EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108501/2021

Held in Glasgow on 23, 24 and 25 November 2021 and 19 January 2022

Employment Judge: L Doherty
Tribunal Member: Mrs E A Farrell
Tribunal Member: Mr A K Smith

Mrs L Murdoch	**Claimant** **Represented by:** **Mr Smith –** **Solicitor**
Real Care Agency	**First Respondent** **Represented by:** **Mr Milligan –** **Solicitor**
Mr T Gill	**Second Respondent** **Represented by:** **Mr Milligan -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that;

(1) the complaint under Section 13 of the Equality Act 2013 is not well founded and is dismissed;

(2) the complaint under Section 15 of the Equality Act 2013 is not well founded and is dismissed;

(3) the complaint under Section 20 of the Equality Act 2013 is not well founded and is dismissed;

(4) the complaint under Section 26 of the Equality Act 2013 is not well founded and is dismissed;

(5) the complaint of automatically unfair dismissal under Section 104 of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

1. The claimant presented a number of claims of disability discrimination, and a claim of automatically unfair dismissal under Section 104 of the Employment Rights Act 1996 (the ERA) .

2. An in person hearing took place over five days; the claimant was represented by Mr Smith, and the respondents by Mr Milligan, both solicitors.

3. The issues were as follows;

Disability Discrimination.

4. Disability status and knowledge of disability are both in dispute.

Claims under the Equality Act 2010 (the EQA)
Section 13 Claim

5. There are a five complaints of direct discrimination. In respect of each complaint, the issue for the Tribunal is whether the treatment complained of amounted to less favourable treatment than would have been accorded to a comparator who did not have the claimant's disability, but whose circumstances were materially the same as the claimants in terms of section 23 of the EQA.

Section 15 claim.

6. As pleaded in the claimant's further particulars of claim (page 33), the unfavourable treatment complained of is that the claimant's failure to attend a meeting was a factor which the respondents took into account in deciding to dismiss the claimant.

7. Knowledge of disability is an issue, as is whether the claimant's disability gave rise to something (a stammer which arises during bad periods of depression) which prevented her attending the meeting

8. There is then an issue as to whether the claimant was subjected to that treatment (i.e. was her failure to attend a factor which was taken into account by the respondents in deciding to dismiss her?).

9. Further, if relevant, there is an issue as to whether the decision to dismiss was justified under section 15 (1) (b).

Section 20 Claim

10. The PCP relied upon is that the respondents adopted a practice of dealing only with the claimant in meetings and by telephone.

11. Knowledge of disability is an issue.

12. It is issue as to whether a valid PCP has been identified, and if so, was it applied and whether it placed the claimant at a disadvantage, and whether it was proportionate.

Section 26 Claim

13. The failure to pay SSP, dismissal, and failure to pay holiday pay are all pled as acts of harassment on the grounds of disability.

14. It is in issue as to whether these were acts which were related to the claimant's disability, and whether they created the proscribed environment.

15. There is also an issue of time bar in relation to the act of dismissal, which was left over from the amendment procedure under which this claim was allowed.

Section 104 claim

16. The claimant relies on alleging an infringement of the right payment of statutory sick pay, which is said to fall within section 13 of the Employment Right Act 1996 (the ERA). It is not accepted that the right to SSP is a relevant statutory right under section 104. It is accepted that unlawful deductions of wages is a relevant statutory right. There is no issue of good faith.

17. Whether the claimant alleged the infringement of a relevant right is therefore in issue, as is causation of dismissal.

The Hearing

18. The claimant gave evidence on her own behalf, and evidence was given on her behalf by her wife, Mrs D Murdoch. For the respondents' evidence was given by Mr Gill, the second respondent, who is also the managing director of the first respondent and by Mrs Mary Jaconelli the office manager. Evidence in chief was given by way of witness statements which were taken as read.

19. The parties lodged a joint bundle of documents.

20. The Tribunal dealt firstly disability status, and then went on to deal with the merits of the claims.

Findings in Fact - Disability Status

21. The claimant whose date of birth is 5/4/81, had a stammer when she was a child. She was referred to Speech and Language therapy and taught coping strategies to help her speak clearly. These have worked well and the claimant's speech is good and she speaks fluently. When the claimant becomes overly tired or anxious, concentrating on keeping rhythm to speak can become more difficult. The claimant has not attended her GP for any speech related issues, prior to her dismissal, during the period for which medical record are produced for this hearing.

