore 2 colleagues have flexible working why can't O? Disability leave recorded separately.

▪ Harassment — behaviour towards me in a way you don't want, such as taunting or bullying, and the behaviour has the purpose or effect of, Violating your dignity (failing to treat you in a respectful way) and Creating an intimidating, hostile, degrading, humiliating or offensive environment for you.

Examples include but are not limited to complaining I was off for 2 months due to a 3rd degree burn permanently disfiguring me and never failing to let me forget the impact it had on 'the team', but 0 empathy or interest towards me and the attitude that I am somehow in control of my condition. Questioning whether I have epilepsy, yet I had a seizure in front of you — the resentment and disbelief of my condition is shocking and insulting. You as my employer have a duty to protect me from such harassment and have not, you have participated and allowed people to speak on me as you have relayed this back to me yourselves sand I have been told so. Implying I held up medical report due to `something on there that I didn't want you to know' aka I was lying about something to do with my condition.

• Victimisation - You have treated me less well than other people because I have complained about disability discrimination e.g. informing me of colleagues being led up' of my sick days and therefore my concerns about when colleagues speak on me are somewhat ok/deserved. Ignoring request for formal complaint against Kim.

57. Aside from a face-to-face interview with the Claimant, Mr Davis conducted all of the interviews for the first draft of his report electronically, by the interviewees downloading the link to an app created by Mr Davis' firm. Mr Mason did his interview electronically by answering a number of questions. This format was also used for interviews with ML (a fellow trainee accountant) and KB (PA to Mr Mason and Mr Bolger).

58. Mr Davis prepared a preliminary report [143] and sent it to the Claimant, Mr Bolger and Mr Mason on 3 April 2019 [140]. That report essentially contained the interviews only, together with the two sets of concerns. The purpose of this preliminary report, Mr Davis explained in the introduction, was to set out each side's respective positions. Following consideration of the report, Mr Davis gave as one option, that he be instructed to prepare a final report with findings and opinions.

59. On 3 April 2019, the Claimant texted Mr Davis about what she referred to as "*miscommunications on some things specifically re me mentioning a complaint which I did*" [166]. That was subsequently accompanied by a copy of the text referred to at paragraph 42 above.

60. On 10 April 2019, at 09.39 [170], Mr Bolger emailed the Claimant saying as follows [sic]:

> ***Iman***
>
> ***I understand that you were due to take professional advice yesterday.***
>
> ***All the issues between us have to now be resolved.***
>
> ***If you wish these to be mediated by Keith, then you must email me to this effect, and he will be asked to arrange for this very quickly and your full cooperation will be required.***
>
> ***Otherwise, please return to work at 10.30am tomorrow morning, 11th April, and we will utilise our formal resolution procedures based on final report which Keith will be asked to prepare before the end of this week if possible.***
>
> ***James***

61. The Claimant replied later that day at 14.36 [171] saying as follows [sic]:

> ***Following Keith's preliminary report, I would like to clarify that I am not suggesting that all trust and confidence has broken down at this stage. Nonetheless I am very concerned about the way in which I have been treated by the company, including the failure to make reasonable adjustments because of my disability, and as a result I am considering submitting Employment Tribunal disability discrimination claims regarding my treatment to date.***

62. On 11 April 2019, at 14.56 [173], the Claimant emailed Mr Bolger as follows [sic]:

> ***James***
>
> ***As expected night three of terrible sleep has resulted in me feeling that I will fall asleep finally now thus if I do not call It is for this reason.***
>
> ***I am also going to get a sick note from the doctor who will clarify my words and confirm the toll it has begun to have on me and I cannot risk anything that could impact my health I.e. Not sleep now = higher risk of seizure. I will not be in work today for these reasons, apologies.***
>
> ***Iman***

63. On 11 April 2019, Dr Tanavi Patel, of the Churchill Medical Centre provided a report to the Respondent, as requested at paragraph 48 above [174]. However, it became clear during the hearing that there had been a delay in this getting to the Respondent because it was not sent direct to them, but left for collection at the surgery.

64. On 12 April 2019, Mr Bolger sent the Claimant a lengthy email [175] which, in summary, denied that the Claimant was a disabled person within the meaning of the Equality Act 2010, and proceeded to explain why the company had not discriminated against the Claimant. Mr Bolger ended the email by saying that any claims in the Employment Tribunal would be "*strenuously resisted*" and that, if a claim was brought, they would seek an order requiring the Claimant to pay a "*deposit in respect of our legal costs*".

65. The Claimant was signed off work for the period 12-26 April 2019 [179] for work "*stress and anxiety, insomnia, and epilepsy and risk of seizures*".

