EMPLOYMENT TRIBUNALS

Claimant: Ms N Ellis

Respondent: Stockport Homes Limited

HELD AT: Manchester **ON:** 20 and 22-28 September 2021

BEFORE: Employment Judge Slater
Mr P Dobson
Mr J Ostrowski

REPRESENTATION:

Claimant: In person
Respondent: Ms R Levene, counsel

JUDGMENT having been sent to the parties on 4 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The parties had agreed a final List of Issues, subject to a dispute in relation to whether the claimant could rely on both mental and physical impairments in relation to the complaint set out in paragraph 27 of the list, rather than just on a mental impairment. The Tribunal decided, after hearing the parties' submissions on this matter, that the claimant was only able to rely on a mental impairment. This was how the claim had been put by solicitors then representing her in the further and better particulars in April 2019. The Tribunal decided that it would require an amendment to the claim for the claimant to be able to rely on a physical impairment as well as a mental impairment in relation to this complaint. The Tribunal refused an application to amend. The claimant had had a long time in which to apply for an amendment, if she wished to do so, and had not done so until this very late stage. The Tribunal considered that the respondent could be prejudiced by having to deal with an amended claim at this very late stage. The respondent might have chosen to ask further questions of medical experts if this had been the basis of the claimant's claim.

The Tribunal considered that the possible prejudice to the respondent of allowing the amendment outweighed any likely advantage to the claimant in being able to rely on a physical impairment as well as a mental impairment in relation to this complaint.

2. The List of Issues, amended to take account of the Tribunal's decision in relation to the complaint at paragraph 27 and the claimant's withdrawal during the hearing of the complaint set out at paragraph 12 (viii), is set out in the Annex to these reasons.

Evidence

3. There were written witness statements for the claimant (described as her impact statement but confirmed to be the statement giving the claimant's evidence for this final hearing), Darren Dixon, the claimant's partner, and Daniel Fryar, the claimant's son, on behalf of the claimant. There were written witness statements for the respondent from Sara Mansell, Neighbourhood Housing Manager and the claimant's line manager; Janice Samuels, former Neighbourhood Housing Manager, who conducted the investigation; Jane Allen, Assistant Director of Neighbourhoods, who chaired the claimant's disciplinary hearing; Robin Burman, chair of the board of trustees, who sat on the appeal panel; and Bhavi Chauhan, HR advisor. We heard oral evidence from all these witnesses, except for Janice Samuels and Daniel Fryar. The claimant did not object to us reading Ms Samuels' witness statement and giving it such weight as we considered appropriate. The respondent did not object to us reading Mr Fryar's statement and giving it such weight as we considered appropriate.

4. We had an electronic bundle of documents of 575 pages, excluding the witness statements.

The Facts

5. The respondent is a company which manages housing stock across Stockport on behalf of Stockport Council.

6. The claimant began employment with the respondent as an Income Recovery Officer in August 2008. She became a Housing Officer on 28 October 2013.

7. The respondent had a sickness absence policy which is contained in the bundle.

8. The claimant was a well-regarded Housing Officer and we have seen examples of praise for her in documents in the bundle.

9. In or around March 2017, the claimant began to experience pain in her arms, wrists and hands. She was referred to Occupational Health in May 2017 and it was said that she had been diagnosed by that time with carpal tunnel syndrome.

10. In or around May or June 2017, a particular chair was recommended for the claimant's use. There are emails showing requests from managers to provide the chair as soon as possible to prevent the claimant being absent from work as much as possible. The chair was never, in fact, provided.

11. Around late June 2017, the claimant was diagnosed with spinal stenosis.

12. The respondent moved on 22 August 2017 to new offices in Stockport. In the new offices, there was a general policy of hot-desking, with different areas for different types of work. There were new chairs available to all staff in those offices and all the new chairs were adaptable.

13. On 11 September 2017, Sara Mansell, the claimant's manager, had a one-to-one with the claimant. The notes from this one-to-one record the claimant's diagnosis with spinal stenosis and carpal tunnel syndrome, and record that the claimant would need surgery. The notes record that they discussed possible adjustments in the role and the claimant said she did not need anything at that stage.

14. The claimant at this hearing disputed the content of these notes. However, we accept the notes to be a genuine contemporaneous record and find that Sara Mansell had no reason to mis-record the discussion. We, therefore, accept that the notes are a fair record of the meeting.

15. On 17 October 2017, the claimant had a letter from her Consultant Spinal Surgeon. Sara Mansell agreed that the claimant provided this to her as soon as the claimant received it. This referred to medication the claimant was on but did not refer to any likely side effects. We find that the claimant provided this letter and subsequent letters about her condition in a timely manner to the respondent.

16. With effect from 18 October 2017, the claimant reduced her hours to 10.30am to 4.30pm each day. This reduced her weekly working hours from 37½ to 30.

17. On 18 October 2017, the respondent made a further Occupational Health referral and pushed for an early date for this. The assessment took place on 27 October 2017. This included the Occupational Health adviser, Caroline Carter, coming to the respondent's premises and setting up the claimant's workstation. We find that Caroline Carter told the claimant that she should not hot-desk. This finding is consistent with the contents of the Occupational Health report.

18. We accept the claimant's evidence that, on 28 October 2017, she arrived at work to find someone sitting at her desk, having adjusted the chair which had been adjusted for the claimant. The claimant did not, however, complain to anyone at that time or subsequently. The claimant sat at another desk and cried. Sara Mansell was not aware of this: she thought she was not in work that day. The claimant never told any managers that there were problems with her workstation.

19. On 30 October 2017, the Occupational Health report was sent to Sara Mansell. This report advised a further reduction in hours with a later start time. It also recommended that the claimant be restricted from hot-desking. It recorded that there was a more suitable mouse on order and that the claimant required a headset. The Occupational Health adviser advised that driving and typing either needed to be eliminated or reduced.

20. We consider it likely that Sara Mansell had a conversation with Caroline Carter following the Occupational Health report. Sara Mansell could not recall discussing hot-desking with Caroline Carter, but we consider it likely that the conversation did include this, since there was a clear recommendation in the

Occupational Health report that the claimant should be restricted from hot-desking. However, the restriction from hot-desking was not implemented. Sara Mansell understood that the claimant could adjust any chair and screen herself to be suitable for her. We are not clear on the basis for this understanding, given the recommendation in the Occupational Health report. However, the claimant did not raise any difficulty with Sara Mansell or any other manager about hot-desking.

21. We accept Sara Mansell's evidence that the claimant did not want a headset, and one was not, therefore, provided. A lot of staff use headsets and we find that the claimant could have had a headset had she wanted one.

22. On 1 November 2017, Sara Mansell sent an email to her manager, Rebecca Cullen. She reported the claimant as having said that Caroline Carter had suggested working 11.00am-5.00pm, so the same number of hours, and that the claimant still wanted to go out on visits. Sara Mansell had advised the claimant to keep visits to 1-1½ days to reduce driving and take breaks from typing. She wrote that she was reviewing the claimant's work weekly with her and assisting with things. Sara Mansell suggested that the claimant would benefit from reducing the day by another half hour. She wrote that the claimant's symptoms were increasing so Sara Mansell thought she was going to have no alternative but to go off work soon but recorded that the claimant wanted to be in work.

23. Rebecca Cullen replied to this email, writing that it would be fine to change the hours to 11.00am to 5.00pm and they could review this on Wednesday after the claimant's appointment, which was to be a scan.

24. We find that there was no reason for Sara Mansell not to be truthful to her manager in her email of 1 November 2017. We find, based on this email, that there was a reduction in the days the claimant spent visiting and, therefore, driving, and that Sara Mansell had weekly meetings with the claimant in which Sara Mansell agreed on work to be taken off the claimant. We find the notes from pages 155A in the bundle reflect these discussions rather than the normal monthly one-to-one discussions which were recorded in a different format.

25. The claimant was then given flexibility to start between 10.30am and 11.00am, finishing between 4.30pm and 5.00pm, working six hours each day. No further reduction in hours was made. The claimant did not ask for a further reduction in hours. We have heard no evidence that the respondent specifically raised the matter of the hours again.

26. There was some dispute about whether there was any discussion with the claimant about possible working from home. We do not find it necessary to make any findings of fact about this since it is not relevant to any of the complaints before the Tribunal.

27. On 28 November 2017, the claimant began sick leave which continued until her dismissal. The fit notes all record the reason for absence as being cervical spinal stenosis and that the claimant was not fit for work. There is no reference on the fit notes to mental health. There is no suggestion on the fit notes that the claimant could work in any other capacity or with adjustments.

28. When the claimant went on sick leave, she was provided with a copy of the sickness absence policy in accordance with the respondent's standard practice when an employee goes off sick.

29. We saw emails around 7 December 2017 about getting agency cover for the claimant. The respondent employed someone to cover for the claimant during her absence, so the respondent had the cost of agency cover in addition to the cost of the claimant's sick pay when she was absent. The sick pay entitlement was to six months at full pay and then a further six months at half pay.

30. From the email correspondence we have seen, we find that there was friendly contact between the claimant and Sara Mansell. There were conversations to keep in touch and emails between them. This friendly and relatively frequent contact continued until early May 2018 when issues arose about contact.

31. On 9 January 2018, the respondent invited the claimant to a stage one sickness interview to be held on 18 January. This would be about six weeks from the start of the claimant's absence. Under the respondent's policy, three weeks' absence could trigger a stage one meeting. The letter also referred to the Employee Assistance Programme if the claimant required that assistance.

32. The stage one review meeting was held on 18 January 2018. The claimant attended this with her mother. She had not informed the respondent in advance that she intended to bring her mother, and the respondent allowed the claimant's mother to attend the meeting with her, although this was not in accordance with the policy, which restricted companions to being a work colleague or a trade union representative.

33. The claimant alleges that Sara Mansell said at this meeting, "God, Nic, you're not in the union are you?", and that she inferred from this that Sara Mansell thought the claimant needed help to prevent the respondent from sacking her. Sara Mansell did not recall a remark of this type. We do not need to make a finding of fact as to whether something along these lines was said, because it is not of sufficient relevance to any complaint before the Tribunal. In any event, if something along these lines was said, we consider it could bear a different interpretation from that suggested by the claimant.

34. The claimant made it plain at this meeting that she could not function entirely, not just in the Housing Officer role. The fit notes and outcome letter are more consistent with not being able to do any work than being incapacitated only from fulfilling the tasks required of a Housing Officer. There was no discussion about whether the claimant could do any other work. This is consistent with the claimant making it clear that she was not fit for any other work with the respondent.

35. The claimant was unclear at this time about the type of surgery she would require or the date any procedures would take place. The claimant was informed that the second stage review meeting would take place in approximately two months' time when they hoped the claimant would have had communication from the hospital and be in a better position to discuss returning to work.