22. The claimant has suffered from depression since she was 13 years of age. She received treatment for it throughout her adolescence.

23. Prior to August 2019, the claimant had been on a low dose of Citalopram for a period of around 7 years. For the most part until 2020 she managed well with this. When she did not take this medication during her pregnancies, she became more volatile and emotional. Her sleep pattern and changed, and she cried more readily; she would occasionally skip meals. She avoided busy places. She also avoided taking part in social gatherings.

24. In around August 2019 claimant had a number of difficult circumstances to deal with in her personal life. She consulted her GP on 19 August and was noted as complaining of low mood and that Citalopram was no longer helping her.

25. The claimant was certified as unfit for work by her GP from 19 August 2019 on account of depressed mood. She was suffering from insomnia and stress. Every time she left her home she was in tears, and that she burst into tears in a client's house on one occasion.

26. The claimant came off Citalopram at or about that time. She received no medication for about a short period before starting new medication. During this time she experienced severe problems with concentration, heightened anxiety, and irritability. The claimant's mediation was changed around mid-October 2021 to Venlafaxine, however this did not help and she continued to experience difficulties with concentration, anxiety and irritability. She was negligent of self-care; she found it difficult to get out of bed in the morning, and she was negligent in taking a medication, and washing herself.

27. Unfortunately the claimant had a bad reaction to the new medication which resulted in her having a seizure. The claimant had to attend hospital as a result of this. She had a period of around one week when she did not take any medication during which she experienced feelings of despair and found herself crying constantly.

28. The claimant's medication was changed again around December 2020, however but she continues to experience problems.

29. In the period from August 2019 to March 2021, the claimant suffered low mood. She has experienced panic attacks and night terrors. She found it difficult to

maintain self-care in terms of washing, dressing and eating, and has become negligent of this. She found it difficult to get up in the morning to go to the toilet to wash. She has to be reminded to eat by her wife. She found it difficult to go out of the house

30. The claimant continued to be certified as unfit for work by her GP on account of depressed mood during this period. She continues to be unfit for work as a result of her depression. The claimant was referred by her GP to the Psychological Therapies Team for counselling in November 2020.

Findings in Fact - Merits

31. The first respondent (RCAL) is a company providing round-the-clock homecare to elderly and disabled people, some of whom are very vulnerable. It is based in East Kilbride, and provides services throughout that area. It is registered with the Care Inspectorate and the SSSC.

32. The second respondent, Mr Gill is the managing director of RACL and has been since 203. He is a registered Social Worker.

33. RCAL employee around 93 staff, the majority of whom are care workers. The majority of care workers are employed part-time, working an average of around 22 hours work per week. A flexible working schedule is offered. RCAL ascertain the hours a worker can work when they are recruited and they attempt to match their rota with these hours. That may change during the course of employment, dependant on the requirements of the employee and of the company.

34. RCAL provide around 9000 hours of care a month. Care workers are normally assigned to a particular service user in order to achieve continuity of care, which is deemed important by RCAL in order to build relationships with service users.

35. The impact of the Covid 19 pandemic was significant for RCAL. Illness and self-isolation requirements badly affected staffing levels, and they had to rely

heavily on staff volunteering to work extra shifts in order to provide care for their service users.

36. RCAL recruit their staff in from a variety of sources, for example Gumtree. A large number of application for employment are made on line. Applicants are asked to complete an application form with personal details, education, training, experience and availability for work. They are also asked to complete a form headed *Declaration of Physical and Mental Capability*, in which they declare that they are physically and mentally capable of working as a care worker, and if in the future they feel they become unfit they will advise RCAL.

37. RCAL require to undertake disclosure checks on all staff. They retain the PVG application number on their personnel files, but not the PVG certificate.

38. Staff are asked to attend an Induction session at the commencement of their employment at which they are given training and issued with their contract of employment. They are also given a staff Handbook.

39. The contract of employment contains the following clauses.

> *(3) Probationary Period*
>
> *The first 3 months of your employment will be a probationary period during which time your performance and conduct will be monitored and assessed. At the end of that period, your employment will be reviewed and may be terminated if you are found for any reason to be incapable of carrying out, or are otherwise unsuitable for your job.*
>
> *The Company may extend your probationary period either verbally or by written notice. The Management will be willing to discuss with you the reason(s) why the probationary period is being extended. For all Care Workers who have two or more absences during the probationary period we will automatically extend this period to a further three months, and every three months thereafter until attendance is satisfactory.*

The Company reserves the right to dispense with official warnings provided for in the Company disciplinary procedure during the initial or extended probationary period.