66. On 18 April 2019, the Claimant sent a text to Mr Davis disputing the accuracy of his account of what she had said in her interview with him, in so far as it related to the complaint about K. Mr Davis later wrote to the Claimant, Mr Bolger and Mr Mason [187] disagreeing with the Claimant's account of what she had said. The Tribunal noted that in his report, Mr Davis had invited the parties to let him know whether any corrections were requested.

67. However this exchange led to Mr Davis interviewing K, which he did in person. Prior to that, Mr Davis sent the Claimant an email asking four questions as follows:

> ***Iman***
>
> ***I have been looking at the "formal complaint" you referred to in the copy texts or WhatsApps that you exchanged with James.***

> ***Please could you help me to understand them by responding to the following:***
>
> ***1. what are the dates of those texts/WhatsApps?***
> ***2. what precisely has K said or done which is the subject of your complaint?***
> ***3. who told you that she had said or done that?***
>
> ***4. what is the "alarming information about you that none of them should know"?***
>
> ***Please could I kindly ask you to reply by return so that I can investigate these issues.***
>
> ***Many thanks***
>
> ***Best regards***
>
> ***Keith***

68. On 30 April 2019, the Claimant wrote to Mr Davis [204] expressing her surprise at being asked the above questions given that, in her words, she had been accused of lying. She said that she did not think there was any point in continuing given that she did not think that Mr Davis was neutral. There followed an exchange of emails in which the Claimant said [206] the following:

> ***….No I specifically told you I asked to make a formal complaint about K when I saw you, showed proof of this, this request was ignored and first mentioned when we had that pointless group meeting by James saying I essentially only asked to complain to deflect off my "issues" yet I apparently hadn't made a formal complaint request. When you quoted me that wasn't everything I said or correct for example, key point, I said I was making this complaint as people had been commenting on the disrespect so that is why I say I question the impartiality now.***

69. On 8 May 2019, Mr Davis wrote to the Claimant, Mr Bolger and Mason attaching the final report. In it he reached conclusions and gave his opinion on those matters and concerns raised by the parties. Under a heading "*overall*" Mr Davis wrote the following:

> ***Having investigated the matters expressed to me, I wonder whether all or most are the consequences of other issues which are the cause of what has become a protracted period of unhappiness for all concerned.***
>
> ***It seems to me that Iman sought a different level of understanding and empathy of her medical condition, and perhaps more from her colleagues than from the Company's directors. If that is correct, then she will have been very disappointed with her perception of how they responded. I suggest that the above-stated events of July 2018***

support this view. I do feel that that underlying issue is likely to be the primary issue in this matter.

From an objective independent perspective, I find that the Company had surpassed the level of understanding and support that it gave to Iman.

Iman, I have considerable sympathy for you having to suffer a medical condition which has made some aspects of your life difficult. I hope that you will seek out further help and support from a wider field than that mentioned to me. I respectfully suggest that you have feelings of anger and frustration which would benefit from assistance in addition to medication. However, I think that you were mainly (but not necessarily entirely) unjustified in holding Alvis & Company and/or your colleagues responsible. Someone has to say this to you and, although my remarks are unlikely to be welcome, they are offered in sincerity and in order to help.

I wish you all well and hope that the differences between you can be resolved soon. Iman, I send you my best wishes and hope that you can soon find a way of dealing with your condition to bring you the peace and happiness you seek. You seem to be blessed with loving parents and possibly your discussing the contents of this report with them might be a good next step.

70. On 10 May 2019, Mr Bolger wrote to the Claimant by letter [231] inviting her to a disciplinary hearing on 17 May 2019 to answer the following seventeen allegations:

- ***Why you told Keith that you have not complained to anyone about K;***
- ***Why you stated: "There was one thing I note in (Keith's final report) report was false". I specifically stated that I would like to make a formal complaint against K"***
- ***Whether you think that making bare accusations in a text amounts to a formal complaint;***
- ***Why you have still not provided details and examples of how K was negative, dismissive, and rude to you;***
- ***Whether you have enabled these to be investigated;***
- ***Why you said that a colleague in some way corroborated your accusations against K;***
- ***Whether your bare accusations against K were sincere and made in good faith;***
- ***How you allege that you have been victimised without having identified and/or particularised the matter that you were allegedly victimised about;***
- ***Why you refused to tell Keith who you say harassed you;***
- ***Why you refused to tell Keith who you say bullied you;***
- ***Whether you made unsubstantiated allegations of victimisation and harassment in good faith;***
- ***Whether you made unsubstantiated allegations of harassment and victimisation in good faith and failed to offer any details of those allegations during the course of the recent investigation;***
- ***Why you refused to hear what Mollie and Kayleigh said about you, remarking: "I don't care";***