36. The outcome from the first review meeting was confirmed in writing on 29 January 2018. This was described in the letter as a first stage warning. The respondent accepts that the terminology used is unfortunate. There was no suggestion that the claimant was at fault as might be inferred from the use of the word "warning". The respondent has now, we understand, changed the terminology used in such letters. However, the intention, as the text of the letter makes clear, was that the claimant's situation would be discussed again at the end of the monitoring period, when they hoped the claimant would have more information relevant to when she might be able to return to work. The second stage was to be in approximately two months' time.

37. We accept the evidence of Bhavi Chauhan that, as a general rule of thumb, the review period after stage two and before the stage three meeting is between 6-8 weeks, although there is flexibility in when the meeting is held. Sara Mansell's understanding was that, generally speaking, they would give stage one warning at a review meeting whatever the circumstances.

38. On 27 February 2018, there was a telephone Occupational Health review. This recorded that the pain was impacting on the claimant's mental wellbeing, and that she was unfit for work in any capacity due to severe pain and painkilling medication and that she would remain so until after surgery. The recovery time was stated to be usually 4-6 weeks after spinal surgery. The date of the surgery was then unknown.

39. On 28 February 2018 Sara Mansell wrote to the claimant saying that she would be in touch after speaking to Caroline Carter as the second stage of the sickness review period was due.

40. In an email to Sara Mansell, the claimant wrote, on 28 February, that she wanted to bring her mother to the second stage meeting, that she could not face it on her own and was suffering from anxiety. She was dreading having to speak to work and worrying about getting the sack. Included in that email she wrote:

> "I know these stages are about helping me back to work but unless someone at SHG can perform spinal surgery I feel it is pointless."

41. The claimant wrote that she had an appointment with the spinal surgeon on 29 March to book the surgery. The claimant was not, at this time, asking for any change in the type or manner of contact with the respondent.

42. On 5 March 2018, Bhavi Chauhan of HR wrote to Rebecca Cullen, suggesting it would be advisable to have the stage two meeting after the claimant's appointment with the specialist. We note from this that the respondent was proposing to exercise some flexibility as to the review period. Rebecca Cullen wrote, on the same day, to Jane Allen and others, reporting this recommendation to arrange the stage two meeting after the meeting with the specialist, "so we can then set a later review date to tie in with the anticipated recovery period". She trusted that they would be agreeable to this. There was then agreement that the stage two meeting should be held a week after the scheduled appointment.

43. By a letter of 16 March 2018, the claimant was invited to the second stage review meeting to be held on 5 April 2018. Its stated purpose was to discuss the sickness absence and to agree an action plan for the future, following the claimant's hospital appointment on 29 March. It was also to discuss any support they could offer in assisting the claimant back to work. Again, details of the Employee Assistance Programme were given.

44. The claimant was mistaken in her oral evidence at this hearing in suggesting that this reference to EAP was made only because of the claimant having said that she was suicidal. It was a suggestion of a specialist counsellor, rather than a reference to EAP, which followed the claimant writing of suicidal thoughts in May 2018.

45. In a telephone call between the claimant and Sara Mansell, the claimant was told that she could not bring her mother to the second stage review meeting. This was in line with the respondent's procedure.

46. The claimant's consultant spinal surgeon wrote a letter on 29 March 2018 and gave the claimant a copy of this. This was a letter to an orthopaedic surgeon asking for possible intervention given risks of neck surgery and other matters. The claimant brought along this letter from the consultant to the second stage review meeting which took place on 5 April 2018. She was very upset at this meeting.

47. We find that the claimant confirmed at this meeting that she was unable to return to work in any capacity at this time. Although the claimant commented on some parts of the outcome letter in an email dated 11 April 2018, her comments did not question this part of the record in the outcome letter.

48. Sara Mansell wrote that they understood the position was not the claimant's fault, but warned that continued absence could ultimately lead to the claimant's dismissal. They set a review period of approximately three months before the third stage review. They hoped by then the claimant would have more information from the hospital and be in a better position to discuss returning to work. We accept from the evidence from the respondent that three months is usually the longest period between a stage two and stage three meeting.

49. In an email to Caroline Carter, Sara Mansell expressed the view that, given this latest information, the claimant was unlikely to be able to work for some considerable time, if ever. Sara Mansell also asked Caroline Carter in an email on 6 April if Caroline Carter could do anything to move things along with the NHS for the claimant, following the claimant's correspondence about difficulties that she was having in getting things arranged.

50. The outcome letter of 9 April 2018 did not refer to the discussion that there had been at the meeting of the claimant's fear of losing her job and about her mental health. It confirmed the third stage meeting to be held in approximately three months.

51. On 11 April 2018, the claimant emailed Sara Mansell, adding points to what was recorded in the second review letter and asking that the letter be put with her records. The letter was put with her records in accordance with this request. The

claimant did not dispute the part of the record about not being able to return to work in any capacity. She wrote that they had discussed anxiety and depression and that the claimant stood to lose everything because of this condition, including her job.

52. On 13 April 2018, the claimant wrote to Bhavi Chauhan and Sara Mansell saying she had received a letter for an appointment with the hand surgeon on 27 April. She emailed again on 30 April to say that she had seen the hand surgeon who was going to do carpal tunnel surgery on her left hand and a steroid injection in her right. She wrote that there was usually a two month wait but she was on a cancellation list. Sara Mansell responded to say she was really pleased that the claimant had some progress and asked her to call her. Sara Mansell then tried calling the claimant a number of times, but the claimant did not return her calls.

53. On 3 May 2018, Sara Mansell emailed Occupational Health providing the information that had been contained in the claimant's emails. She wrote that the claimant had not responded to her phone calls so she could not give further information. She asked Caroline Carter whether, with the information provided, she could offer an opinion as to the possible outcome of the proposed treatment.

54. Sara Mansell emailed the claimant on 9 May 2018 saying she needed to speak to her to fully understand the diagnosis and prognosis, and she was making a referral to Occupational Health who would be in contact with the claimant. Again, she included information about the Employee Assistance Programme.

55. The claimant replied the same day by email. She referred to there being a week when she was unable to answer Sara Mansell's calls because she was contemplating suicide. She wrote that she did not understand why she was being referred back to Occupational Health when it had already been reported that she was not fit for work by her GP, consultant and Occupational Health. She concluded:

> "If you did genuinely understand how much of a detrimental effect this was having on my mental wellbeing you would not be pushing me for information that I wish I had but clearly I have not."

56. Sara Mansell replied to the claimant on the same day, writing that she was really worried about her. She wrote that she had asked Occupational Health not to contact the claimant at this time. She had discussed the matter with HR and gave the claimant the name of a specialist counsellor, and wrote that, if the claimant wanted to take this up, she would get a referral processed.

57. The claimant texted Bhavi Chauhan on 14 May, referring to her mental health suffering and that she had been sent details of a counsellor.

58. On 21 May 2018, Bhavi Chauhan sent the claimant details of someone to contact about financial issues. We accept this is not something the respondent normally does but the respondent wanted to ensure that they did everything they could for the claimant.

59. On 26 May 2018, the claimant emailed Sara Mansell and Bhavi Chauhan with an update, saying that she had been on a list for surgery on the Sunday but the list did not go ahead, but she was on the list for the following Saturday.

60. Around the end of May 2018, the claimant moved onto sick pay of half normal pay.

61. In an email of 1 June 2018, the claimant wrote that the surgery had been cancelled again and that she had written to her MP to see if she could help. Bhavi Chauhan responded to these emails in a supportive way.

62. In early June 2018, the claimant learnt somehow about a conversation between two work colleagues. We find that there was a conversation between two work colleagues about the claimant's absence. We do not have any reliable information on the basis of which to find what was said. The claimant has not satisfied us that the colleagues talked about the claimant being sacked. When the claimant raised it in an email of 4 July, Rebecca Cullen looked into the matter and told the colleagues that they should not be discussing people's absences and speculating.

63. On 8 June 2018, Bhavi Chauhan wrote to the claimant to ask for consent to access medical records to help Occupational Health get a better understanding of her medical conditions, to help them determine the most appropriate action to take moving forward. This was in line with the respondent's sickness absence policy, being information that would be normally required before a stage three review meeting. The claimant did not respond to this email and Bhavi Chauhan chased it up on 20 June 2018.

64. Sara Mansell then tried calling the claimant on 21 June, at Rebecca Cullen's request. She wrote to Rebecca Cullen that she did not expect the claimant to get back to her as she had asked that they did not ring and could not face talking to them. She wrote, "The last I knew we were not pursuing her, has this changed?". Sara Mansell wrote that she imagined the claimant was in a state with the email that had been sent about her medical records.

65. Also on 21 June 2018, Bhavi Chauhan wrote to Sara Mansell and Rebecca Cullen saying that they wanted to start accessing the claimant's GP report which would give them a more informed analysis of the claimant's condition to help them determine how to move forward and best support the claimant. The information would help on things such as whether they could redeploy the claimant. Rebecca Cullen and Sara Mansell suggested that this could be explained to the claimant in writing. The claimant accepted in cross examination that managers and HR had no reason to lie to each other in their emails.

66. On 25 June 2018, the claimant responded to the 20 June email, refusing consent. She wrote that she felt it was an invasion of privacy and expressed concern about possible lack of protection of her personal data. She wrote that Occupational Health could have letters between consultants and her GP if they could assure her that her data would be protected. The claimant said in cross examination that her medical notes were going to be used to dismiss her, and that she had given the respondent every letter she had.

67. On 29 June 2018, Caroline Carter offered to email the claimant to reassure her that the report would come to her and would be kept under lock and key. Bhavi Chauhan agreed that that would be really helpful.

68. At some time before 2 July 2018, the claimant had the surgery on her hand.

69. In an email dated 3 July 2018 from Caroline Carter to the claimant, she informed the claimant that information from her GP would go directly to her and be kept in her office under lock and key, and she would write a summary to management.

70. The claimant wrote to Sara Mansell on 3 July, saying she had seen the hand surgeon the previous day and the wound was healing well but she was still in a lot of pain and had numbness. She was waiting for an appointment to have her right hand injected. She wrote that the hand surgeon was to see her on 4 September to assess the success of the operation, and she would see the spinal surgeon following the right nerve block to discuss the options about her spine. She received a supportive reply from Sara Mansell.

71. On 4 July 2018, the claimant replied to requests for access to medical reports, writing that she had nothing to hide but would not provide the respondent with the tools to terminate her employment. She wrote that she did not trust anything to remain confidential. She referred to another employee telling people she was getting sacked. This is the email that caused Rebecca Cullen to look into what colleagues had been saying about the claimant's absence.

