Case Numbers: 3320627/2019 & 3320628/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C Scotland	v	British Airways plc

Heard at: Watford **On**: 25-28 October 2021

Before: Employment Judge Hyams **Members:** Mrs C Grant
Ms L Jaffe

Representation:

For the claimant: Mr A Ali, claimant's colleague
For the respondent: Ms E Gordon-Walker, of counsel

UNANIMOUS JUDGMENT

1. The claimant's claims of wrongful dismissal, direct discrimination within the meaning of section 13 of the Equality Act 2010 ("EqA 2010") because of race and/or sex and/or disability, and of a failure to make one or more reasonable adjustments within the meaning of section 20 of that Act, do not succeed and are dismissed.

2. The claimant's claim of a breach of section 15 of the EqA 2010, contrary to section 39 of that Act, succeeds to the extent stated in paragraphs 63-65 of the reasons set out below.

3. The compensation which the claimant should receive for that breach of section 15 is in the agreed sum of £2,000, on which no interest is payable.

REASONS

The claims

1 By a claim form presented on 25 April 2019, the claimant claimed (by ticking the boxes on page 6 of the claim form and putting the words "Wrongful Dismissal" in

the box on that page) unfair dismissal, wrongful dismissal, and that she was discriminated against because of race, disability and sex. The claimant was employed by the respondent only from 8 March 2018 to 21 February 2019, so she did not have the right to claim unfair dismissal and the details of the claim did not state such a claim.

2 The claimant commenced a period of early conciliation on 18 March 2019 and the early conciliation certificate (at page 21 of the hearing bundle; any reference to a page below is, unless otherwise stated, to a page of that bundle) was issued on 18 April 2019.

3 The claim of wrongful dismissal was not based on any failure to give the claimant proper notice, as she was given pay in lieu in that regard. The claim of wrongful dismissal was, rather, based on the proposition that the claimant had completed her probationary period and that the respondent should as a result have followed its disciplinary procedure in deciding whether or not she should be dismissed.

The issues determined by us at trial

4 There was a case management hearing conducted by Employment Judge ("EJ") Hawksworth on 23 January 2020, the record of which was at pages 51-60. The liability issues to be determined at trial were recorded there in paragraph 4 at pages 54-56, in the following manner.

> "*Probation period (disputed issue of fact)*
>
> 4.1 The respondent says that the claimant was dismissed under its probation policy, the claimant says that she was no longer In her probation period at the time of her dismissal. Determination of the claimant's complaints may include determination of this disputed factual issue.
>
> *Wrongful dismissal (breach of contract)*
>
> 4.2 Did the claimant have a contractual entitlement that the respondent would follow a disciplinary procedure before dismissal?
>
> 4.3 If so, was the claimant dismissed in breach of contract?
>
> 4.4 If so, what loss has the claimant suffered and what is the correct measure of damages?
>
> *Disability (section 6 and schedule 1 of the Equality Act 2010)*
>
> 4.5 Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s):

a. Endometriosis;
b. Uterine fibroids.

Direct discrimination because of race, sex or disability (section 13 of the Equality Act 2010)

4.6 Did the respondent treat the claimant less favourably by dismissing her? The claimant relies on Mr K Monjal as a comparator; the respondent contends that Mr Monjal is not an appropriate comparator in accordance with section 23 of the Equality Act 2010.

4.7 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race, sex or disability?

4.8 If so, what is the respondent's explanation? Does the respondent prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability (section 15 of the Equality Act 2010)

4.9 Did the respondent treat the claimant unfavourably by dismissing her?

4.10 If so, did the following things arise in consequence of the claimant's disability:

a. the claimant's sickness absence between 11 December 2018 and 23 January 2019;
b. the claimant's need to be on restricted duties after her return to work on 23 January 2019;
c. the claimant's difficulty walking and need for bathroom breaks after her return to work on 23 January 2019.

4.11 If so, did the respondent dismiss the claimant because of any of those things?

4.12 If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim?

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

Reasonable adjustments (sections 20 & 21 of the Equality Act 2010)

4.14 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. required standards of attendance;
b. required standards of performance (including under the probation policy);
c. the sickness absence policy.

4.15 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, because:

a. she had to have a period of sickness absence following surgery;
b. she had to return to work on restricted duties, had difficulty walking, required more bathroom breaks and had anaemia and tiredness.

4.16 If so, did the respondent know or could it reasonably have been expected to know that the claimant was disabled and that she was likely to be placed at any such disadvantage in comparison with persons who are not disabled?

4.17 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. Allowing the claimant to start work a bit later;
b. Giving the claimant more time to recover after her return to work rather than dismissing her;
c. Allowing the claimant a phased return to work;
d. Allowing the claimant a phased support programme, including shadowing or working with a colleague;
e. Extending the probation period (if the claimant was still in one) rather than dismissing her;
f. Allowing the claimant a monitored period under the performance management plan and/or under the sickness absence procedure rather than dismissing her;
g. Referring the claimant to OH;
h. Providing the claimant with counselling;
i. Adjusting any sickness absence trigger levels which were applied to the claimant.

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

4.19 Insofar as the respondent failed to make adjustments, when is that failure said to have taken place?

Less favourable treatment of a part-time worker (Regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000)

4.20 Has the claimant been treated less favourably than the respondent treats or treated a comparable full time worker by being dismissed? The claimant relies on Mr K Monjal as a comparator. The respondent contends that Mr Monjal Is not an appropriate comparator.

4.21 If so, was the treatment on the ground that the claimant is a part-time worker?

4.22 If so, was such treatment justified on objective grounds? The respondent relies on the legitimate aim of ensuing staff on their probationary period achieve the standards expected by the respondent and have an acceptable level of attendance and time keeping.