- ***Why you have failed to provide a doctor's certificate regarding your absence from work on 29th April in breach of previous instructions issued to you in this respect;***
- ***Why you have failed to report your absences on Monday 29 April 2019, the late reporting of your absence on Tuesday 30 April 2019 and failure to report any absences since that date;***
- ***Why you drove home on 22 October 2018 notwithstanding our conversation on that date and whether you were prohibited from driving at the time;***
- ***Whether by your conduct and/or attitude, you have destroyed the company's trust and confidence in you by reason of all or some of the above.***

71. The letter went on to say:

> ***I decline to pre-judge any of the above. However, it might assist if I explain the company's approach towards the above. Whilst the breach of instructions regarding absence reporting and certification is serious, these are matters which, by themselves, might attract some level of written warning. That having been said, the absence of any justification for not fully co-operating with the investigation and/or making serious accusations against a colleague and the company not in good faith are likely to be regarded as gross misconduct for which the sanction of summary dismissal will be considered.***

72. On 16 May 2019, the Claimant wrote to Mr Bolger and Mr Mason [236] stating that her GP had advised that she was not fit to participate in any disciplinary process, and produced a fit note. In fact, she had remained off work due to sickness since 12 April 2019. The reasons given by the Claimant's GP were "*stress, anxiety and insomnia*". The Respondent's position, both then and at this hearing, was that whilst they accepted that she was unfit for work, this did not mean that she could not participate in a disciplinary hearing.

73. By email on 16 May 2019, Mr Mason agreed to postpone the hearing provided that the Claimant provide a letter from her doctor by the following Tuesday. On 21 May 2019, the Claimant emailed Mr Mason and said that she had still not heard anything from her GP. She agreed to consent to her GP speaking directly with the Mr Mason to speed things up. Mr Mason refused this offer, requesting that the Claimant provide a medical certificate confirming that she could not attend a disciplinary hearing, by 5pm the next day.

74. By email dated 28 May 2019, Mr Bolger informed the Claimant that the disciplinary hearing would be pushed back until 6 June 2019.

75. On 6 June 2019, the Claimant wrote to the Mr Mason and Mr Bolger with her comments to the allegations.

76. The disciplinary hearing went ahead on 6 June 2019. The Claimant maintained that she was not well enough to attend the hearing.

77. In a lengthy letter dated 12 June 2019, the Claimant was summarily dismissed. Mr Bolger rejected the Claimant's complaints, setting out his reasons. He accused her of lying about making a formal complaint about K, and then accused of her making false allegations about her. He summed up his concerns by saying:

> ***My difficulty here is not so much about whether your complaints were justified (and, on balance, most or all of them were not justified) but rather whether you have conducted these in a sincere and reasonable manner and, indeed, whether your claims of discrimination etc. were made in good faith.***
>
> ***Very sadly, I do not believe that you have raised concerns in a reasonable manner and, even more sadly, I think that you have been disingenuous in a number of respects. I do not believe that you have acted in good faith.***
>
> ***Rather than accepting responsibility for some matters, you attempted to shift the blame on to others who had a view different from your own. The manner in which you have done this has rendered impossible the continuation of your employment by us. For my part, the relationship of trust and confidence between us has been irretrievably destroyed by your actions.***

78. The Claimant appealed against the decision to dismiss her, in writing on 28 June 2019.

79. The Respondent required the Claimant to attend the appeal hearing but she could not do so, due to her being unwell. This resulted in a number of postponements. The Claimant said in evidence that Mr Mason made it difficult for the Claimant to appeal because he insisted on her producing an appeal bundle, giving her little time to do so. The deadline for producing an appeal bundle was eventually pushed back until 3 September 2019, which the Claimant complied with.

80. On 10 November 2019, the Claimant wrote to the Claimant saying that she did not feel comfortable attending the appeal in person due to the hostile environment and the effect of this on her mental health. However, Mr Mason insisted on her attendance.

81. On 11 December 2019, the Claimant attempted to take her own life. The Respondent was informed of this, together with the fact that the Claimant could not attend an appeal hearing in person.

82. As the Claimant could not attend in person, the appeal hearing never went ahead.

LEGAL PRINCIPLES

Direct discrimination (s.13 EQA)

83. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

> ***A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

84. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?*" Put another way, "*What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?*" It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

85. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

86. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason for the treatment of the Claimant was not in any sense whatsoever because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of

there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

87. Notwithstanding what is said above, in ***Laing v Manchester City Council and another 2006 ICR 1519, EAT***, the point was made that it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment.

Failing to make reasonable adjustments (s.20 EQA)

88. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty to make reasonable adjustments; then the Tribunal must consider whether that duty has been breached.

89. Section 20 of EQA deals with when a duty arises, and states as follows:

> ***(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.***
>
> ***……***
>
> ***(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

90. Section 21 of the EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

91. The duty to make adjustments therefore arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled.

92. The EQA says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, applying the evidence adduced during a case, and is

assessed on an objective basis.