72. The claimant also wrote that the spinal surgeon said that, once he operated, she would be back on a yearly basis for further surgery. She wrote that she had gone for an ECG because of pain in her chest and they had diagnosed anxiety. She wrote that she was single with a mortgage and stood to lose her home, job, car and identity. She wrote that, had the respondent adhered to Caroline Carter's recommendations, perhaps she would have been able to carry on, but they ignored how she had set up the workstation and made her hot desk the following day. She was happy to provide any letters but was not willing to provide the respondent with 44 years of medical history.

73. Caroline Carter replied by email on 6 July 2018, offering to meet the claimant on 12 July to discuss her concerns. The claimant did not reply to this and did not meet with Caroline Carter on 12 July.

74. On 11 July 2018, Sara Mansell wrote to the claimant. She wrote that the limited communication was negatively impacting on their ability to manage her sickness properly. She wrote:

> "It is important that we understand properly your medical condition, treatment, prognosis and barriers to returning to work so we can consider what support we can offer you to help facilitate a return to work, such as possible reasonable adjustments. Additionally there are decisions that will need to be made given that you have been off work since last November and we need to fully understand your current circumstances and your views about when you may be able to return and in what capacity in order that we can do this properly and fairly."

75. Sara Mansell wrote that they were now overdue to have a third stage review meeting. She wrote:

> "Stockport Homes as your employer can only make decisions based on the information that we have, and not providing information or not engaging with us to discuss your sickness will force us to make decisions based on limited or inaccurate information, and this is unlikely to be in your best interests. Your actions are also potentially a breach of Stockport Homes' sickness notification rules and our requirement to attend Occupational Health appointments upon which eligibility for sick pay depend."

76. Sara Mansell urged the claimant to contact Caroline Carter. She was expecting the claimant to attend the Occupational Health appointment on Thursday or to arrange an alternative one.

77. On 16 July 2018 the claimant wrote to Sara Mansell. She wrote that she had provided all the information she had. She did not understand herself when she would be returning to work. She referred to having visited the GP with chest pains, having an ECG and receiving a diagnosis of anxiety and being prescribed medication for this. Sara Mansell responded on the same day, offering to meet for a chat outside the formal process.

78. On 19 July 2018, the claimant was sent notice of an Occupational Health appointment on 25 July. She was warned that, if she failed to attend that appointment, they would hold the stage three review in the absence of any up-to-date medical evidence.

79. In the period 21-23 July 2018, the claimant exchanged WhatsApp messages with a number of people in a group of which she was the administrator, which she called "Pastures New". Included in this group was Jo Richardson, the claimant's manager for a few months about five years previously. The claimant gave evidence that she did not consider she had a good relationship with Jo Richardson. We have rejected the explanation given by the claimant to the respondent and also to us that she deliberately included Jo Richardson in this group. This did not seem credible. We find it more likely that Jo Richardson was included in error.

80. In the WhatsApp messages the claimant wrote that she and Darren (her partner) were "off to Malta early Tuesday morning". She wrote that Dan (who is her son) had rented a beach front bar for a couple of months and they were going to manage it for him. She wrote that they could not wait to get over there and get stuck in. She wrote that she did not have an appointment with the surgeon until September so she would come back for that, and she wrote that hopefully they would all come and visit, starting with Ell (her father) who was coming over as soon as they were established.

81. The claimant's father responded enthusiastically to the message and the claimant then provided more information in the responses about the arrangements which had been made to set up the bar.

82. Jo Richardson reported the messages to Sara Mansell. Sara Mansell then tried to phone the claimant and then called at her house without any reply on 23 July 2018.

83. On 25 July 2018, the claimant failed to attend the Occupational Health appointment which had been arranged. In evidence, the claimant said, why would she want to attend the meeting when she knew she would be sacked?

84. On 25 July 2018 the claimant was invited by email to an investigation meeting. The claimant accepted in evidence that the respondent had to investigate the matter raised by the WhatsApp messages.

85. The claimant replied on 25 July 2018, writing that she had sent the WhatsApp because she wanted everyone to leave her alone. She wrote that she had included Jo as a manager as Sara Mansell had enough going on. She would attend the meeting but wanted her mum with her. The respondent agreed that the claimant could be accompanied to this meeting by her mum.

86. Jo Richardson was then removed from the WhatsApp group on 26 July 2018.

87. The investigation meeting was held with Janice Samuels on 1 August 2018 with Bhavi Chauhan as notetaker and HR adviser. The claimant was accompanied by her mother. The claimant said at this meeting that it was a complete fantasy and she wanted everyone to leave her alone. She said that the details set out were her son Dan's plan about what he was doing next year. The claimant said she had a mental health condition and was anxious. The claimant said she had not been in Malta the previous week; she could not even leave the house. Bhavi Chauhan advised the claimant to see Occupational Health, saying that it was in her best interests in relation to stage three of the sickness process. The claimant responded, "well we all know how that's going to end".

88. On 2 August 2018, Bhavi Chauhan emailed Caroline Carter asking her to arrange an appointment for the claimant on Caroline Carter's return from holiday. She wrote that the respondent was wanting to progress with stage three. She had passed Caroline Carter the claimant's medical notes the previous week, which Caroline Carter said she would review. Caroline Carter replied that the claimant had emailed her and she had given the claimant a date of 15 August for a meeting. She wrote, "she isn't abroad then" to which Bhavi Chauhan replied, "no, she isn't abroad".

89. On 9 August 2019, Janice Samuels wrote to confirm the Occupational Health appointment for 15 August. She advised the claimant that, if she did not attend, it would not be rescheduled again and the stage three review would take place and proceed on the basis of the medical information as they were aware of it.

90. Jo Richardson wrote a statement which was signed and dated 9 August 2018.

91. On 10 August 2018, Janice Samuels obtained information from social media about a bar in Malta called "Gin and Juice", this being the name given by the claimant in the WhatsApp messages. These postings on social media suggested that the bar had opened for business some time between 20 July and 10 August.

92. The claimant wrote to Caroline Carter in the evening of 14 August to say she was not able to attend the Occupational Health meeting, saying she unwell.

93. Janice Samuels wrote to the claimant on 14 August requiring the claimant to attend a disciplinary hearing on 21 August. The allegation was set out as follows:

> "That whilst claiming pay from Stockport Homes sickness scheme on the basis that you are medically unfit for work of any kind due to poor physical health, spinal stenosis and carpal tunnel, you were making arrangements and had every intention to manage and run a beach bar in Malta. This allegation constitutes an abuse of Stockport Homes sick pay entitlement, which is a fraudulent act and stated as an example of gross misconduct in Stockport Homes disciplinary policy. This allegation if proven is a serious breach of trust and confidence, is considered as constituting gross misconduct and hence could lead to your summary dismissal from Stockport Homes Limited."

94. The claimant was given an opportunity to submit documentary evidence or to call witnesses. She was warned that the meeting could lead to her dismissal for gross misconduct. Janice Samuels enclosed a copy of the investigatory interview notes and other evidence. The claimant was advised of the right to be accompanied.

95. On 15 August 2018 Caroline Carter told Tanya Haines verbally that the claimant should be fit to attend meetings with management. Tanya Haines, an HR Business Partner, then asked Caroline Carter to review the medical reports that the claimant had shared with them and give a view of her medical condition and fitness to work based on the information Caroline Carter had to date. She wrote:

> "We have asked her to provide evidence of the underlying mental ill health she refers to as her fit notes have only ever been for the physical conditions. She said she would go to her GP and get the fit note changed but has not provided this or any other evidence. Please can you comment as to whether in your knowledge from past appointments with her, albeit these are not recent as she has failed to attend recent appointments, she is affected severely by poor mental health to the degree that she would not be able to engage with us i.e. attend meetings with managers or Occupational Health. It is worth noting that she attended an investigatory interview on 1 August, we allowed her mum to attend as support, and was able to engage and respond effectively in that meeting without any concerns about how she was coping with this from her manager or Bhavi or from HR."

96. The claimant emailed on 15 August to say that she was not well enough to attend the hearing with Jane Allen.

97. On 16 August Yvonne Greenhalgh, an HR Business Partner, asked Janice Samuels to contact the claimant to find out what was stopping her attending and when she might be able to attend. Janice Samuels emailed the claimant on 16 August asking what specifically was preventing the claimant attending the meeting and giving an indication of when she would be able to attend. She said her mother could attend or the claimant could provide a written submission. She warned her that it could not be postponed indefinitely and could take place in her absence.

98. By a letter dated 17 August 2018 the claimant was invited to a third stage sickness review meeting to be held on 24 August 2018.

99. On 21 August 2018 the claimant was informed by letter that the disciplinary hearing had been rescheduled for 29 August 2018.

100. The claimant replied to Janice Samuels on 22 August 2018. She wrote:

> "Due to cervical spinal stenosis and subsequent harassment regarding a return to work date my mental health has suffered and I have work related anxiety. I am not fit for work or to attend any meetings. As previously stated, no-one wants a return more than I do, however mentally and physically I am not able."

101. The claimant also emailed Sara Mansell in response to the invitation to the stage three sickness review, writing that she was not well enough to attend any meetings and asking that it be held in her absence.

102. On 23 August 2018 Yvonne Greenhalgh contacted Caroline Carter to arrange a telephone appointment with the claimant to determine her fitness to attend work-related meetings and/or any reasonable adjustments.

103. On 23 August 2018 Sara Mansell replied to the claimant that they would hold the stage three meeting in her absence using the information she had provided. She asked the claimant for a further fit note and wrote that it should include in the reasons for absence any additional medical conditions other than spinal stenosis.

104. On 23 and 24 August 2018 Caroline Carter tried calling the claimant but the claimant did not answer the calls. Caroline Carter left messages for her.

105. Bhavi Chauhan asked Caroline Carter what the ringtone was like – did it indicate she was abroad? – but Caroline Carter replied that it was normal.

106. The stage three meeting had been scheduled for 24 August 2018 but it did not go ahead on this date. In fact, it was never held because of the subsequent dismissal for gross misconduct. At a stage three meeting they would have discussed reasonable adjustments, any possible redeployment or ill health retirement. We accept the evidence of Bhavi Chauhan that they could have had an initial stage three meeting and then reconvened after an appointment with the consultant, but it does not appear the claimant was given that information.

107. The claimant provided a further fit note dated 24 August. This again gave the reason for absence as cervical spinal stenosis. There was no reference in it to the claimant's mental health.

108. The disciplinary hearing was held in the claimant's absence on 29 August 2018. The claimant did not submit any evidence to this hearing. The claimant said in evidence to us that she was not well enough to attend or submit evidence, and she would have submitted evidence if she had been given more time. However, there is no evidence that the claimant asked for any more time to submit evidence.