……..

8. Sick Pay

8.1 The Employer the operates statutory sick pay scheme and you are required to cooperate in the maintenance of any records. Providing that you comply with the sickness rules and procedures from time to time in force, you will receive any statutory sick pay to which you may be entitled.

9. Absence and Illness

9.1 On the first day of any sickness absence you must ensure that your Office Manager is informed by telephone of your sickness at the earliest possible opportunity. You should also give details of the nature of your illness and the day on which you expect to return to work. You must inform the Company as soon as possible of any change in the date of your anticipated return to work. Under no circumstances is it acceptable to communicate any absence via text message and/or email.

9.2 If you are absent from work on account of sickness or injury you or someone else on your behalf should inform the Employer of the reason for your absence as soon as possible but no later than the start of the working day in which the absence first occurs.

9.3 Sickness absence of up to and including seven consecutive days must be fully supported by a self-certificate, and thereafter this should be supported by a medical certificate on the eighth calendar day of absence stating the reason for the absence, and thereafter provide a like certificate each week to cover any subsequent periods of absence.

9.4 You must inform the Office Manager on the first day of your return to work after a period of sickness absence and complete a self-certificate if applicable.

9.5 The Employer reserves the right to require you at any stage of absence to produce a medical certificate and/or undergo a medical examination.

40. The claimant whose date of birth is 5/4/81 had previously worked for the RCAL between 2006 and 2007. She emailed them in March 2019 advising she was due to finish her studies in June, and asked to be considered for any future vacancies. Mr Gill responded saying it was nice to hear from her and asking for a couple of dates to arrange an interview at the Company Office.

41. Mr Gill and the claimant met before she started working with RCAL. RCAL's normal practice was to interview prospective employees, but on occasion they took on staff who had worked for them before without interview, and without them having to complete an application form. Mr Gill offered the claimant employment having met her and remembering her as a good worker when she was previously employed by RCL; he was happy to take her on .The claimant was not asked to complete an application form or fitness declaration prior to her commencing work.

42. The claimant attended an induction session on 3 May 19. She was issued with a contract of employment, and the staff handbook on that date, and she signed her contract of employment on 3 May.

43. The respondents made a disclosure request, and received a PVG disclosure dated 17 May 2019 which showed the claimant had a conviction for fraud from 2010. Mr Gill discussed this with the claimant when he received it. His primary focus was to ensure that the disclosure did not prevent the claimant working in the care sector, and he was satisfied that it did not.

44. The claimant attended a six monthly supervision with a Sharon Rafferty in August 2019. The record of that supervision noted in part that the claimant has stated she was trained in self-care and therefore manages stress extremely well, and that she was very aware of her limitations and what she was capable of. It also noted that the claimant had stated she would speak to Ms Rafferty, should this ever change.

45. In December 2019 RCAL received an earnings arrestment for the claimant's earnings (page 136). RCAL had experience of this for other staff members, and it was Mr Gill's practice to speak to the employee affected and advise them of the arrestment and the impact it would have on their wages. Mr Gill had this discussion with the claimant in December 2019.

46. In the course of her employment the claimant 'handed back' a number of shifts which have been allocated to her. While RCAL attempts to be flexible with workers, handing back the shifts causes them considerable inconvenience and it was not a practice which they considered was appropriate on a regular basis. The claimant was always accommodated with her requests to hand back shifts. Mr Gill was unaware of the extent to which the claimant had handed back shifts. The claimant's absences and shift hand backs are produced at page 171/172 of the bundle.

47. The claimant also had a number of absences due to ill-health, or family related reasons . In the period from her employment commencing until 1 August 2020 she is recorded as having 15 periods of absence. None of these absences were recorded to be for a reason related to the claimant's disability.

48. Mr Gill spoke to the claimant on at least one occasion on an informal basis about her high level absence.

49. The claimant was never issued with a warning in respect of absence. Nor was she ever told that her probationary period was being extended, although her absences met the trigger in clause 3 of her contract.

50. On 19 August 2020 the claimant was suffering stress, insomnia and she felt severely down. She consulted her GP, who proscribed a change in mediation and provided a fit note stating that she was suffering from depressed mood and certifying her as unfit for work from the 20 August for a period of 28 days.