93. In determining a claim of failing to make reasonable adjustments, the Tribunal therefore has to ask itself three questions:

- What was the PCP?
- Did that PCP put the Claimant at a substantial disadvantage compared to someone who is not disabled?
- Did the Respondent take such steps that it was reasonable to take to avoid that disadvantage?

94. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

95. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to her, and it placed her at a substantial disadvantage compared to someone who is not disabled. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

96. It is a defence available to an employer to say "*I did not know and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

Unfavourable treatment arising in consequence of disability (s.15 EQA)

97. Section 15 EQA provides as follows:

> ***(1) A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

98. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the Respondent treat the Claimant unfavourably because of an (identified) 'something'?; and (ii) did that something arise in consequence of the Claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the

Respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the Claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the Respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the Respondent have knowledge of the causal link between the 'something' and the disability.

99. If section 15(1)(a) is resolved in the Claimant's favour, then the Tribunal must go on to consider whether the Respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in ***Grosset [2018] EWCA Civ 1105***, upheld this reasoning, underlining that the test under s 15(1)(b) EQA is an objective one according to which the ET must make its own assessment.

100. In terms of the burden of proof, it is for the Claimant to prove that she has been treated unfavourably by the Respondent. It is also for the Claimant to show that 'something' arose as a consequence of her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

Victimisation (s.27 EQA)

101. Section 27 of EQA provides as follows:

> ***(1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***(a) B does a protected act, or***
>
> ***(b) A believes that B has done, or may do, a protected act.***
>
> ***(2) Each of the following is a protected act—***

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

102. The test to be applied here is threefold:

- Did the Claimant do a protected act?
- Did the Respondent subject the Claimant to a detriment?
- If so, was the Claimant subjected to that detriment because she had done a protected act, or because the employer believed that she had done, or might do, a protected act?

103. Here the most important decision to be made by the Tribunal is the "*reason why*" the Respondent subjected the Claimant to a detriment. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the detriment is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

104. A person claiming victimisation need not show that the detriment meted out was *solely* by reason of the protected act. As Lord Nicholls indicated in ***Nagarajan v London Regional Transport 1999 ICR 877, HL***, if protected acts have a '*significant influence*' on the employer's decision making, discrimination will be made out. ***Nagarajan*** was considered by the Court of Appeal in ***Igen Ltd & ors v Wong and other cases 2005 ICR 931, CA,*** a sex discrimination case. In that case Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather "*an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial*. *The crucial issue for the Tribunal to determine is the reason for the treatment — i.e. what motivated the employer to act as it did? But it is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor"*.

105. Whilst the same burden of proof applies in such cases, namely that the Claimant must prove sufficient facts from which the Tribunal could conclude, in the absence of hearing from the Respondent, that the Claimant has suffered an act of discrimination, it is also perfectly acceptable to go straight to the "*reason why*" because that is the central question that the Tribunal needs to answer.

Harassment (s.26 EQA)

106. Section 26 EQA defines harassment as follows: -

> ***(1) A person (A) harasses another (B) if—***
>
> ***(a) A engages in unwanted conduct related to a relevant protected characteristic, and***
>
> ***(b) the conduct has the purpose or effect of—***
>
> ***(i) violating B's dignity, or***
>
> ***(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.***
>
> ***(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—***
>
> ***(a) the perception of B***
>
> ***(b) the other circumstances of the case***
>
> ***(c) whether it is reasonable for the conduct to have that effect.***

107. There are three essential elements of a harassment claim under s.26(1):

- unwanted conduct
- related to disability
- which had the *purpose* or *effect* of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (the "proscribed environment").

108. When considering "effect", the Tribunal must consider the Claimant's perception; the circumstances of the case; and whether it is reasonable for the conduct to have that effect: s.26(4). Establishing reasonableness is essential: ***Pemberton v Inwood [2018] EWCA Civ 564.***

Unfair dismissal (s.98 ERA)

109. The law relating to the right not to be unfairly dismissed is set out in s.98 Employment Rights Act 1996 ("ERA"). Section 98(1) says as follows:

> ***(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

110. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

111. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

112. In a conduct case, it was established in the well-known case of **British Home Stores v Burchell** that a dismissal for misconduct will only be fair

if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

113. In another case called **Iceland Frozen Foods Ltd v Jones**, it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

114. In **Sainsburys Supermarket Ltd v Hitt** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal.

115. Finally, in **London Ambulance NHS Trust v Small** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

116. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.

117. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

118. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer. This is commonly termed a Polkey reduction, taken from the well-known case **Polkey v A E Dayton Services Limited**.

119. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's

conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

120. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.***

121. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2)**. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Wrongful dismissal

122. In wrongful dismissal cases, employers typically rely on serious or gross misconduct by the employee to justify summary dismissal. But it is important to remember that the underlying legal test to be applied by a Tribunal is whether there has been a fundamental or repudiatory breach of contract by the employee entitling the employer to treat the contract as at an end.

123. The Tribunal's function when considering a claim of wrongful dismissal is very different to that of an unfair dismissal claim. In a wrongful dismissal case, the Tribunal does not look at the employer's actions and decide whether it was reasonable for the employer to treat the Claimant's conduct as a repudiatory breach of contract. The Tribunal itself has to be satisfied that the Claimant did, on the balance of probabilities, commit a repudiatory breach of contract.

124. Where an employer dismisses for a breakdown in trust and confidence, that is in essence a reliance on a breach of the implied duty not to "*without reasonable and proper cause"* conduct oneself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee; ***Malik v Bank of Credit and Commerce International SA [1997] I.C.R. 606***.

CONCLUSIONS, ANALYSIS AND ASSOCIATED FINDINGS OF FACT

125. The Tribunal went through each of the claims and allegations as set out in the list of issues. References to numbers in square brackets below are references to those issues as repeated at paragraph 4 above.

Direct disability discrimination

Dismissal [4(a)(i)]

126. By the start of the hearing, there was only one claim of direct discrimination which related to the dismissal. Tribunal therefore considered the reason for the Claimant's dismissal and whether it was because of the Claimant's disability. In reaching this decision, the Tribunal considered the conscious and unconscious thought processes of the alleged discriminator.

127. On that note, the Tribunal concluded that both Mr Mason and Mr Bolger made the decision jointly to dismiss. Whilst Mr Mason said that he did not discuss the Claimant's dismissal with Mr Bolger prior to the decision, the Tribunal did not find that evidence realistic or credible. It rejected the suggestion that Chinese walls were placed between them, as not being truthful evidence. In reaching this decision, the Tribunal took into account Mr Bolger's clear evidence that when asked whether Mr Mason was consulted whether disciplinary action should be taken against the Claimant upon receipt of the report from Mr Davis, Mr Bolger said that Mr Mason was consulted; he even said that Mr Mason would *have* to be consulted on such a decision. The Tribunal concluded it was most unlikely that Mr Mason would be consulted on a decision whether to take disciplinary action, but not on the decision to dismiss itself. The Tribunal also took into account, that despite the suggestion of Chinese walls, there had been no prior attempt to separate their roles; indeed, Mr Mason represented the company during interviews with Mr Davis, and his name was all over much of the correspondence. In looking at the conscious or unconscious thought processes or motivations of the discriminator, the Tribunal therefore looked at both Mr Mason and Mr Bolger.

128. The Tribunal concluded that there had been no direct discrimination. The Tribunal was satisfied that it was the Claimant's sickness absence that was the main driver, together with the other factors mentioned below under the heading "Victimisation". In reaching this conclusion, the Tribunal noted that Mr Mason and Mr Bolger had known that the Claimant had suffered with epilepsy very early on in her employment, and had they wanted to take action because of the Claimant's disability, they would have done so sooner.

129. For the above reasons, the claim of direct discrimination fails and is

dismissed.

Reasonable adjustments

Not allowing the Claimant to work from home from time to time [4(e)(i)]

130. This claim was reduced to one allegation on the first day of the hearing, which was the failure to allow the Claimant to work from home, from time to time, when she needed to because of her epilepsy.

131. The Tribunal concluded that the Respondent applied a PCP to the Claimant and others in the practice, namely that they had operated a policy of not allowing trainee accountants to work from home. The Tribunal concluded that this placed the Claimant at a substantial disadvantage because when she had a seizure, there were times when the Claimant could not go to work, or did not feel able, or confident, to travel to work immediately thereafter, but felt able to work from home.

132. The Tribunal noted that there was a complete failure of the Respondent to properly explore with the Claimant the kind of adjustments that would help mitigate the disadvantage to her by virtue of her disability, preferring instead to offer “token” adjustments, which the Claimant considered did not help her at all.

133. The Tribunal noted that the Respondent allowed the Claimant to work from home during one period (see paragraph 36 above) which, whilst this was not completely successful, the arrangements lacked the necessary engagement by the Respondent to ensure that Claimant had the available tools and guidance to enable those arrangements to work. That did not happen.

134. The Tribunal accepted that trainee accountants needed supervision and that they needed to be in the office for a significant proportion of their time, but the Tribunal concluded that there was no good reason, from the evidence it heard, why allowing the Claimant to work from home, even on the mornings or days when the Claimant had a seizure, was not a reasonable adjustment that could have been made. She was not asking to work from home all of the time, but rather from time to time. In fact, the Respondent divulged during their evidence, that more people had to work from home as a result of the COVID19 pandemic.