109. Janice Samuels provided a statement of case to the disciplinary hearing and presented the case for the management.

110. On 31 August 2018 the claimant was dismissed for gross misconduct and was informed of her dismissal by a letter of that date. The allegations were set out in that letter as follows:

> "That you have been fraudulent and abused Stockport Homes sick pay entitlements. Specifically that whilst claiming pay from Stockport Homes sickness scheme on the basis that you are medically unfit for work of any kind due to poor physical health, cervical spinal stenosis and carpal tunnel, you were making arrangements and had every intention to manage and run a beach bar in Malta."

111. In her letter, Jane Allen included that she rejected the claimant's explanation that the plans discussed in the conversations on WhatsApp were a fantasy. She also rejected the claimant's assertion that Jo Richardson was included in the WhatsApp group intentionally. Jane Allen concluded that, when considering all the evidence together, based on the balance of probabilities, the allegations made against the claimant were proven. She decided to summarily dismiss the claimant as she considered that the allegations were proven and gross misconduct. She informed the claimant of her right of appeal.

112. The claimant was still receiving sick pay at half pay when dismissed, and, had she not been dismissed, she would have continued to receive sick pay at half pay until around the end of November 2018.

113. The claimant appealed against her dismissal. Included in her letter, she wrote that she wanted them to consider her appeal on the basis that, regardless of what lies she told, the fact of the matter was surely she could not be sacked for something that she had not done. She wrote that she had not committed gross misconduct; she had lied due to her mental health and suffering chronic pain for over a year.

114. The claimant was invited to an appeal hearing to take place on 21 September 2018.

115. Caroline Carter wrote, at Bhavi Chauhan's request, on 13 September that she was unable to give a clear view around the claimant's physical fitness to attend work: the claimant had refused consent to enable her to write to her GP or specialist for an updated report. Caroline Carter had no medical evidence to support the claimant's reported mental health issues, and it was reasonable to suggest that there seemed little reason for her not to be well enough to attend meetings with managers or Occupational Health. She wrote that she had tried to set up face to face and telephone consultations with the claimant to discuss her overall wellbeing.

116. Jane Allen produced a statement for the appeal. We did not find this to explain exactly what Jane Allen had found that the claimant had done to amount to gross misconduct.

117. The claimant wrote on 14 October that she would not be well enough to attend the appeal. She was then informed that the appeal hearing would be on 30 October. She was asked for any written submissions and a doctor's letter by 25 October.

118. The claimant wrote a written submission for the appeal on 24 October. In this, she included that it was her son who was trialling the bar between 1 and 21 July, before she lied about going to Malta on 24 July, and it was his intention to open and manage the bar in April 2019 and that she was not, and would not be, a part of it.

She wrote that she knew Jo Richardson would report what she had sent her as she was on her team and she hated her and did not speak to her for months. The claimant wrote that she thought she could make everyone go away and leave her alone and she was not thinking straight.

119. The claimant sent a letter from her GP which stated that the claimant had been seen with stress leading to somatic anxiety symptoms relating to her recent sacking, and that she was not fit to attend a work meeting due to these symptoms at present.

120. Jane Allen wrote a response to the claimant's submission.

121. The appeal hearing was held on 30 October 2018 before an appeal panel. The panel did not see any evidence about the claimant's mental health. The panel upheld the dismissal, confirming this by a letter dated 31 October 2018.

122. The claimant contacted ACAS under the early conciliation process on 27 November 2018 and the ACAS certificate was issued on 19 December 2018. The claimant presented her claim to this Tribunal on 19 December 2018.

Additional Evidence

123. Evidence we have seen, additional to that which was before the respondent at the time of its decision making, includes the following:

(1) An expert's report from Dr Rafi. In this he wrote that he was not suggesting there was any causal link and that the claimant's mental impairment caused her to make fantasy plans. He also wrote that he did not think the medication the claimant was taking had a significant contributory cause for the way the claimant acted.

(2) Dr Rafi recorded that the claimant had told him that after sending the WhatsApp she knew about the immediate detrimental impact and that she would be sacked.

(3) The claimant agreed in evidence that she had remained off work well into 2019 and beyond, and had not been able to work for many months after the appeal.

(4) A witness statement from the claimant's son, Daniel, although he did not attend to give oral evidence. He wrote in this statement that he had made attempts to open a bar in Malta in July 2018 and May 2019 and that the steps outlined in the claimant's WhatsApp messages were his plans and things that had been executed by him.

The Law

<u>Disability discrimination</u>

124. The law relating to discrimination arising from disability is contained in section 15 of the Equality Act 2010. This provides:

> "A person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> "This 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."

125. The provisions relating to the duty to make reasonable adjustments are included in section 20 of the Equality Act 2010 and schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising 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."

126. Paragraph 20 of schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

127. "Substantial" in the Equality Act 2010 in these contexts means "more than minor or trivial".

128. For an adjustment to be reasonable it is sufficient that there is a prospect of it alleviating the disadvantage; it does not have to be certain, or even more than likely, to alleviate the disadvantage.

129. Section 136 of the Equality Act 2010 includes provisions about burden of proof, which provide that:

> "If there are facts from the court could decide in the absence of any other explanation that a person contravened the provision concerned, the court must hold that the contravention occurred, but that does not apply if that person shows that they did not contravene the provision."

130. The time limit provision for discrimination complaints under the Equality Act 2010 is normally three months beginning with the effective date of termination, subject to an extension to take account of the effects of early conciliation if ACAS is notified within the primary time limit. If the complaint is presented outside the normal time limit, then the Tribunal will only have jurisdiction if it is just and equitable to consider it outside that normal time limit. The onus is on the claimant to convince the Tribunal that it is just and equitable to extend time, in which case we must consider whether it was just and equitable having regard to all relevant circumstances.

131. Ms Levene referred us to a number of legal cases, particularly in relation to the discrimination complaints, which we have taken note of. We feel we should refer to the Court of Appeal decision in **Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265** in relation to the reference made in paragraph 99

of Ms Levene's submissions. That referred to the EAT decision in **Griffiths.** We add to what Ms Levene has said, that the Court of Appeal disagreed with the EAT in **Griffiths** on a number of points, including that the section 20 duty was not engaged simply because the policy applied equally to everyone. The Court of Appeal considered that the EAT had made an incorrect assumption that the sickness absence policy itself was the PCP rather than a requirement under the policy to maintain a certain level of attendance. At paragraph 46, the Court of Appeal commented that, if that was indeed the correct formulation of the PCP, i.e. that it was the policy itself, then the conclusion that the disabled were not disadvantaged by the policy itself was inevitable given the fact that special allowances could be made for them. The policy in question in that case permitted a more lenient application of the principles to disabled employees by permitting them longer periods of absence before the imposition of sanctions was considered, and was in fact way potentially more favourable to disabled employees.

Unfair dismissal

132. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94 of that Act provides that the employee has the right not to be unfairly dismissed by his employer. The fairness or the unfairness of the dismissal is determination by application of section 98. This provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal, and, if more than one, the principal one, and that it is a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is identified as one of the potentially fair reasons for dismissal.

133. Subsection 98(4) provides that, where the employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal, and that is to be determined in accordance with equity and the substantial merits of the case.

134. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed, and the penalty of dismissal, were within the band of reasonable responses. The burden of proof is neutral in deciding unreasonableness.

135. When we are dealing with conduct dismissals, we are guided by the authority of **British Home Stores v Burchell [1979] IRLR 379.** When considering whether the respondent has shown a potentially fair reason for dismissal, we must decide whether the respondent had a genuine belief in the claimant's guilt, and then, in considering the fairness or otherwise of the dismissal, we must consider whether the belief was based on reasonable grounds, and whether it was it formed after a reasonable investigation.

Wrongful dismissal

136. The law relating to wrongful dismissal is in what is called our "common law", developed in case law rather than being written down in statutes or statutory instruments. According to common law, an employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. However, if the employee was not in fundamental breach of contract, the contract can only be lawfully terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.

137. When we are deciding a complaint of wrongful dismissal we must consider, on the basis of the evidence before us, whether, on a balance of probabilities, the claimant was guilty of gross misconduct. This is distinct from the approach taken in unfair dismissal where we look at the information before the respondent and decide whether, on the basis of that information, it was reasonable for the employer to dismiss on those grounds and whether that decision was within what is called the band of reasonable responses. In deciding a complaint of wrongful dismissal, we have to decide whether or not there was, as a matter of fact, gross misconduct on the evidence available to us.

Submissions

138. Ms Levene, for the respondent, produced written submissions and made additional oral submissions. The claimant made oral submissions.

139. We do not seek to summarise Ms Levene's detailed written submissions, which can be read if required. Ms Levene referred us to a number of cases of which we have taken note.

140. In response to an invitation from the judge, Ms Levene provided oral submissions about why the respondent said the Tribunal should find, on the evidence before us, that the claimant was guilty of gross misconduct. These related to the claimant's alleged conduct in doing work preparing for the opening of the bar. Ms Levene's submissions relating to the facts included that the Whatsapp messages reflected detailed plans to move to a different country and open a beach bar, reflecting that the claimant had done a huge amount of work and preparation and that this amounted to dishonesty and fraud. In answer to a question about what would be the situation if the claimant was doing this work outside normal working hours, Ms Levene submitted that the Tribunal should take judicial notice that it would take a lot of time and effort and it would not be reasonable to conclude that this was done out of normal working hours. Ms Levene noted that the claimant's evidence to the Tribunal was that she was unable to function at all and submitted that, if she was unable to function in any capacity, as her sick notes said, she could not be doing this and certainly could not do it in the evenings. If the claimant was disabled to the extent that she put to the respondent, the only reasonable conclusion was that the preparatory work was not compressed into out of work hours. In relation to dishonesty, Ms Levene submitted that, if the claimant could do these administrative tasks, she could not be incapacitated to the level she put to the respondent. This

was an abuse of the sick pay scheme and fraud. If she could have done modified duties, she should have told her GP and Occupational Health.

141. The claimant made oral submissions in relation to the facts the Tribunal should find. Ms Levene noted, in reply, that the claimant raised some new matters and reminded the Tribunal that the Tribunal could not make findings of fact based on new evidence contained in the claimant's submissions. The Tribunal has not based any of its findings of fact on any new information provided in the claimant's submissions.

142. The claimant submitted that she was dismissed for fraud, for claiming sick pay, but she did not abuse the sick pay scheme. She submitted that she was dismissed for intent, which implies no fraud had taken place. She submitted that the dismissal was unfair because no fraud had taken place; there was no evidence that it had. The claimant submitted that she was treated unfavourably because of becoming disabled.

Conclusions

Discrimination arising from disability

143. We have taken the approach in dealing with the complaints of discrimination arising from disability of considering first the merits of the complaint. There are jurisdictional issues about time limits, but, to make an informed decision about whether complaints were in time and whether they formed part of a continuing act of discrimination, we decided we needed to address the merits first.