Remedy

4.23 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, how much should be awarded."

The evidence which we heard

5 We heard oral evidence from the claimant on her own behalf, and, on behalf of the respondent, from (1) Ms Nicola Drinkwater, who was, and remains, employed by the respondent as a Heathrow Services Manager, and (2) Ms Abigail Goodwin, who was at the material times employed by the respondent as "Head of HR - People Department".

6 There was a bundle of 523 pages before us, and we read the parts of it to which we were referred by the parties.

7 Having heard and read that evidence, we made the findings of fact stated in the next section of these reasons. While that section is headed "Our findings of fact", in some critical respects, we state the relevant evidence before stating our conclusions about precisely what occurred. Having stated those conclusions, we refer to the relevant statutory provisions and case law, after which we state our conclusions on the claims before us. Before doing so, we record that at the start of the hearing, Ms Gordon Walker (to whom we were grateful for her assistance) said that the respondent (1) did not contest the issues stated in paragraphs 4.5; 4.9; 4.10(a)-(b); 4.13 and 4.14 of the list of issues and (2) conceded that the claims were presented in time, so that the issues raised in paragraphs 4.18 and 4.19 of that list were also no longer "live".

Our findings of fact

The contractual terms under which the claimant was employed and related factual matters

8 The claimant was employed by the respondent from 8 March 2018 onwards as a "Customer Service Representative – Seasonal". Her contract of employment was in the form of the letter at pages 63-75. On page 65, there were these words:

> "**6. Probationary Period**
>
> The first 6 months of your employment with the Company is probationary during which time your employment will be under review. This period may be extended by the Company at its sole discretion. At the end of your probationary period, your employment will either be confirmed or terminated. You and the Company may give one week's notice to terminate your employment during or at the end of the probationary period."

9 However, under paragraph 26 of the letter, at the top of page 73, headed "Notice period", the respondent was required to give only "1 week's notice for each complete year of service up to a maximum of 12 weeks' notice". On its face, that permitted the respondent to give less than a week's notice, but it was subject to the terms of section 86(1)(a) of the Employment Rights Act 1996, which required the giving of a week's notice after a month of continuous employment. In any event, no advantage in terms of the right to notice would be acquired by the claimant under her contract of employment by reason of the ending of her probationary period.

10 Under the heading "Staff Rules", paragraph 9 of the claimant's contract of employment provided (page 65):

> "You are required to comply at all times with the Company's staff rules, policies and procedures in force from time to time, including Company standing instructions and those set out in the 2010 Employment Guide (the Guide). The Guide is non-contractual and its contents are not incorporated into this contract. Where the contents of your contract and the Guide vary, the contents of this contract apply."

11 Paragraph 21 of the claimant's contract of employment (page 71) started in this way:

> "**21. Dispute Resolution**
> The Company's disciplinary and grievance procedures are set out in the Guide."

12 Ms Goodwin's oral evidence (which we accepted in this regard) was that at some point before the claimant was employed by the respondent, the respondent's

written guidance relating to the employment of staff in the kind of role which the claimant held expressly stated that if an employee had three (or more) instances of late arrival at work, i.e. the place where at Heathrow Airport they were required to carry out their duties, then an absence review meeting (with the potential as a result of disciplinary action) would be "triggered". However, there was nothing formally to that effect in the claimant's contract of employment or the Employee Guide to which that contract referred in paragraph 9 of the contract. Ms Drinkwater's witness statement contained in paragraph 3 this passage (which we accepted, although the word "confirm" is odd, since there was nothing confirmatory about the first sentence):

> "I can confirm that the Claimant was managed under local probationary guidelines in accordance with the acceptable and reasonable standards and behaviours of those within a probationary period. These informal guidelines were developed by a team of 8 of us to give structure and consistency to how probationary employees were managed. They were not written down but formed an informal framework for us when deciding on whether an employee had passed their probation period. One of these informal guidelines related to instances of lateness and if an employee had 3 or more instances of lateness then this would be an indicator that they would not pass their probation period."

13 Ms Drinkwater was employed by the respondent as a Probation Manager. That was her only function, so that she had no other role and was not responsible for line managing the claimant. Rather, Ms Drinkwater was responsible for deciding whether a number of employees had successfully completed their probationary periods and, if they had not done so, whether or not to extend their probationary periods. At the end of such an extension, it was Ms Drinkwater who decided whether or not the employment of the employees in question should be continued or terminated.

14 The claimant's contract was for an annual number of hours. The number and way in which that number was to be worked were stated in paragraph 11 of the contract at page 66, in the following manner.

> "You are required to work 834 hours a year, including paid holiday.
>
> You be [sic] required to work for such hours and on such days as notified by the Company from time to time. Unless you have signed an opt-out agreement stating otherwise, you will not be required to work more than 48 hours per week. The Company reserves the right in its absolute discretion to determine the hours and days on which you are required to work.
>
> You also agree that you will volunteer to be on stand-by for 10 days between November and March. On such days you shall be available to work at short notice if required by the Company. Both you and the Company will agree which 10 days will be 'stand-by' days prior to November. You will not receive

payment for stand-by days unless you are required to work them (in which case you will be paid in accordance with clause 11 for hours worked).

The operation runs 24 hours a day and 365 days a year so shifts can fall at any time on any day of the week including weekends and bank holidays. The Company reserves the right to vary your hours at any time to meet its operational needs."