135. For the above reasons, the claim of failing to make reasonable adjustments is well founded and succeeds.

Victimisation

Dismissal [4(i)(xii)]

136. The Tribunal considered the dismissal first before turning to other detriments.

137. The Claimant alleged three protected acts. These were:

137.1. the Claimant's email dated 26 March 2018 [131] in which she, at the request of Mr Davis, set out her concerns about Mr Mason and Mr Bolger which she wanted investigated by Mr Davis;

137.2. the Claimant's email to Mr Bolger (copied to Mr Davis and Mr Mason) on 10 April 2019 [171].

137.3. The Claimant's first Employment Tribunal claim on 24 August 2019.

138. Both of the above emails (paragraphs 137.1 and 137.2) alleged that that the Claimant had been subjected to acts to unlawful discrimination, and the Tribunal were satisfied that they were protected acts within the meaning of s.27(2)(d) of the EQA 2010. The Tribunal claim was a protected act within the meaning of s.27(2)(a).

139. The Claimant alleged that she was dismissed because she did a protected act. In reaching its conclusion on this issue, the Tribunal had to decide what the real reason was for the dismissal: was it the breach of trust as alleged by the Respondent; or was it because the Claimant did a protected act.

140. Having considered all of the evidence, the Tribunal concluded that the Respondent had three reasons in mind when deciding to dismiss the Claimant. The first, and certainly the most prominent reason, the Tribunal concluded, was because the Claimant had complained of discrimination in her emails of 26 March and 10 April 2019.

141. On 12 April 2019, Mr Bolger wrote a lengthy four-page email to the Claimant which he said was in response to the Claimant's email of 10 April 2019. The Tribunal concluded, however, that what Mr Bolger was actually responding to was both the Claimant's 26 March 2019 and 10 April 2019 emails. This was evident from his response because Mr Bolger chose to respond to what the Claimant had told Mr Davis during her interview with him, which was clearly based on the concerns raised in her 26 March 2019 email. What surprised the Tribunal was that Mr Bolger chose to respond in detail to the allegations of discrimination, the very same complaints Mr Davis had been tasked to consider, even before Mr Davis had concluded his report. Mr Davis' final report was only supplied to the parties on 8 May 2019. It is difficult to understand precisely what role Mr Davis was supposed to play at that point, given that Mr Bolger had already responded

and reached conclusions on the Claimant's concerns.

142. The Tribunal concluded that Mr Bolger was angry at the Claimant's allegations, choosing to threaten the Claimant with an order to make a deposit in relation to their costs, should she bring an employment Tribunal. The Tribunal concluded that his email was very much aimed at deterring the Claimant from bringing a claim in the Employment Tribunal. The very fact that Mr Bolger had chosen to reach his own conclusions before Mr Davis had reached his, left the Tribunal believing that the process being conducted by Mr Davis was designed by Mr Bolger and Mr Mason to be a sham, and that Mr Bolger and Mr Mason had decided well before the end of that process that the Claimant was going to be dismissed.

143. The Tribunal noted with interest, during the re-examination of Mr Bolger, when he was asked by Mr Davis whether the Claimant was guilty of misconduct because she made complaints of discrimination, that Mr Bolger agreed that "*it was one of the factors*". In his answer, therefore, he admitted victimisation within the meaning of s.27 EQA. The Tribunal concluded it was more than one factor, it was a major factor.

144. The other two factors which the Tribunal concluded played their part in the decision to dismiss the Claimant was firstly the Claimant's sickness absence, which clearly Mr Mason and Mr Bolger had become frustrated with. Secondly, they had become irritated and impatient with complaints the Claimant made about K, complaints about her colleagues talking about her absences; and a lack of understanding why her colleagues were making negative comments about her absences.

All remaining allegations [(4)(i)(i)-(xi) and (xiii)-(xiv)]

145. The Tribunal having reached the above conclusions, then considered whether the protected acts were a significant factor in its treatment of the Claimant as set out in the above detriments, and it concluded that it was. The Tribunal concluded that Mr Bolger and Mr Mason's response to her complaints of discrimination were such that they very much affected what they (Mr Bolger and Mr Mason) did. The Tribunal concluded that the protected acts were a material influence in the way the Claimant was treated by Mr Bolger and Mason, including in respect of those matters which were alleged as detriments.

146. The Tribunal did not accept that the Claimant had acted in bad faith in doing the protected acts.

147. For all of the above reasons, the Tribunal concluded that all of the claims of victimisation were well founded and should succeed.

Unfavourable treatment arising in consequence of disability

Giving the Claimant a poor appraisal [4(f)(i)]

148. It was difficult for the Tribunal to conclude whether this was factually correct. No grade was given to the Claimant from which it was possible to assess how she performed compared to colleagues. It was difficult for the Tribunal to concluded what "*poor*" meant in these particular circumstances. Had this allegation been differently framed, it may have succeeded, but not in the way that it was described for this case. This claim therefore fails.