144. The first of these complaints is that, as a result of the claimant's sickness absence which arose in consequence of her disabilities, the respondent continually harassed the claimant throughout her sickness absence between 28 November 2017 and 29 August 2018 by asking her to explain her sickness absence, which further exacerbated her stress, depression and anxiety.

145. The "something arising" was the claimant's absence because of disabilities. There was no problem, we find, with the contact between the claimant and the respondent until the beginning of May 2018. After May 2018, it appears that the claimant may have perceived the contact to be harassment, but we conclude that the respondent needed to keep asking the claimant for information since the claimant was not then keeping in contact and providing information as she was required to do in accordance with the sickness absence procedure.

146. We conclude that the attempts the respondent was making to contact the claimant and ask her for information was not unfavourable treatment. The respondent needed to be sure that they had all the necessary information to make the decisions which they had to make. This was a necessary part of the respondent's absence management procedure: they needed to get the information from the claimant.

147. Since we have concluded that the efforts made were not unfavourable treatment of the claimant, this means that this complaint of discrimination arising from disability fails for that reason.

148. However, we also considered that the respondent's attempts to obtain the information would have been a proportionate means of achieving a legitimate aim. The legitimate aim relied on is identified in the List of Issues as being:

(i) Keeping the claimant up to date with what was happening in the workplace;

(ii) To keep updated as to the claimant's health and prognosis for a return to work in order to be able to make plans for covering her work, both in the short and long term; and

(iii) To identify any support or adjustments that would enable the claimant to return to work as soon as practically possible.

149. We consider that the contact with the claimant and requests for information which we have outlined in detail in our findings of fact would be a proportionate means of achieving that legitimate aim if we had needed to consider justification, but because the complaint has failed on other reasons, that is simply an additional reason for the complaint failing.

150. We therefore conclude that that complaint is not well-founded.

151. Having considered the merits of the first complaint, we then went on to consider the jurisdictional issue, that is whether we have power to consider the complaint having regard to when the claim was presented. There is a time limit issue in relation to this particular complaint.

152. The last acts in terms of trying to get contact with the claimant to seek information from her were the Occupational Health adviser acting at the respondent's request, seeking information by trying to call the claimant on 23 and 24 August 2018. The claimant went to ACAS under the early conciliation procedure on 27 November 2018, which is more than three months after that last act. It is, therefore, out of time unless it formed part of a continuing act with other acts of discrimination. Given the findings that we go on to make in relation to other matters, we have concluded that the subject matter of the first complaint did not form part of any continuing act of discrimination which would have needed to end on 28 August 2018 or a later date. The complaint was, therefore, presented out of time. We only, therefore, have power to consider it if we consider it is just and equitable in all the circumstances to do so.

153. The onus is on the claimant to explain to us why it would be just and equitable to allow the complaint to proceed out of time and to provide evidence relevant to that. The claimant has failed to provide an explanation and evidence about this. We, therefore, conclude that we have no basis on which we could find that it would be just and equitable to extend time to consider that complaint.

154. We have explained our conclusions in relation to time limits in detail in relation to this complaint. We take the same approach in relation to all the other complaints where there is a time limit issue. In relation to each of those, we find there is no basis on which to conclude that it would be just and equitable to extend time. If the complaint itself was presented out of time then we do not extend time and we do not have power to deal with it.

155. The second complaint of discrimination arising from disability is that the sickness absence procedure was engaged in consequence of the claimant's disabilities. Between 28 November 2017 and 29 August 2018, the respondent breached the sickness absence procedure by failing to offer the claimant a non-competitive interview for another role and by failing to take steps to reach an agreement with the claimant as to how the best contact might be maintained.

156. This complaint, in fact, contains two different complaints, the first being about an alleged failure to offer a non-competitive interview for another role, and the second one being failing to take steps to reach an agreement with the claimant as to how the best contact may be maintained.

157. Dealing with the first one of those, which is about the non-competitive interview, we conclude that the possibility of this simply did not arise. It could not do so until there was information before the respondent that the claimant was capable of some form of work, and, as we have noted in our findings of fact, the information before the respondent was that the claimant was not capable of any form of work, not just the Housing Officer role. Formal consideration of possible redeployment would not have happened until the stage three meeting, and the claimant never reached the stage three meeting because of the intervening events. We find, in these circumstances, that there was no unfavourable treatment by failing to offer a non-competitive interview for another role; a non-competitive interview was not applicable.

158. We agree with Ms Levene's submission at paragraph 59 of her written submissions that "further or alternatively there was a legitimate aim of following and respecting the medical evidence and information provided by the claimant which indicated that she was unable to work in any role. It was proportionate to respect this as otherwise it might have been seen as pressurising the claimant".

159. We have had some difficulty with the time limit issue in relation to this complaint because it was not entirely clear to us when the claimant was saying that the respondent should have offered this, but, taking the complaint as framed at face value, it was between 28 November 2017 and 29 August 2018. We take the view that it is being argued as an act continuing throughout that period. A complaint in respect of something at the end of that period would be in time. We consider that we have jurisdiction to consider that complaint but, for the reasons we have given, the claim fails on its merits. We concluded that it was not unfavourable treatment and additionally that not giving a non-competitive interview would be a proportionate means of achieving a legitimate aim.

160. The second part of the second complaint of discrimination arising from disability was failing to take steps to reach an agreement with the claimant as to how the best contact may be maintained.

161. We find that this complaint fails on the facts. As we have outlined, the respondent did take steps to try to agree how best to contact the claimant and respected her wishes and was flexible in terms of times of contact and the methods of contact. Again, in relation to the time issue, taking it at face value that it was over the entire period, we take the view that the complaint is brought in time, but the complaint fails on its merits and is not well-founded.

162. Moving on to the third complaint of discrimination arising from disability – this is about the issue of a first stage warning.

163. The respondent accepts, and we find, that this was unfavourable treatment in consequence of the claimant's physical impairments. We conclude, however, that the issue of the first stage warning was a proportionate means of achieving a legitimate aim. The legitimate aim relied on is identified in the List of Issues as being "making the claimant aware that her ongoing absence might in due course lead to the termination of her employment". We consider it was necessary that employees going through the process be advised of the next steps and possible consequences. The respondent acted reasonably in terms of delaying the review for information to be obtained, and we consider, by these actions, they were acting proportionately to achieve that legitimate aim. We, therefore, conclude that the complaint on its merits is not well-founded.

164. Considering the time limit issue, the issue of the stage one warning was on 29 January 2018, so a complaint about the issue of that is clearly out of time. It is not part of any continuing act of discrimination. For reasons previously given, we do not consider it just and equitable to extend time. We, therefore, conclude that we have no jurisdiction to consider that complaint but, if we did, for the reasons we have explained, we would have considered that the complaint failed on its merits.

165. The fourth complaint of discrimination arising from disability is about the issue of the second stage warning. We apply the same reasoning as in relation to the first stage warning. It was unfavourable treatment, but it was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon is the same legitimate aim as for the issue of the first stage warning. On the merits, therefore, the complaint would fail. The complaint about this was presented well out of time. It is not part of a continuing act of discrimination. For reasons previously given, it is not just and equitable to extend time.

166. The fifth complaint of discrimination arising from disability includes two parts. One of these parts is an allegation that the respondent predetermined the decision to dismiss the claimant. It is clear from the context in which this is described in number 5 that this is talking about dismissal for sickness absence rather than the conduct matter which subsequently arose. The second part of this complaint is about talking about the claimant's impending dismissal openly in the office.

167. Considering first the allegation about predetermining the decision to dismiss, we consider that this complaint on its merits would fail on the facts. There is no indication in the contemporaneous documents that a decision had been taken to dismiss the claimant because of sickness absence. Dismissal was one of a number of possible outcomes, depending on how things developed in terms of the claimant's health and her ability to return to work, but no decision had been taken and, indeed, never was, to dismiss because of sickness absence. The complaint is also presented out of time. The claimant places this in her complaint at around 8 June 2018, around the time of the alleged gossip in the office, so it is presented out time. It is not part of a continuing act of discrimination. For reasons previously given, it is not just and equitable to extend time, so we do not have jurisdiction to consider that complaint. If we had, we would find that the complaint was not well-founded on its merits.

168. The second part of that complaint is about what the claimant describes as talking about her impending dismissal openly in the office. On the facts we have found, we were not satisfied that the colleagues were talking about the claimant being dismissed, although there was some conversation about the claimant's absence and some speculation about this. There is no evidence that this was prompted by managers as opposed to colleague simply speculating on their own account, and Rebecca Cullen dealt with the matter when it arose. On the facts that complaint would fail on its merits. The complaint is also out of time, described as being on around 8 June 2018. It is not part of a continuing act of discrimination and, for reasons previously given, it would not be just and equitable to extend time.

169. The sixth complaint of discrimination arising from disability is that the claimant was informed on 19 July that she was progressing to a stage three interview. This was unfavourable treatment arising from the claimant's disabilities which gave rise to her absence. However, we conclude that this was a proportionate means of achieving a legitimate aim. The legitimate aim described for this one is "to review the claimant's current state of health and prognosis for a return to work and to identify any support or adjustments that could enable the claimant to return to work in order to assess whether or not to progress to a hearing to consider the potential termination of the claimant's employment". It is noted that the claimant wanted the date of 24 August added in as the date on which the stage three sickness interview was scheduled to take place. We consider that inviting the claimant to that meeting was a proportionate means of achieving a legitimate aim. The respondent had got to the stage where they had previously told the claimant they would be reviewing matters and they were trying to gather the evidence that they needed. In the event, the stage three meeting did not take place. Because we consider it was a proportionate means of achieving a legitimate aim, we conclude that the complaint would not be well-founded on its merits.

170. However, we also consider that we do not have jurisdiction to consider the complaint because of time limits. In the complaint, it is described as occurring on 19 July 2018 but, even taking the claimant's other date that she wanted to put forward, the complaint would be out of time. At the latest, it appears that a decision had been taken to invite the claimant to a stage three meeting on 17 August, when the invitation to the meeting on 24 August was issued. There was earlier correspondence, including the letter of 19 July, which suggested they had decided, by an earlier date, to proceed to a stage three meeting.

171. On the merits, the complaint would fail but also the complaint is out of time. It is not part of a continuing act of discrimination and, for reasons previously given, it would not be just and equitable to consider it out of time.

172. The complaint of discrimination arising from disability about unlawful deduction from wages was withdrawn by the claimant during the hearing and has been dismissed on that basis.

173. The remaining complaint of discrimination arising from disability is number (vii) in the List of Issues; the dismissal of the claimant for saying she was going to Malta to run a bar. This complaint was presented in time.