The circumstances which led to the claimant's dismissal

15 On 7 September 2018, Ms Drinkwater sent the claimant the letter at page 76. That was the final day of the first six months of the claimant's employment, and the letter was sent by post rather than by email, so it was bound to arrive outside that six-month period. It was the claimant's evidence that the letter arrived on 13 September 2018. Whether or not it arrived then or before then, we accepted that it was received by the claimant only after the ending of the first six months of her employment. The letter invited the claimant to a "probation review meeting on 11th of September 2018", and stated that the purpose of the meeting was "to discuss [the claimant's] progress during [her] six month probationary period".

16 Ms Drinkwater's witness statement described what happened in regard to the meeting as follows:

"8. By letter dated 7 September 2018 (see page 76) I invited the Claimant to attend a probationary review meeting on 11 September 2018 but she did not attend.

9. On 7 October 2018 the Claimant emailed (see page 79) me to explain she had not received the letter inviting her to a probationary review until after 11 September 2018 and had not been in touch earlier as she had been unwell. I rescheduled the probationary review meeting and it took place on 17 October 2018. On the day of the meeting the Claimant was late. As a result of that meeting I decided to extend the Claimant's probationary period until 8 January 2019 as stated in my outcome letter (see page 80).

10. My reasons for extending the probationary period are explained in the outcome letter but primarily I had concerns about the Claimant's attendance, in particular, the high number of lateness occurrences which totalled 10 occasions in just 3 months (see page 80), far in excess of the 3 occasion trigger point. As the occasions of lateness were so high I did consider whether to terminate her employment at that stage but decided to extend the probationary review to give her the chance to improve her attendance levels particularly in relation to her time keeping. An extended probationary period is – the same as a probationary period – subject to a review meeting sometime on or

around or around [sic] the end date and a decision as to whether employment is continued or terminated is given, in writing.

11. As there had been a slight delay in meeting for the employee's first probation meeting due to her shift pattern and sickness absence I extended the Claimant's probationary period by 4 months (as opposed to the usual 3 months) to allow for her to have the full 3 months to demonstrate improvement in her time keeping. I did this to ensure the Claimant was treated fairly and consistently the same as all other probationary employees who may have been on an extended probationary period."

17 We accepted those paragraphs of Ms Drinkwater's witness statement, although we regarded the terms of the letter at pages 80-81 as being the best evidence of what was in Ms Drinkwater's mind at the time, and we refer in detail to the terms of that letter below, when considering precisely what was the cause of the claimant's dismissal. We also accepted the following paragraphs of Ms Drinkwater's witness statement up to and including the first two sentences of paragraph 19 with the exceptions stated below. We did so in part because much of that passage was in accordance with the claimant's own evidence.

18 The sequence of relevant events which preceded the claimant's dismissal was as follows.

19 On 19 October 2018, Ms Wambui Wanguhu sent the claimant the letter at page 94, which (1) was dated 19 October 2018, (2) recorded that the claimant had been absent from work for four working days, namely 8-11 September 2018 inclusive, and (3) invited the claimant to an "Absence Review Meeting" on 24 October 2018 as that absence had "triggered Level 1 of Section 2.7 Managing Attendance of Our Colleague Guide". At that meeting, Ms Wanguhu was intending to "establish the background, nature and reasons for [the claimant's] absences." The meeting occurred, and on 30 October 2018, Ms Wanguhu sent the claimant the letter of that date at page 95, which recorded that Ms Wanguhu had issued the claimant with "an attendance improvement notice and a written warning" which was to be valid for six months from 30 September 2018. The letter informed the claimant of the right to appeal against that decision, but the claimant did not exercise that right. The letter recorded that the claimant had told Ms Wanguhu that she had "fibroids and endometriosis, which causes excessive bleeding". The letter continued:

> "You told me you have been referred to a consultant but for now you feel fit enough to be at work. I asked if there was any support you required at work and you declined."

20 On 12 November 2018, the claimant sent Ms Drinkwater the email at page 96, which so far as relevant was in these terms:

> "I am due for hospital admission on 11th December for an abdominal myomectomy due to my fibroids and endometriosis reaching the stage of disability which in turn affects my work and life in general greatly. To put it into perspective, my uterus is the same size as a five and a half month pregnancy due to the tumours.
>
> The recovery period is about 4 weeks however I have concerns as to how this may affect my probation.
>
> I need to have this surgery on this date as I have been having treatment for the last three months to help shrink the fibroids before surgery and it is not recommended for me to continue the treatment any longer than three months as it has induced me into menopause which can trigger osteoporosis. My third and last treatment will be on the 14th November.
>
> Please find attached a copy of my admission letter. I took forward to hearing from you."

21 Ms Drinkwater did not reply in writing, but she did speak to the claimant in person, who then on 19 November 2018 sent the text at pages 138-139 which so far as relevant was in these terms:

> "Hello Nicola
>
> Thank you for your kind words today. I feel much better as you have assured me everything regarding my surgery and my probation will be fine."

22 As Ms Drinkwater recorded in paragraph 15 of her witness statement, the claimant was "signed off by her GP for 2 weeks from 15 December 2018." In the preceding paragraph of her witness statement, Ms Drinkwater recorded that the claimant was sent an email on 18 December 2018 (i.e. while she was signed off by her GP as not being fit to work) by her line manager, Ms Nazia Jabeen, about her lateness. We were unimpressed by the fact that the claimant was sent such an email while she was absent from work on account of sickness, but it appeared that it had occurred because the respondent's computer systems had generated what Ms Drinkwater called in paragraph 14 of her witness statement "an automated alert report". Ms Drinkwater's witness statement continued:

> "I was unaware of this report at the time and Nazia was also unaware that I had raised the high number of occasions of lateness in the probation review meeting. The Claimant explained to her Line Manager that she had already taken part in a probationary review meeting with me, her Probation Manager and so no further action was taken by Ms Jabeen as it was being managed and reviewed by me as part of the probation extension."