(b) Giving the Claimant a low bonus [4(f)(ii)]

149. The Tribunal refers to its findings at paragraphs 28 and 29 above.

150. There was no doubt in the Tribunal's mind that a significant reason why the Claimant was not paid a higher bonus was because of her sickness absence, which then had an adverse effect on her performance. She was therefore subjected to unfavourable treatment because of sickness absence, which the Tribunal concluded arose in consequence of disability. No valid defence of objective justification was put forward to this allegation. This claim therefore succeeds.

Disciplinary warnings [4(f)(iii)]

151. The Tribunal refers to its findings at paragraphs 39-41 above. The Tribunal concluded that the Respondent appeared to want to punish the Claimant for not arranging for her family to call in on her behalf, without ever investigating the circumstances of the seizure and who was at home to call in on her behalf. In his witness statement, Mr Bolger said that he realised that there should have been a fair process followed before giving her a warning, and apologised for that in his witness statement. However the Tribunal did not sense any regret or contrition by Mr Bolger during the hearing. In fact, he continued to defend his actions. There was no retraction of these warnings. It was unfavourable treatment which arose in consequence of disability. The Respondent put forward no justification for this allegation. This claim therefore succeeds.

Showing empathy and not investigating concerns [4(f)(iv)(v)(x) and (xi)]

152. The Tribunal was very concerned by this allegation. There is no doubt that colleagues in the office were gossiping and complaining about the Claimant being absent from work. What a responsible employer ought to have done in those circumstances was to prevent that from happening, given that Mr Mason and Mr Bolger knew the reason for the Claimant's absences, which were predominantly in connection with her epilepsy. What they did, in effect, was defend what their workers did by criticising the Claimant for not being more understanding and grateful. She then took,

what must have been quite a humiliating step, to stop that gossip and complaining, by writing to her colleagues explaining the reasons for her absence. This step should not have been necessary at all, had the Respondent taken appropriate steps. Their actions most likely encouraged poor behaviour by her colleagues. The Tribunal is satisfied that the criticism of the Claimant persisted throughout, resulting in the Claimant having to complain a number of times about the negative comments by colleagues. Mr Bolger referred to the Claimant in his evidence as "*going on*" about it. It was most certainly unfavourable treatment which arose in consequence of disability. The Tribunal considered whether this was justified but was satisfied that it was not. These claims therefore succeed.

Criticism of performance [4(f)(vi)]

153. The Tribunal was satisfied that the Claimant's performance was criticised and that her performance was adversely affected by her sickness absence. Her sickness arose in consequence of her disability. This claim therefore succeeds.

Commencing a disciplinary process [4(f)(vii)]

154. The Tribunal has already found that a reason for the Claimant's dismissal was the Claimant's sickness absence. It follows that this was also the reason for commencing the disciplinary process. As the sickness absence arose in consequence of disability, this claim succeeds.

Criticising the Claimant for taking early lunch breaks [4(f)(viii)]

155. The Tribunal finds that the Claimant was criticised for taking early lunch breaks in order to attend medical appointments related to her disability. There did not appear to be anything in the Claimant's contract defining when lunch breaks should be taken, or indeed any proof of a requirement that the Claimant ought to have told the Respondent that she was taking lunch early. It was unfavourable treatment which arose in consequence of disability. This claim therefore succeeds.

Criticising the Claimant's actions following her seizure on 22 October 2018 [4(f)(ix)]

156. There is no doubt that it was upsetting for this to have happened to the Claimant in front of her colleagues. The Claimant wanted to leave the office as soon as she could, and the Tribunal accepted her evidence that she was not thinking straight when she decided to drive home. The Tribunal found it surprising, so many months later, to see this incident listed as one of those matters for which the Claimant was to be disciplined, when no action was taken about it immediately after the event. The Tribunal was

satisfied that this was unfavourable arising in consequence of disability. Therefore this claim succeeds.

Dismissing the Claimant [4(f)(xii)]

157. As the Tribunal has already decided, a significant factor which led to the Claimant's dismissal was her sickness absence. As such it was unfavourable treatment arising in consequence of disability. This claim therefore succeeds.

Harassment

Constantly criticising the Claimant about her disability sickness absence [4(l)(i)]

Requiring the Claimant to show empathy towards her colleagues [4(l)(ii)]

158. The Tribunal concluded that each of the above was unwanted conduct which had the purpose of violating the Claimant's dignity, and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if they did not have that purpose, they certainly had that effect, and the Tribunal concluded that it was reasonable for it to have done so. Those two acts of harassment therefore succeed.