174. The respondent correctly conceded that the dismissal was unfavourable treatment. The issue for us is causation – was the dismissal because of something arising in consequence of the claimant's disabilities? The claimant has not satisfied us on the evidence that her saying she was going to Malta to run a bar arose in consequence of her physical and/or mental impairments. There is nothing to support this other than the claimant's assertion to this effect. Dr Rafi's report expresses the view that there is no connection with the claimant's mental impairment and also from the medication. There is no evidence before us, on the basis of which we could link the way that the claimant acted with her physical impairments or the medication she was taking for it. Because of this, we conclude that the complaint was not well-founded.

Failure to make reasonable adjustments

175. The first provision, criterion or practice ("PCP") is the requirement to work a set number of hours.

176. We conclude that there was a requirement to work a set number of hours in that there was a requirement to work the contractually agreed number of set hours. From 18 October 2017, this was a requirement to work the hours 10.30am to 4.30pm or 11.00am to 5.00pm, being six hours per day. As noted in our findings of fact, the claimant did not ask to reduce these hours further and Sara Mansell was discussing with the claimant weekly her workload and taking work from her.

177. There was no evidence that the claimant was put at a substantial disadvantage by the requirement to work these particular hours of six hours a day with the flexibility of starting between 10.30am and 11.00am. We conclude that she was not put at such a disadvantage. In addition, we conclude that the respondent did not know and could not reasonably have been expected to know that the claimant was at a substantial disadvantage by working those hours. We conclude that the duty to make reasonable adjustments did not arise, and, on the merits, the complaint is not well-founded.

178. However, there is also a jurisdictional point. The application of this requirement to work those hours only applied until the claimant went on sick leave at the end of November 2017. The claim was, therefore, presented out of time. It does not form part of any continuing act of discrimination and, for the reasons previously given, we have no basis on which we could find it was just and equitable to extend time. We, therefore, have no jurisdiction to consider this complaint. Even if we did, we would have found that it was not well-founded on the facts.

179. The second complaint of failure to make reasonable adjustments is about the practice of hot-desking. The respondent accepts that there was a practice of hot-desking.

180. There was not sufficient evidence to persuade us that the claimant was put at a substantial disadvantage by this practice of hot-desking. We acknowledge that Occupational Health had made a recommendation that hot-desking be restricted, and we have accepted that the claimant was upset when she came in the day after her workstation had been adjusted to find somebody had sat in her place. However, we have also made a finding of fact that the claimant did not raise any concern with

her managers about hot desking which leads us to conclude that the practice did not cause the claimant sufficient concern to lead her to raise this as an issue. The claimant's witness statement does not explain any disadvantage that she suffered because of the practice of hot desking. Sara Mansell understood that the claimant could adjust any chair and screen to make any workstation suit her. We conclude that the practice of hot desking did not put the claimant at a substantial disadvantage.

181. We also conclude that the respondent, in the face of the claimant not making any complaint about this and the understanding about the adjustments, did not know, and could not reasonably be expected to know, that the claimant would be put at a disadvantage by the practice of hot desking, notwithstanding the Occupational Health recommendation.

182. This complaint is also out of time for the same reasons we gave in relation to the first complaint of a failure to make reasonable adjustments. This practice only had any application whilst the claimant was at work. She was not at work after 27 November 2017. The complaint is out of time and does not form part of any continuing act of discrimination and it is not just and equitable to extend time.

183. The third PCP is the requirement to use a phone without a headset. We have found, as a matter of fact, that there was no requirement not to use a headset. A lot of employees did use headsets and the claimant could have had a headset had she wished to have one. Also, we have no evidence of disadvantage or that the respondent knew of the disadvantage or ought to have known of the disadvantage. The complaint would fail on its merits but, for the same reasons as in relation to the other two complaints we have dealt with, the complaint is out of time because it only applied whilst the claimant was at work prior to going on sick leave and it is not just and equitable to extend time.

184. The fourth PCP is the requirement to drive. It is accepted this remained a requirement, although we have found that that requirement was reduced in its nature, and the amount of driving was agreed with the claimant. The claimant did not raise that the amount of driving that remained as part of her job was a problem, and we had no evidence in this hearing to that effect either. We, therefore, conclude that the claimant was not at a substantial disadvantage and the respondent did not know or could not reasonably be expected to know that she was put at such a disadvantage. The complaint would fail on its merits but also, for the same reasons as before, we have no jurisdiction to consider this complaint. The requirement only applied whilst the claimant was at work. She was not at work after 27 November 2017. The complaint was presented out of time and it is not just and equitable to extend time, so we have no jurisdiction to consider the complaint.

185. The fifth complaint of failure to make reasonable adjustments is about the sickness absence procedure and the requirement to attend various sickness absence review meetings.

186. In relation to the time limit matter which we will deal with first, the claimant was being required to attend meetings on an ongoing basis until she was dismissed and, therefore, we do consider that this complaint was in time and we have jurisdiction to consider it.

187. Looking at the merits of the complaint, having regard to the Court of Appeal decision in **Griffiths**, we agree that the policy and the requirement to attend meetings does not put the claimant at a substantial disadvantage because of her physical impairments, because there is flexibility in the policy which could take account of those impairments. We also consider the policy itself does not put the claimant at a substantial disadvantage in relation to her mental health, again because the flexibility in the policy which could take account of that.

188. The respondent did not argue that they did not know or ought reasonably to have known that the claimant was disabled by reason of mental impairment, so we take it that that is accepted.

189. In relation to the requirement to attend meetings, having regard to the claimant's mental health disability, on the basis of the facts we have found we conclude that, up to May 2018, the respondent did not know that the claimant was at a disadvantage and there was no reason for them to have known reasonably that she was at such a disadvantage. She was engaging with them and attended stage one and stage two meetings, the stage two meeting being in April.

190. However, we conclude that, from May onwards, the respondent either knew or ought reasonably to have known that attending such meetings would put the claimant at a substantial disadvantage on the basis that someone with a mental impairment was likely to have more difficulty engaging with such meetings. In particular, the email from the claimant of 9 May flagged up that she was having suicidal thoughts. Contact with the claimant was becoming more difficult from May onwards. We conclude that the duty to make reasonable adjustments in relation to attending meetings and having regard to the claimant's mental health did arise from May 2018 onwards.

191. The claimant proposed two adjustments to alleviate the disadvantage: discounting her disability related absences and not progressing her through the various stages of the sickness absence procedure towards a dismissal. We are not clear that the claimant intended the first suggested adjustment to apply in these circumstances. We do not consider the proposed adjustment of discounting disability absences to be a relevant adjustment in relation to the attending of the meetings. If it was, we would not consider that that would be a reasonable adjustment to discount entirely the disability absences.

192. The other adjustment suggested is not progressing through the stages of the sickness absence procedure. By May, the claimant had already progressed through stages one and two, so we are looking at progressing towards a stage three meeting which was under consideration from May through to 29 August 2018. The information before the respondent from July 2018 was that the claimant had an appointment with a hand surgeon on 4 September which was going to give some more information. We conclude that it would have been a reasonable adjustment to tell the claimant that they would not progress her to the stage three meeting until after that appointment. We consider that could have helped to alleviate some of the anxiety the claimant, due to her mental impairment, was suffering. To that extent, we conclude that the complaint of failure to make reasonable adjustments is well-founded on its merits. For the reasons given, we have decided that the complaint was presented in time.

193. We conclude that all the other parts of the fifth complaint of failure to make reasonable adjustments are not well-founded.

194. The sixth complaint of a failure to make reasonable adjustments is expressed as the requirement "to be in frequent contact with the respondent and update the respondent on sickness absence". Because of the Tribunal's rejection of the claimant's application to amend at the hearing, this refers to the disadvantage caused by the claimant's mental impairment only.

195. We agree with the respondent that the requirement applied was not to be in frequent contact; it was to be in "reasonable" contact as opposed to what might be described as "frequent" contact. We conclude that the relevant PCP is not exactly as framed in the List of Issues. However, taking the PCP to be the requirement to be in contact and update them on sickness absence, we conclude that there was not substantial disadvantage caused by that PCP, given that the respondent was flexible in their methods and times of contact with the claimant. For example, the claimant could update the respondent in writing when she felt able to communicate. We conclude that the PCP did not put the claimant at any substantial disadvantage. Similarly, we conclude that the respondent did not know, or should reasonably have known, that the claimant would be put at a disadvantage by having to have contact with them and update them on her sickness absence, this contact being dealt with in the flexible way.

196. In terms of the time limit issue, we take the view on this that this was an ongoing matter applying throughout the claimant's employment and, therefore, the complaint was brought in time, even though, in practice, the last contact with the claimant was before 28 August. There was still an ongoing expectation of contact, so we consider that the complaint was presented in time. However, for the reasons given, we conclude that the complaint is not well-founded on the merits.

Unfair Dismissal

197. We conclude that the claimant was dismissed for reasons of conduct. The process leading to dismissal was triggered by the WhatsApp messages and the investigation that followed. There is no evidence to suggest that this intervening event was used as an excuse for dismissal for other reasons, such as the claimant's sickness absence. The two processes of the sickness absence and the disciplinary process were proceeding separately. We find no evidence that the claimant was not really dismissed for conduct as the respondent has set out in all the correspondence and its evidence.

198. We did have some concerns about the way that the allegation was set out and the conclusions in the outcome letter, which led us to question whether the respondent had concluded that the claimant was dismissed for something that she had done already or whether she was being dismissed for something that she was planning to do, or because she was intending to work elsewhere whilst claiming sick pay. We conclude, having considered Jane Allen's evidence and the outcome letter carefully, that Jane Allen concluded that the claimant had either (1) already done work preparatory for the bar opening which was inconsistent with the sick pay scheme and fraudulent, or (2) not yet done work but planned and made concrete arrangements to go to Malta on 24 July and do work managing a bar whilst still

claiming sick pay, which would be inconsistent with the sick pay scheme and fraudulent. Given the claimant's response to the allegations and limited information provided, the respondent could not be sure which of those it was but concluded that, if was not one, it was the other, and that either would be a fundamental breach of contract.

199. We conclude that there was a reasonable investigation in the circumstances. The claimant was given every opportunity to bring information to the investigatory interview and could have brought information to the disciplinary hearing either in person or in writing, but she did not attend the disciplinary hearing and did not put in any written submissions. The claimant had also not provided up-to-date medical information so the respondent could not conclude, on the basis of any up-to-date information, that the claimant was incapable of doing the work which the respondent thought she may have been doing in preparation for, or in actually running the bar.