23 In fact, there was no discussion during which the claimant "explained" anything. Rather, the claimant responded to the email of Ms Jabeen (which was at pages 103-104) in the email at pages 102-103, which was in these terms:

> "Thank you for your email,
>
> I have already had a meeting discussing my lateness with Nicola [i.e. Ms Drinkwater] and I have had no further issues of lateness since then.
>
> I will however follow your advice and will email you with a reason should I ever be late again in the future."

24 The claimant's probationary period was ended by Ms Drinkwater on 21 February 2019 after a sequence of events which started with Ms Drinkwater sending the letter dated 13 February 2019 at page 105, inviting the claimant to a meeting to "discuss [her] progress during [her] extended probationary period", which was to take place on 16 February 2019. In her witness statement, Ms Drinkwater said that the meeting in fact took place on 21 February 2019, but at the hearing before us she accepted that that was wrong and that the meeting started on 16 February 2019 and was adjourned, after which it was resumed on 21 February 2019.

25 The claimant was accompanied at the meeting by a representative of her trade union, Mr Chris Fenner. The meeting was adjourned after (as described by Ms Drinkwater in paragraph 17 of her witness statement, albeit that she had when she wrote it forgotten that the adjournment to which she referred there was between 16 and 21 February 2019 and was not "for a short period") "the Claimant suggested she had been late due to the amount of walking time it takes to get to the allocated working position and that she had arrived in the terminal on time."

26 Paragraph 17 of Ms Drinkwater's witness statement continued:

> "17. ... In consideration of this I decided to investigate and the meeting was adjourned for a short period for me to check this. When the meeting reconvened and after speaking with HR, I explained to the Claimant that under the Respondent's policies (under which the Claimant was managed) there was no walk time allowance which meant the shift start time is the time colleagues need to be at the work position and it was the colleague's responsibility to make sure they were there on time. The Claimant did not say that this was in any way linked to her medical condition or the operation she had. Her point was simply that she didn't think she was late as she was in the terminal on time just not at the part of the terminal where she was working.
>
> 18. The Claimant also raised the point that on some occasions she was late due to travel incidents such as train strikes. I explained that in this case

> and when an incident happens that is beyond anyone's control all staff may be allowed an exceptional period of walk-time. However, in regards to the Claimant's lateness, this happened on only 2 of the 15 occasions of lateness and on both occasions the Claimant was still significantly late, even with the exceptional walk-time added on."

27 There was in the bundle at page 201 a document recording those 15 occasions (and we checked the number recorded in that document: it was indeed 15). The reasons for the 15 occasions of lateness were all "Late Swipe", except for the lateness of 17 October 2018, which was the worst (in terms of time) lateness (it was of 17 minutes), the reason for which was stated to be "Traffic".

Ms Drinkwater's stated reasons for determining that the claimant's probationary period should be ended by her dismissal

28 At the meeting of 21 February 2019, Ms Drinkwater gave the claimant the letter at pages 112-113. It was dated 21 February 2019 and started "We met today 16th February 2019 to discuss your month probationary period as Customer Service Representative" (sic). The relevant part of the letter was in these terms:

> "During [your employment] your performance has been assessed and as we have discussed how you have not achieved the standards that we expect. Your attendance level is unacceptable, you have been late to work on 13 [sic] separate occasions between March 2018 and February 2019, and taken 4 days as depencey [sic] leave, one of which you had requested leave and it had not been authorised.
>
> I have taken into account that you had a planned medical procedure on the 11th December 2018, which you have been recovering from and signed off work by your GP between 15th December 2018 - 2nd Februay [sic] 2019, however the seasonal roster that you were working offers vast amounts of flexibility to swap shifts and work on available rest days prior or post your procedure.
>
> A further three further occasions of lateness on the 24th of Octbober [sic] 2018, 7th November 2018 and 2nd February 2019 following our review meeting and my letter to you dated 17th October 2018 extending your probationary period due to concerns regarding your attendance and performance.
> This level of performance is unacceptable to British Airways and does not meet the standard required during your probationary period."

29 In assessing what, precisely, were Ms Drinkwater's reasons for deciding that the claimant's probationary period should be ended by the claimant being dismissed, we looked with care at the letter at pages 80-81, which recorded the reasons for the extension of the claimant's probationary period. That letter, after two introductory paragraphs, was in these terms.

"The reason for my decision to extend your probationary period is due to the following attendance issue which we discussed at the review meeting:

Year	Period	Absence Dates
2018	Dependency days	30/3/2018, 6/7/2018, 24/7/2018 17/8/2018,
2018	Sickness	8/9/2018 - 11/9/2018
2018	Lateness	31/5/2018, 24/6/2018, 17/7/2018, 23/7/2018, 01/8/2018, 04/08/2018, 08/04/2018, 15/8,2018, 28/8/2018, 01/09/2018

You advised me you that you have childcare challenges especially during school holidays as your mother is your only support, you mentioned that you will ask another family member. I stressed the importance of building your support network to enable you to fulfil your rostered shifts and suggested some ways which you may wish to consider going forward. Attendance is particularly over busy periods such as school holidays, has a serious impact on our ability to deliver for our customers. [Sic]

In the Heathrow Directorate we all have a responsibility to protect the interests of our customers and thereby the interests of our business and all colleagues. In order to sustain the operation and ensure we meet and exceed our customers' expectations, we must all attain consistent levels of attendance.