159. Allegations 4(l)(iii) and (iv) were not upheld. There was insufficient evidence about what it was about Mr Davis' investigation that constituted harassment. The Tribunal did not hear enough evidence about that. It did not really understand allegation (iv) sufficiently to conclude it was an act of harassment.

Unfair dismissal

160. The Tribunal has already made findings as to the reason for dismissal. The reason relied on by the Respondent, the Tribunal concluded, was not the real reason. The Tribunal concluded that it did not genuinely believe the Claimant to be guilty of the misconduct alleged in the invite to the disciplinary hearing, and did not have a reasonable basis for that belief. Indeed, it appeared to twist completely what had occurred regarding the Claimant's complaint about K. The Tribunal concluded that the Claimant did make a complaint about K in her text on 14 February 2019. Whether or not that was an appropriate method of raising a complaint, the Respondent was placed on notice of that complaint. That ought to have led to further discussions with the Claimant to explore the reasons for the complaint. There is a responsibility on the employer to take that step. They did not. In fact they refused to believe there had been a complaint and used that as one basis for taking disciplinary action.

161. What was clear to the Tribunal was by the point that the Claimant was invited to the disciplinary hearing (in fact earlier than that) the Respondent had decided that it wanted to dismiss her. It attempted to do so by putting forward reasons which a reasonable employer would not have dismissed for, and no reasonable employer would have concluded, on the basis of the evidence, that there had been a breach of mutual trust and confidence.

162. The reasons put forward by the Respondent for dismissal were an attempt to hide the real reasons for the dismissal, which was the fact that the Claimant had raised complaints of discrimination, her sickness absence, and the fact that she was complaining about her colleagues talking about her absence and that she failed to show empathy. For these reasons alone, the dismissal was unfair. Other reasons which the Tribunal rendered the decision to dismiss to be outside the range of reasonable responses included:

    162.1. The Claimant was never told that the investigation by Mr Davis. could lead to disciplinary action. Indeed the Claimant believed that she was in a mediation process, which then seemed to convert to a disciplinary process.

    162.2. The Respondent did not delay the disciplinary hearing, bearing in mind she could not attend, or ascertain from the Claimant's GP whether or not she was fit to attend a disciplinary hearing, which the Claimant said she was not, or verify when she would be able to attend.

    162.3. Mr Bolger was a witness in his own case against the Claimant; there were allegations and complaints being made by the Claimant about him.

    162.4. Mr Bolger had already decided on many of the Claimant's complaints in his email of 12 April 2019.

    162.5. There was no appeal. In fact the Tribunal was struck by how the Respondent insisted on the Claimant attending the appeal hearing, but did not wait until she could attend the disciplinary hearing, itself supporting the Tribunal's view that the Respondent simply wanted the Claimant out.

    162.6. Mr Mason was completely conflicted because of his role in the disciplinary process, including giving evidence on behalf of the Respondent during the investigation process and making the decision to dismiss the Claimant jointly with Mr Bolger.

163. The Tribunal was very mindful of not reaching a decision based on its own views as to the fairness of the Respondent’s actions, but instead to judge

the Respondent's actions against that of a reasonable employer. Were their actions within a band of reasonable responses? The Tribunal found little difficulty in concluding that their actions fell significantly outside that band.

164. The Tribunal considered the circumstances of the Respondent, including its size, and the fact that Mr Bolger and Mr Mason were both directors. It noted, however, that the Respondent was accustomed to using consultants, Mr Mason referring to the use of a HR consultant and of course the use of Mr Davis during the investigation. The Respondent failed to consider whether to use an independent person for the appeal. That, the Tribunal decided, was not a decision a reasonable employer would have reached in these circumstances.

165. The Respondent accused the Claimant of acting in bad faith and lying as part of its reasons for dismissing her. For the avoidance of doubt, the Tribunal does not accept that the Claimant lied or acted in bad faith at all.

166. For the above reasons the decision to dismiss the Claimant was unfair.

167. The failings of the Respondent were so significant that it did not believe it could make a *Polkey* reduction because of the difficulty in assessing what might have been had the Claimant done things differently. Equally the Tribunal could not conclude, on the facts of the case, that the Claimant contributed to her dismissal. It therefore makes no Polkey reduction or a reduction on the grounds of contributory fault.

Wrongful dismissal

168. For reasons which should already be clear, there was no breach of contract by the Claimant entitling the Respondent to dismiss the Claimant without notice. There was no breach of the implied term of mutual trust and confidence, as alleged by the Respondent, or at all. This claim of wrongful dismissal therefore succeeds.

Respondent contract claim

169. As there was no breach of contract by the Claimant, this claim by the Respondent also fails. The Tribunal also noted that there was no evidence led by the Respondent in support of this claim in their witness statements.

_____
Employment Judge Hyams-Parish
Date: 27 August 2021

Sent to the parties on
Date: 13 September 2021

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