200. We have concluded that the respondent had reasonable grounds for these conclusions, on the basis of the information before them, for these reasons. In relation to the first possibility, which is that the claimant had already done work preparatory to the bar opening which was inconsistent with the sick pay scheme and fraudulent, we considered the grounds for the respondent's conclusion not to be as strong as for the other possibility. However, we consider it is a conclusion that they could reach within the band of reasonable responses.

201. We consider that the respondent could reasonably reject the claimant's explanation of what was set out in the Whatsapp messages as being a fantasy and to get people to go away and, therefore, reasonably reject the claimant's version of events. Material before the respondent included the detail in the WhatsApp messages about the steps taken and the lack of surprise from recipients of those messages about the plans. There was no evidence before the respondent that the claimant's mental health was such that it could lead her to create such a fantasy. We consider they could reasonably conclude that the evidence that Ms Richardson was included intentionally and that the claimant by sending the messages wanted to be left alone was not credible.

202. In the claimant's account of matters in the investigatory interview, she said it was her son's plans for next year. Social media searches after the investigatory meeting showed that the bar was, in fact, opened that year. The respondent, we conclude, could reasonably infer that the claimant had not been truthful also about the extent of her involvement in the preparation for the opening of the bar and, therefore, on reasonable grounds, could reach the first of their possible conclusions, that the claimant had already done work preparatory for the bar opening which was inconsistent with the sick pay scheme.

203. Taking the second possibility, that the claimant had not yet done work but had planned and made concrete arrangements to go to Malta on 24 July and do work managing the bar whilst still claiming sick pay, that was clearly taking at face value what the claimant said in her WhatsApp messages. The respondent could reasonably do that, in the face of rejecting, for the reasons we have given, the claimant's other explanation.

204. We considered then, on the basis of the conduct which the respondent found, whether the respondent could reasonably have concluded, as stated in the outcome letter, that this was fraudulent and an abuse of the sick pay policy. In relation to the conclusion that the claimant had already done work preparatory for the bar opening, we consider the answer to this to be yes. This was fraudulent and an abuse of the sick pay policy on the basis of that finding.

205. In relation to the second, which was about the possibility that the claimant had not yet done work but had planned and made concrete arrangements to go and manage the bar, we consider that this would have been better expressed as an intention to act in a fraudulent manner, abusing the sick pay scheme by working when claiming sick pay, and doing that would have been a serious breach of trust and confidence, as indeed was referred to in the invitation letter but not then referred to again in the outcome letter. We concluded that this was still an allegation of gross misconduct and the way that it was expressed does not mean that the respondent did not conclude that this was gross misconduct.

206. Taking all things together, we have concluded that the respondent genuinely reached the conclusions it did and had reasonable grounds for doing so after a reasonable investigation. There are no procedural flaws that we consider take the process outside the band of reasonable process.

207. We consider next whether the decision to dismiss was in the band of reasonable responses. This was a serious matter and the respondent had reasonably concluded that the claimant was not telling them the truth about the matter. The claimant did not present them with any mitigating factors which were of relevance to why she had acted in this particular way. The claimant's length of service and previous good service did not act as sufficient mitigation for not considering that this matter was so serious that it warranted dismissal.

208. We, therefore, conclude that the decision to dismiss was within the band of reasonable responses.

209. The claimant was then given the right of appeal, and we conclude that the panel on the appeal could reasonably reach the conclusion that they did on the material before them. The GP note which was before them was about the claimant's mental health after dismissal, and there was no evidence before them to undermine the original decision to dismiss the claimant.

210. For these reasons, we conclude that the complaint of unfair dismissal is not well-founded.

Wrongful Dismissal

211. When considering a complaint of wrongful dismissal, we have to look at the evidence which is before us, which includes evidence which was not available to the respondent. We are considering here whether the evidence is such that, on a balance of probabilities, it leads us to conclude that the claimant had committed a very serious breach of contract or gross misconduct.

212. The respondent’s case in relation to wrongful dismissal, as explained to us in submissions, is that the claimant was guilty of gross misconduct in that, whilst

claiming sick pay, she did a substantial amount of work during work time in preparation for the opening of the bar. We have referred to various additional information in our findings of fact which was available to us but had not been available to the respondent. This included, in particular, the claimant's son's witness statement which confirmed he opened the bar in 2018 as well as 2019, and that he executed all the plans that were recorded by the claimant in her WhatsApp messages. That the bar was open in 2018 was backed up by the social media evidence which had been before the respondent. We also had evidence, obviously now with the benefit of time having passed, that the claimant was not, in fact, able to work for the rest of 2018 and through 2019, and we had the respondent's concession of disability in relation to physical and mental impairments all through the relevant period up to 29 August 2018. We find, on the basis of all that information, that the claimant was not, in fact, fit because of ill health to run a bar in July/August 2018.

213. We reject the claimant's explanation that she included Jo Richardson in the Whatsapp group intentionally; we do not think that that is a credible explanation. We also reject her explanation that she was sending the Whatsapp messages because she wanted to be left alone; that lacks plausibility. Dr Rafi's evidence does not support there being any causal connection between the claimant's mental health and her sending the messages.

214. Although we have rejected these parts of the claimant's explanation, the burden still lies on the respondent to satisfy us that the claimant had been working, making arrangements for the opening of the bar, whilst claiming sick leave. An obvious alternative possibility is that it was her son, who was resident in Malta, making these preparations and keeping his mother informed of these. On the basis of the evidence before us, the respondent has not satisfied us, on a balance of probabilities, that the claimant was engaged in work preparatory for the bar opening before 24 July 2018.

215. For these reasons we conclude that the complaint of wrongful dismissal is well-founded.

Employment Judge Slater

Date: 12 November 2021

REASONS SENT TO THE PARTIES ON

15 November 2021

FOR THE TRIBUNAL OFFICE

ANNEX
List of Issues

Unfair Dismissal

1. Was the claimant dismissed for a reason falling within s98(2) ERA 1996?

    (i) The respondent asserts that the claimant was dismissed for a reason relating to her conduct.

    (ii) The claimant asserts that the dismissal was for a reason relating to her physical and mental impairments.

2. Was the claimant dismissed for gross misconduct?

3. Did the claimant's actions amount to gross misconduct?

4. Did the respondent act reasonably in dismissing the claimant for that reason?

In particular:

    (i) Did the respondent carry out a reasonable investigation?

    (ii) Did the respondent have a genuine belief in the alleged misconduct following that investigation?

    (iii) Was dismissal within the band of reasonable responses?

5. Was the claimant unfairly dismissed?

6. Was the decision to dismiss procedurally unfair as set out in paragraph 86 section 4 of the Particulars of Claim?

7. Were any of the mitigating factors considered before the decision to dismiss was taken?

8. Did the respondent understand the nature of the claimant's disabilities before the dismissal?

Wrongful Dismissal

9. Was the respondent entitled to terminate the claimant's employment without notice or a payment in lieu of notice? The respondent asserts that the claimant was dismissed for gross misconduct.

Disability Discrimination

<u>Disability</u>

10. It is accepted that the claimant's physical impairments (cervical spinal stenosis, bilateral carpal tunnel syndrome) amounted to a disability during the

relevant period, being the period from October 2017 until the end of the claimant's employment on 29 August 2018.

11. It is accepted that the claimant's mental impairment of stress, depression and anxiety amounted to a disability during the relevant period, being the period from October 2017 until the end of the claimant's employment on 29 August 2018.

Discrimination arising from disability

12. Are any of the complaints set out at paragraph 73 and 71 (mark 2) of the Particulars of Claim well-founded? The alleged complaints are as follows:

    (i) As a result of the claimant's sickness/absence which arose in consequence of her disabilities, the respondent continually harassed the claimant throughout her sickness absence between 28 November 2017 and 29 August 2018 by asking her to explain her sickness absence which further exacerbated her stress, depression and anxiety.

    (ii) The sickness absence procedure was engaged in consequence of the claimant's disabilities. Between 28 November 20178 and 29 August 2018, the respondent beached the sickness/absence procedure by failing to offer the claimant a non-competitive interview for another role, and by failing to take steps to reach an agreement with the claimant as to how the best contact may be maintained.

    (iii) As a result of the claimant's sickness/absence which arose in consequence of her disabilities, on 29 January 2018 the claimant was issued with a first stage warning.

    (iv) As a result of the claimant's sickness/absence which arose in consequence of her disabilities, on 9 April 2018 the claimant was issued with a second stage warning.

    (v) On or around 8 June 2018, the claimant heard her colleagues were talking about the fact that she was going to be dismissed, leading the claimant to conclude that the decision to dismiss her was predetermined and was being talked about openly in the office. As a result of the claimant's sickness/absence which arose in consequence of her disabilities, the respondent predetermined the decision to dismiss her and talked about her impending dismissal openly in the office.

    (vi) As a result of the claimant's sickness/absence which arose in consequence of her disabilities, on 19 July 2018 the respondent informed the claimant that they were progressing to a stage 3 sickness interview.

    (vii) As a result of the claimant being heavily medicated and incredibly anxious, which arose in consequence of her disabilities, the claimant informed the respondent she was going to Malta to run a bar. On 29 August 2018, the respondent dismissed the claimant for saying she was going to Malta to run a bar.

(viii) [withdrawn by the claimant]

13. If yes, in each case does it amount to unfavourable treatment?

14. Did the respondent treat the claimant unfavourably by subjecting her to the alleged unfavourable treatment set out at paragraph 12 above?

15. If yes, was this because of something arising in consequence of one or both of the claimant's disabilities?

16. In respect of each complaint, upon which disability does the claimant rely? In this regard the claimant contends as follows:

(i) R treated C unfavourably by continually harassing C between 28 November 2017 and 29 August 2018, by asking her to explain her sickness absence which further exacerbated her stress, depression and anxiety. C contends she was treated unfavourably because of her sickness absence which predominantly arose in consequence of her **physical impairments.**

(ii) Between 28 November 2017 and 29 August 2018, R treated C unfavourably by failing to offer C a non-competitive interview for another role, and by failing to take steps to reach an agreement with C as to how best contact may be maintained as prescribed by the sickness absence procedure. C contends that the unfavourable treatment was because of her sickness absence which predominantly arose in consequence of her **physical impairments.**

(iii) On 29 January 2018, R treated C unfavourably by issuing her with a first stage warning. C contends that the unfavourable treatment was because of her sickness absence which predominantly arose in consequence of her **physical impairments.**

(iv) On 9 April 2018, R treated C unfavourably by issuing her with a second stage warning. C contends that the unfavourable treatment was because of her sickness absence which predominantly arose in consequence of her **physical impairments.**

(v) On or around 8 June 2018, R treated C unfavourably by pre-determining the decision to dismiss C and by allowing the dismissal to be talked about openly in the office. C contends that the unfavourable treatment was because of her sickness absence which predominantly arose in consequence of her **physical impairments.**

(vi) On 19 July 2018, R treated C unfavourably by informing her that they were progressing to a stage 3 sickness interview scheduled for 24 August. C contends that the unfavourable treatment was because of her sickness absence which predominantly arose in consequence of her **physical impairments.**

(vii) On 29 August 2018, R treated C unfavourably by terminating her employment because C had said she was going to Malta to run a bar. C

said she was going to Malta because she was heavily medicated and incredibly anxious. C therefore contends that R treated her unfavourably due to being heavily medicated and anxious which arose in consequence of both her **physical** and **mental impairments.**

(viii) On 14 September 2018, R treated C unfavourably by unlawfully deducting from C's wages. C contends that the unfavourable treatment was because of her WhatsApp message dated 24 July 2018 which arose in consequence of both her **physical** and **mental impairments.**

17. Did the officer who took the decision to dismiss send the email saying, 'If it's affecting her mental health, as she claims, do we need another referral to occupational health?'