Taking all the above into account, I have come to the decision to extend your probation period by a further four months in order for you to be able to consolidate your attendance and to further demonstrate to me your continued commitment to the British Airways vision.

Failure to improve on the above areas, or any further occasions of poor conduct, performance or attendance, could impact on your extended probationary period and may result in a review of your continued employment. If you would like to discuss any of the above areas, please do not hesitate to call me."

30 Those two letters indicated that the claimant's absences through sickness might be a partial cause of Ms Drinkwater's decision that the claimant's employment should be terminated. We saw that in paragraphs 20-22 of her witness statement, Ms Drinkwater said this:

> "20. As discussed in the meeting and explained in the outcome letter, during the Claimant's probationary period and extended probationary period there were sickness and dependency leave absences. These were discussed to give a complete picture of the Claimant's employment history but were not material in my decision to terminate her employment.
>
> 21. In regards to the Claimant's time off due to her planned surgery and recovery time, I did not expect nor ask her to swap shifts or take annual leave to cover those days off. However, I am aware that some colleagues do swap shifts and / or use annual leave day for such absences and had explained this to the Claimant as an example of a way in which would have demonstrated her commitment to ensure low absence levels.
>
> 22. I can categorically say that the decision to dismiss the Claimant was not made because of the Claimant's sickness absence, nor the need to be on restricted duties following her return to work after her operation not because of any difficulty she had walking or any need to take bathroom breaks. In fact I was not aware of any difficulty walking or increased need for bathroom breaks whether before or after her surgery."

31 In assessing the credibility of those paragraphs, we considered the next two paragraphs of Ms Drinkwater's witness statement, which were denied except that the claimant accepted that she had indeed sent the email at page 119 stating that Ms Drinkwater was "a lying bitch". It is not necessary to set out those paragraphs here. It is only necessary to record that they contained a description of aggressive conduct of the claimant which the claimant denied. Ms Drinkwater was pressed in cross-examination on those paragraphs, and she stood by them firmly. We accepted Ms Drinkwater's evidence in those paragraphs despite the claimant's denial of their substance, mainly because we accepted Ms Drinkwater's evidence that Mr Fenner had sent the email at pages 120-122 to Ms Drinkwater and it corroborated both Ms Drinkwater's oral evidence before us and what she said in paragraphs 23 and 24 of her witness statement. Given that email, and having seen and heard Ms Drinkwater give evidence, we accepted that she was an honest witness, doing her best to tell us the truth. In fact, we came to the same conclusion about the claimant in general terms, but we concluded that the claimant had (whether consciously, subconsciously or unconsciously) blanked out of her mind her memory of the way in which she reacted to being told that her employment with the respondent was being terminated.

32 We were a little puzzled nevertheless by the apparent mingling by Ms Drinkwater in her letter of 21 February 2019 at pages 112-113, the material part of which we have set out in paragraph 28 above, of the concepts of "attendance" and "performance". Ms Gordon Walker pointed to the extract from the respondent's

"Our Colleague Guide" at page 477, where, under the heading "Attendance at work", in paragraph 1.2, this was said:

> "Colleagues are also required to attend work promptly and be ready to start work at their allocated time. Failure to do so is a disciplinary offence. Repeated lateness will be dealt with under the formal Conduct and Poor Performance policy and the Company may, at its discretion, deduct pay for any periods of lateness or require the colleague to go home without pay until they can be utilised on other duties."

33 In fact, we found the evidence of Ms Goodwin and some of the documents to which she referred to be material in our determination of the precise reasons for Ms Drinkwater's decision that the claimant's employment should be terminated. We therefore now turn to that evidence and those documents.

Ms Goodwin's evidence

34 The claimant did not have a right to appeal against the decision to terminate her employment on 21 February 2019. Nevertheless, she sent the detailed email at pages 134-137 protesting about that termination. That email was dated 26 February 2019 and was sent to (1) Mr Tom Stevens, the respondent's Head of Worldwide Airports, and (2) Mr Alex Cruz, the respondent's Chief Executive Officer. Ms Goodwin was asked to look into the matters raised by the claimant in that email and she told us (and we accepted) that if she had concluded that the claimant should not have been dismissed, then she would have overturned Ms Drinkwater's decision that the claimant's probationary period should be ended by the claimant being dismissed. For present purposes, the most important part of the claimant's email of 26 February 2019 was the final bullet point at the top of page 136, which was this:

> "The fact that I had made all attempts to ensure my surgery would not interfere with my employment for Nikki to then make the statement that she I [sic] should have sorted my recovery time off with shift swaps and leave is completely unfair and discriminatory. My surgery was gynaecological for endometriosis (a condition that only affects women) and uterine fibroids (a condition that prevalently affects Black women). Why should I be expected to have covered recovery time from major surgery with leave and shift swaps when Kamaljit Monjal, an Asian male who had surgery on his hand is currently off on recovery and has not been required or expected to have gotten shift swaps to cover his?"

35 Ms Goodwin told us that what she had written in paragraph 9 of her witness statement was said on the basis of what she was told by the persons whom she asked to carry out the investigation which she had been asked to procure. That paragraph was in these terms:

> "The Claimant claims comparative treatment to another colleague (Mr Monjal) but as Mr Monjal is a full-time worker, in a different role and having been employed for far longer than the Claimant, it is not comparing like with like."

36 Ms Drinkwater had also been told that, as she said this in paragraph 26 of her witness statement:

> "In her Tribunal claim the Claimant has referred to how Mr Monjal was treated. I did not manage him but have made enquiries through HR. He was employed since May 2005 and so was a long standing employee who was not in his probationary period. Further, because of his length of service, I believe that he would be on a different contract that would include a contractual absence management policy. In any event, while he was off work following an operation like the Claimant, this was not the reason why I terminated her employment. The main issue was the high number of times she was late. Mr Monjal did not have a similarly high number of occasions of lateness."

37 In fact, Mr Monjal was employed only from 2018 onwards and he was employed on the same terms as the claimant. He too was employed under an annualised hours contract, the number of which was about the same as those of the claimant. However, as the document at page 499 showed, Mr Monjal arrived at work late on two occasions only during the period from June 2018 to August 2020.

38 In paragraph 8 of her witness statement, Ms Goodwin said this:

> "I confirm that during my investigations I found no evidence to suggest that the Claimant's sex, race or part time status were the reasons why she was dismissed. I was satisfied that Ms Drinkwater made the decision to dismiss based on the high levels of lateness. Ms Drinkwater made it clear that she did not dismiss because of the Claimant's absence for surgery. It appeared that the operation was a success, which relieved her symptoms. Upon the Claimant's return to work I have found no evidence to suggest she asked for any reasonable adjustments to be made or gave any indication that there were any difficulties she was experiencing."

39 There was in the bundle at page 495-497 an occupational health referral for the claimant which was sent on 16 January 2019 and was responded to on 17 January 2019, before the claimant returned to work (which she did on 23 January 2019). At page 495, the question was asked "Is there any support which we can offer?" On page 496, the occupational health adviser had recorded this:

> "Thank you for your referral Nicola [i.e. Ms Drinkwater] regarding as to whether Cordelle [i.e. the claimant] is fit to return to work.

> I spoke with her today by telephone and she feels well, albeit a few niggles. She would benefit from standing for no longer than 90 minutes and to be mindful of time critical roels [sic] for the next 2 blocks.
>
> She can then undertake her full contractual remit."

40 Ms Goodwin's "investigations" were carried out on her behalf principally by Ms Lorraine Kennedy, whose initial conclusion was stated in the email at page 147 dated 6 March 2019 which she sent to Ms Goodwin. Ms Goodwin then on 14 March 2019 sent the short email at page 152 to the claimant, in which Ms Goodwin wrote:

> "I was asked to investigate this matter on your behalf as Head of HR and have reviewed your case. My findings are that your dismissal was consistent with the approach for our employment policies and that your line management team provided you with support to improve your performance by extending your probation. Having taken into account the evidence provided it is my conclusion that you were treated fairly and appropriately under our employment policies."

41 The claimant responded by asking (in the email at pages 151-152, sent subsequently on 14 March 2019) for more information about the decision. Ms Goodwin then asked Ms Kennedy and Ms Bree Goxhuli, an HR Business Partner of much experience, to assist in the matter. At page 169 there was a copy of an email from Ms Goxhuli sent on the next day, 15 March 2019, to Ms Goodwin and Ms Kennedy, which showed a keen awareness of the relevant issue, where it said (in the final bullet point under the heading "Next steps"):

> "Also I would like to be clear that the reason for her termination was not linked to her her [sic] attendance which is linked to her condition".

42 Ms Drinkwater was evidently then asked about the matter by Ms Kennedy, as Ms Drinkwater sent Ms Kennedy the email at page 164, dated 15 March 2019, which was so far as material in these terms:

> "we initially manage lateness as a informal local process, setting an improvement plan. In some cases we would then manage through EG901 or OCG 5.1, if and when required. During probation we take a balanced view of attendance and performance. My reference to performance was based on the all round concerns she did not meeting [sic] the expected standards by poor attendance, high levels of dependency leave and lateness.
>
> I did not dismiss on sickness as my letter stated, it was a planned procedure and Cordelle [i.e. the claimant] knew well in advance the seasonal roster has incredible amounts of flexibility within it. It would have been possible to swap shi[f]ts during this period."

43 When Ms Jaffe asked Ms Goodwin what she would have decided if the claimant had said that she was unable because of her endometriosis to attend work on time, Ms Goodwin said that she would have looked at a shift pattern that started later than the early morning, or if appropriate a phased return to work, but that the respondent's operations were hugely affected by lateness and (as noted by EJ Hyams) that "attendance in a timely fashion is really critical as part of an employee's performance". She also said (also as so noted) that "This many occasions of lateness [i.e. the number of occasions of lateness shown in the document at page 201, to which we refer in paragraph 27 above] would absolutely be a cause for dismissal." We accepted that evidence of Ms Goodwin.

Some further relevant factors

44 Nowhere in the claimant's detailed email of protest at her dismissal (at pages 134-137) did she say that her endometriosis could on occasion cause her to arrive at work late. Only on the first day of the hearing before us, 25 October 2021, did the claimant say that her endometriosis had caused her to be late to arrive at her workplace, and she said then that that lateness was the result of (1) her being unable to walk as quickly as she otherwise could have done, and/or (2) a need to go to the toilet more frequently than normal. Nevertheless, the claimant acknowledged (much to her credit) in discussions with EJ Hyams that all that she needed to do to avoid the risk of being late as a result of those factors was to arrive at Heathrow Airport itself earlier than she might otherwise have done.