18. Did HR send the email in response to the question 'Is she abroad? 'No'.

19. In each case, if the respondent treated the claimant unfavourably because of something arising in consequence of one or both of the claimant's disabilities, was the treatment a proportionate means of achieving a legitimate aim? In this regard the respondent contends as follows:

(i) It is denied that the respondent continually harassed the claimant as she alleges. If which is denied, it is held that the respondent's level of contact with the claimant amounts to unfavourable treatment, the respondent submits that its contact with the claimant was a proportionate means of achieving a legitimate aim, namely to keep the claimant up to date with what was happening in the workplace, to keep updated as to the claimant's health and prognosis for a return to work in order to be able to make plans for covering her work both in the short and long term, and to identify any support or adjustments that would enable the claimant to return to work as soon as practicably possible.

(ii) It is denied that the respondent treated the claimant unfavourably by failing to offer her a non competitive interview for another role. The claimant confirmed to the respondent at her first stage review meeting in January 2018 and thereafter that she was unable to work in any capacity so the issue of alternative roles did not arise.

(iii) It is denied that the respondent treated the claimant unfavourably by failing to take steps to reach an agreement with the claimant about how best the contact may be maintained. Sara Mansell of the respondent agreed with the claimant to speak regularly (every couple of weeks) by telephone in the late afternoon (to allow for the effects of the claimant's medication) and the claimant advised that she would also provide any updates as they occurred. The respondent also communicated with the claimant by email. If, which is denied, it is held that the respondent's method of contacting the claimant by telephone and/or email amounts to unfavourable treatment, the respondent submits that contacting the claimant in this way was a

proportionate means of achieving a legitimate aim, namely to keep the claimant up to date with what was happening in the workplace, to keep updated as to the claimant's health and prognosis for a return to work in order to be able to make plans for covering her work both in the short and long term, and to identify any support or adjustments that would enable the claimant to return to work as soon as practicably possible.

(iv) It is submitted that the issue of a first stage warning on 18 January 2018 was a proportionate means of achieving a legitimate aim, namely to make the claimant aware that her ongoing absence might in due course lead to the termination of her employment.

(v) It is submitted that the issue of a second stage warning on 5 April 2018 was a proportionate means of achieving a legitimate aim, namely to make the claimant aware that her ongoing absence might in due course lead to the termination of her employment.

(vi) It is denied that the respondent "predetermined" to dismiss the claimant on or around 8 June 2018. The respondent cannot comment on office gossip but there was no reason for the claimant's colleagues to believe that the claimant was to be dismissed.

(vii) It is submitted that progressing to a stage 3 sickness interview was a proportionate means of achieving a legitimate aim, namely in light of her ongoing sickness absence, to review the claimant's current state of health and prognosis for a return to work and identify any support or adjustments that could enable the claimant to return to work, order to assess whether or not to progress to a hearing to consider the potential termination of the claimant's employment. [The claimant requests that the date 24 August is added in here as the date on which a stage 3 sickness interview was scheduled to take place].

(viii) It is denied that the claimant's dismissal amounts to a discrimination. The claimant was dismissed for gross misconduct and not because of something arising in consequence of any disability. If, which is denied, it is held that the claimant's dismissal was because of something arising in consequence of a disability, it is submitted that in light of the evidence of the claimant's dishonesty, dismissal was a proportionate means of achieving a legitimate aim, namely that the respondent needs to maintain trust and confidence in its employees and so required its employees to be honest in their dealings with the respondent.

(ix) It is denied that the respondent made an unlawful deduction from the claimant's wages on 14 September 2018.

20. Have any of the claimant's complaints been brought out of time? In this regard the respondent contends that the claimant contacted ACAS for early conciliation on 27 November 2018 and the claim was lodged on 19 December 2018. It is submitted therefore that the complaints referenced at paragraph

12(vi) and 16(vi) above and all the complaints relating to the physical impairments which precede it are out of time.

21. If yes, has there been a continuing act of discrimination which brings any such complaints into time?

22. If no, would it be just and equitable to extend time?

Failure to make reasonable adjustments

23. Did the respondent apply any of the PCPs set out at paragraph 75 of the Particulars of Claim to the claimant? The alleged PCPs are as follows:

(i) The requirement to work a set number of hours.

(ii) The practice of hot desking.

(iii) The requirement to use a phone without a headset.

(iv) The requirement to drive.

(v) The sickness absence procedure and the requirement to attend various sickness absence review meetings.

(vi) The requirement to be in frequent contact with the respondent and update the respondent on sickness absence.

24. Did the respondent know or ought the respondent reasonably to have known that the claimant was substantially disadvantaged by any of the PCPs set out at paragraph 23 above because of one or both of her disabilities?

25. Did the respondent fail to comply with its obligation to make reasonable adjustments in respect of any of the PCPs set out at paragraph 23 above, as alleged in paragraph 76 of her Particulars of Claim and as set out in paragraph 26 above?

26. In respect of each alleged failure, upon which disability does the claimant rely? In this regard the claimant contends as follows:

(a) R applied the PCP of requiring employees to work a set number of hours. R's application of this PCP put C at a substantial disadvantage because it forced C out of work and into sickness absence, which in turn resulted in less pay for C, deterioration of C's mental health and the eventual termination of C's employment. The substantial disadvantage was caused by both C's physical and mental impairments. R should have made the reasonable adjustment of further reducing C's working hours, between 27 October 2017 and 29 August 2018.

(b) R applied the PCP of "hot desking". R's application of this practice put C at a substantial disadvantage because it upset C, forced her out of work and into sickness absence, which in turn resulted in less pay for

C, a deterioration of C's mental health and the eventual termination of C's employment. The substantial disadvantage was caused by both C's physical and mental impairments. R should have made the reasonable adjustment or removing the requirement for C to "hot desk" between 27 October 2017 and 29 August 2018.

(c) R applied the PCP of requiring employees to use a phone without a headset. R's application of this practice put C at a substantial disadvantage because it forced her out of work and into sickness absence, which in turn resulted in less pay for C, a deterioration in C's mental health and the eventual termination of C's employment. The substantial disadvantage was caused by both C's **physical and mental impairments.** R should have ordered C a headset for her phone, between 27 October 2017 and 29 August 2018.

(d) R applied the PCP of requiring employees to drive. R's application of this practice put C at a substantial disadvantage because it forced her out of work and into sickness absence, which in turn resulted in less pay for C, a deterioration in C's mental health and the eventual termination of C's employment. The substantial disadvantage was caused by both C's **physical and mental impairments**. R should have eliminated the need for C to drive, between 27 October 2017 and 29 August 2018.

(e) R applied the PCP of counting disability related absence and requiring employees to attend to attend various sickness absence review meetings. R's application of this practice put C at a substantial disadvantage because it exacerbated C's stress, anxiety and depression and prevented R from taking steps that may facilitate C's return to work. The substantial disadvantage was caused by both C's **physical and mental impairments**. R should have discounted C's disability related absences, and not progressed C through the various stages of the sickness absence procedure towards a dismissal, between 28 November 2017 and 29 August 2018.

27. R applied the PCP of requiring employees to be in frequent contact with R and update R on sickness absence. R's application of this practice put C at a substantial disadvantage because it greatly exacerbated C's stress, anxiety and depression, and that anxiety caused C to say she was going to Malta to run a bar which resulted in her dismissal. The substantial disadvantage was caused by C's **mental impairment**. R should have taken steps to reach an agreement with C as to how best the contact may be maintained, between 28 November 2017 and 29 August 2018.

28. Have any of the claimant's complaints been brought out of time? In this regard the respondent contends as follows:

(a) The complaints referenced at paragraph 23 above relate to adjustments which the claimant alleges should have been made following an OH report of 27 October 2017. The very last date on which the respondent might reasonably have been expected to make any such adjustment was 18 January 2018 when the claimant

confirmed to the respondent at her first stage sickness review meeting that there was nothing that could be altered in her role to enable her to return to work at the present time. The claimant contacted ACAS for early conciliation on 27 November 2018 and the claim was lodged on 19 December 2018. It is submitted therefore that these complaints are out of time.

(b) The complaints referenced at paragraph 23 above relate to adjustments which the claimant alleges should have been made to the respondent's sickness absence procedures and the nature of the contact with the claimant. The most recent complaint in this regard is set out at paragraph 58 of the Particulars of Claim, namely that the respondent informed the claimant on 17 August 2018 that it was progressing to a stage 3 sickness interview. The claimant contacted ACAS for early conciliation on 27 November 2018 and the claim was lodged on 19 December 20918. It is submitted therefore that these complaints are out of time.

29. If yes, has there been a continuing act of discrimination which brings any such complaints into time?

30. If no, would it be just and equitable to extend time?

Unlawful deductions from wages

31. [withdrawn by claimant]

Compensation

32. If the claimant is successful in her claim for wrongful dismissal, what damages should she be awarded?

33. If the claimant is successful in her claim for unfair dismissal, what compensation should she be awarded?

34. If the claimant is successful in her claim for disability discrimination, what compensation should she be awarded?

35. Should there be a deduction from any compensation awarded to the claimant under the principle in **Polkey v A E Dayton Services Limited**?

36. If so, what should that deduction be?

37. Should any compensation awarded to the claimant be reduced because of her contributory fault?

38. If so, what should that reduction be?

39. Should any compensation awarded to the claimant be reduced because of an unreasonable failure on the part of the claimant to raise a grievance in respect of her complaints of discrimination in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

40. If so, what should that reduction be?

41. Should any compensation awarded to the claimant be reduced because of an unreasonable failure on the part of the claimant to attend the disciplinary and/or appeal hearings in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

42. If so, what should that reduction be?

43. Has the claimant taken reasonable steps to mitigate her loss?

44. Should any reduction be made to any compensation or damages awarded to the claimant because she has failed to mitigate her loss?