Our conclusions on the reasons for the claimant's dismissal

45 The inaccuracies in the evidence of Ms Drinkwater to which we refer in paragraphs 24 and 36-37 above made us approach that evidence with particular care. However, we were able to come to a conclusion on what were the material factors which caused her to decide that the claimant's employment should be terminated by reference to the contemporaneous documentation, namely in particular the letter at pages 112-113 the material part of which we set out in paragraph 28 above and the email at page 164 the material part of which we have set out in paragraph 42 above. While somewhat clumsily expressed, we concluded that they were to the effect that Ms Drinkwater did not in making her decision rely to any extent on the fact that the claimant had been absent from work because of her endometriosis, but, rather, the fact that the claimant could have avoided, but did not avoid, taking those days as sickness absences. We also concluded that the overwhelming reason for dismissing the claimant was her frequent instances of lateness, including one which occurred after she had returned to work after her surgery of 11 December 2018, and that the fact that the claimant had taken four dependency days was seen in the same way as the fact that the claimant had taken as sick leave the days when she was rostered to work during the period covered by her GP's fitness certificate issued after that surgery.

Relevant law

The claims of breaches of the Equality Act 2010

46 The claims under the Equality Act 2010 ("EqA 2010") were made under section 39 of that Act, which is the provision of the EqA 2010 under which a remedy must be awarded, and provides so far as relevant:

> "(2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment."

47 Section 15 of the EqA 2010 provides this:

> "(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

48 That section requires a tribunal to ask

48.1 whether the claimant's disability caused, led to the consequence that there was, or resulted in, "something", and

48.2 if so, whether the respondent treated the claimant unfavourably because of that "something".

49 In *Pnaiser v NHS England* [2016] IRLR 170, Simler P (as she then was) sitting in the Employment Appeal Tribunal ("EAT") gave (in paragraph 31 of her judgment) the following guidance about the manner in which the question whether there has been unfavourable treatment for the purposes of section 15 of the EqA 2010 should be addressed:

> "In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, as

indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence

arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

50 Another judgment of Simler P in the EAT provides clarification in regard to whether or not there has been unfavourable treatment within the meaning of section 15 of the EqA 2010. That is the case of *Charlesworth v Dransfields Engineering Services Ltd* UKEAT/0197/16/JOJ, where Simler P made it clear that it may in some cases be necessary (or at least lawful) "to draw a distinction

between the context within which the events occurred and those matters that were causative", and then to conclude that the "something" that caused the claimed unfavourable treatment was no more than "the context within which the events occurred". In addition to considering the facts of that case, we referred ourselves to *Hall v Chief Constable of West Yorkshire*, to which Simler P referred in paragraph 31 of the EAT's judgment in *Pnaiser*, *Dunn v Secretary of State for Justice* [2019] IRLR 298, *Robinson v Department for Work and Pensions* [2020] IRLR 884, and *York City Council v Grosset* [2018] ICR 1492.

51 As regards the claims of a breach of section 20(3) of the EqA 2010, it is necessary to identify a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and which put the claimant at such a disadvantage. If such a PCP is identified then it is necessary to "take such steps as it is reasonable to have to take to avoid the disadvantage". Whether or not a step is reasonable is a matter for the tribunal, not the employer: *Smith v Churchills Stairlifts* [2006] ICR 524.

52 Paragraph 20 of Schedule 8 to the EqA 2010 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 an [employee] has a disability and is likely to be placed at the disadvantage referred to in [section 20(3)]."

53 The analysis of Elias LJ in *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2016] IRLR 216, shows that in many cases claims of breaches of sections 15 and 20 of the EqA 2010 are in effect different ways of making the same kind of claim, in that if one succeeds then the other will be likely also to succeed, but if one fails then the other will be likely also to fail. Nevertheless, the claims are distinct, and give rise to specific considerations.

The burden of proof

54 In considering the EqA 2010 claims issues, we were obliged to apply section 136 of that Act, which is in these terms:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

55 That provision is of particular importance when determining a claim of direct discrimination within the meaning of section 13 of the EqA 2010. When applying section 136 it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence, but not its explanation, for the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

56 In some circumstances, it is possible, or even necessary, either instead of applying section 136, or in addition, to apply the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 and therefore to ask why that which is the subject of the claim occurred.

Part-time worker discrimination

57 Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 ("the 2000 Regulations"), provides this:

> "(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—
>
> (a) as regards the terms of his contract; or
>
> (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
>
> (2) The right conferred by paragraph (1) applies only if—
> (a) the treatment is on the ground that the worker is a part-time worker, and
>
> (b) the treatment is not justified on objective grounds.
>
> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate."

<u>Our conclusions</u>

The claim of wrongful dismissal

58 In our judgment, clause 6 of the claimant's contract of employment, which we have set out in paragraph 8 above, could not be read as conferring on the claimant the right to be regarded as having ceased to be in a probationary period

merely because the claimant's employment had extended beyond six months. That was because, as Ms Gordon Walker submitted, the probationary period could be ended only by the employment being confirmed or terminated. Thus, the claimant's probationary period did not end at any stage until 21 February 2019, when she was dismissed.

59 In any event, no practical advantage would have been caused by the probationary period being ended before 21 February 2019, because

59.1 there would, given what we say in paragraphs 8 and 9 above, have been no right to any more notice pay than during the probationary period, and

59.2 the respondent was not, we concluded, as a result of clause 9 of the claimant's contract of employment, which we have set out in paragraph 10 above, obliged by any express (or in the circumstances any implied) contractual obligation to follow any particular procedure in deciding whether the claimant's employment with the respondent should be ended.

60 Accordingly, the claim of wrongful dismissal did not succeed.

Direct discrimination within the meaning of section 13 of the EqA 2010 because of race, sex and/or disability

61 The claimant did not press her claims of direct discrimination within the meaning of section 13 of the EqA 2010. In any event, there was before us no evidence which, if we had accepted it, would have justified the drawing of an inference that the claimant was discriminated against by being treated less favourably to any extent because of her race, sex or disability. Accordingly, the claim of direct discrimination within the meaning of section 13 of the EqA 2010 did not succeed.

The claim of a breach of section 15 of the EqA 2010

62 We concluded that Ms Drinkwater's decision to terminate the claimant's employment with the respondent was the key decision here. Ms Goodwin reviewed that decision, but she was satisfied that it was not tainted by unlawful discrimination and therefore she decided not to overturn it.

63 As for the causes of Ms Drinkwater's decision, they were as we have stated in paragraph 45 above. The one factor which could have made the decision a breach of section 15 of the EqA 2010 was that Ms Drinkwater plainly did take into account, in the manner stated in paragraph 45 above, in making her decision the fact that the claimant had had some absences from work on account of sickness, which sickness was the result of the claimant having endometriosis, which the respondent accepted was a disability.

64 Ms Drinkwater did that by criticising the claimant for not swapping shifts with the result that the claimant did not, as far as Ms Drinkwater was concerned, exhibit what Ms Drinkwater would have regarded as a commendable spirit. That treatment of the claimant, i.e. that criticism, was made only as a result of the claimant being unable to work because of the surgery which had been required to mitigate the effects of (or, it may have been the case, cure) her disability. In our judgment, that criticism was unfavourable treatment because of something (the claimant's inability to work) which arose in consequence of the claimant's disability of endometriosis. The respondent did not seek to say that that treatment was a proportionate means of achieving a legitimate aim, and in any event, we concluded that it was not such a means of achieving such an aim.

65 Accordingly, the claim of a breach of section 15 of the EqA 2010 succeeded to a limited extent. That breach caused the claimant no financial loss, since if that breach had not occurred, the claimant would still have been dismissed. The claimant is nevertheless entitled to an award of compensation for injury to her feelings.

The claim of a failure to make reasonable adjustments within the meaning of section 20 of the EqA 2010

66 We turn now to the claim of a breach of section 20 of the EqA 2010. For the sake of simplicity, we merely consider here the lettered sub-paragraphs of paragraph 4.17 set out in paragraph 4 above, taking them in the order in which they appear there.

66.1 "a. Allowing the claimant to start work a bit later". The claimant at no stage told the respondent that she might need to attend work a little late because of her disability. In any event, in the circumstances to which we refer in paragraph 43 above, we concluded that it would not have been a reasonable adjustment to permit the claimant to attend work late, to any extent.

66.2 "b. Giving the claimant more time to recover after her return to work rather than dismissing her". The claimant was not dismissed for anything done by her after she returned to work which was caused by her disability. Thus this claim could not succeed.

66.3 "c. Allowing the claimant a phased return to work". There was no evidential basis for allowing the claimant a phased return to work.

66.4 "d. Allowing the claimant a phased support programme, including shadowing or working with a colleague". Similarly, there was no evidential basis for giving the claimant any kind of "phased support programme".

66.5 "e. Extending the probation period (if the claimant was still in one) rather than dismissing her". The reason for the claimant's dismissal was her lateness. There was no material before the respondent at the time of her dismissal or Ms Goodwin's consideration of the situation which indicated to any extent that the claimant's lateness was connected to any extent with her disability.

66.6 "f. Allowing the claimant a monitored period under the performance management plan and/or under the sickness absence procedure rather than dismissing her". There was no evidential basis for the proposition that it would have been a reasonable adjustment within the meaning of section 20(3) to allow "the claimant a monitored period under the performance management plan and/or under the sickness absence procedure rather than dismissing her".

66.7 "g. Referring the claimant to OH". The claimant was referred to occupational health, as we record in paragraph 39 above. Presumably this part of the claim was an allegation that it would have been a reasonable adjustment to refer the claimant to occupational health instead of dismissing her. We saw no evidential basis for such an adjustment being a reasonable one to make.

66.8 "h. Providing the claimant with counselling". Presumably this part of the claim was an allegation that it would have been a reasonable adjustment to provide the claimant with counselling instead of dismissing her. We saw no evidential basis for it being a reasonable adjustment to do that.

66.9 "i. Adjusting any sickness absence trigger levels which were applied to the claimant." The claimant was not dismissed to any extent because of her sickness absences. Thus, there was no evidential basis for this claimed reasonable adjustment.

The claim of part-time worker discrimination

67 We saw in the evidence before us no basis for a claim of part-time worker discrimination within the meaning of regulation 5 of the 2000 Regulations. Even if Mr Monjal had been a full-time employee, his situation was materially different, given the factor to which we refer in paragraph 37 above, namely that he was absent from work on only two occasions during the period to which the document at page 499 relates.

In conclusion on liability

68 In conclusion, one of the claimant's claims succeeds, namely as stated in paragraphs 64 and 65 above. The rest of her claims do not succeed and are therefore dismissed.

Remedy

69 After we had announced our above decision and the reasons for it, we invited the parties to consider it and the short case summaries referred to in *Harvey on Industrial Relations and Employment Law* describing awards for injury to feelings in discrimination cases. After we had had an adjournment for them to do so, Ms Gordon Walker put before us some short written submissions on remedy, referring to some of those summaries. We sent the parties the complete set of the summaries, from paragraph L[1046] onwards, and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. We then adjourned again to give the claimant time to assimilate the material which we had sent her and the respondent's written submissions. We resumed the hearing at 2pm, and when we did so, the claimant told us that she was willing to accept the sum for which Ms Gordon Walker contended on behalf of the respondent, namely £2,000 (and no interest). We therefore agreed to give judgment for that sum.

_____

Employment Judge Hyams

Date: 29 October 2021

SENT TO THE PARTIES ON

22/11/2021

N Gotecha

FOR THE TRIBUNAL OFFICE