51. The claimant contacted RCAL' office, and spoke with a member of the administrative staff, Tyne Sneddon, to advise she was unfit to attend work. Tyne messaged the claimant later that day from her own phone, with a message of reassurance, reminding her to hand in her fit note. The claimant

submitted her first fit note and was paid SSP on 23 September for the period covered by the fit note.

52. The claimant continued to suffer from stress and low mood. On 16 September she was certified at being unfit for work for a further 28 days because of depressed mood.

53. The claimant moved house on at some point in September. She did not advise the respondents of change of address.

54. The claimant did not contact the respondents to advise them about her ongoing unfitness for work as was required by their Absence Procedure, and she did not submit the fit note issued to her on 16 September.

55. The claimant continued to suffer from depression, anxiety, and insomnia. On 14 October she was issued with further fit note certifying her as unfit for work the period 28 days on account of depressed mood.

56. The claimant did not submit this fit note to the respondents, nor did she contact them. The claimant had not telephoned RCAL at any point during her absence, other that her initial telephone call with Tyne Sneddon.

57. It is not uncommon for members of the respondent staff to be certified as unfit for work, and the circumstances where they receive the fit note certifying employees unfit, this is passed to their accountants who deal with pay role. Employees in these circumstances are paid statutory sick pay. RCAL will not pay statutory sick pay if a fit note is not provided. RCAL therefore did not process the claimant's statutory sick pay after the expiry of the fit note issued in August, which they had received.

58. As a result of the claimant not having been in touch with the respondents as required by their absence management procedure, and their not having received a further statement of fitness for work, Mr Gill decided to write to her on 23 September asking her to attend an absence review meeting on 29 September. The letter asking her to attend the meeting stated that the

Company would like to discuss what support could be put in place an order to assist the claimant's return to work.

59. The letter was sent to the claimant's address , which was the one the RCAL held for her.

60. The claimant did not attend this meeting, and did not contact the respondents. Mr Gill wrote again to the claimant on 1 October inviting her to a further absence review meeting on the 7 October. His letter noted that the claimant had not attended the meeting on 29 September or advised of the reason for her non-attendance, and again stated that the company would like to meet with the claimant in order to consider what support could be put in place to assist her return to work. The letter also noted that the claimant had failed to adhere to the respondents' procedure in the Handbook for reporting absence.

61. This letter was also sent to the claimant's old address, which was the one the RCAL had for her.

62. The claimant did not receive this letter, or the one dated 23 September.

63. The claimant did not attend the meeting and did not contact the respondents.

64. The claimant's next pay day was 21 October. As RCAL had not received a fit note covering the pay period, they did not pay the claimant SSP. Mr Gill did not consider that he could pay SSP as there was no fit note certifying the employee was unable to work during the relevant period. He was concerned about the implications of paying SSP in these circumstances, and that if he paid SSP without a fit note, this might be queried by HMRC should they conduct an audit.

65. The claimant was very distressed at not having received payment. She emailed Pauline, a member of the admin staff at 8.20am stating;

> '.. *I'm really struggling with my mental health. I need to speak to office and can make a call without crying can I give permission for Debbie to speak on my behalf. It's because I did not receive my wages'*.

66. Pauline replied at 9:20 am saying that she would get back when Mr Gill got in, and emailed again at 10.39 saying that Mr Gill would only speak to the claimant.

67. Shortly thereafter Mrs Debbie Murdoch, the claimant's wife, messaged stating;

> '*This is Debbie Lori's wife. I'm sorry but Lori is in no fit state to speak to you and I will call in five minutes.*

68. The claimant's wife then telephoned the office, and was put through to Mrs Jaconelli.

69. Mrs Jaconelli was not prepared to give out information about the claimant's pay to Mrs D Murdoch without the claimant's authority to do so.

70. Mrs Jaconelli's contemporaneous note of the conversation is produced at page 151/152. Mrs D Murdoch said she was phoning on behalf of her wife, and wanted to know why she had not been paid. Mrs Jaconelli told her that she was unable to give out information to a non-employee about an employee due to data protection. Mrs D Murdoch told her that due to the claimant's mental health issues she was unable to make the call and that Mrs Jaconelli should give her the information requested. Mrs Jaconelli told her that she did not have instructions from the claimant to allow her to speak to Mrs D Murdoch, and she continued to refuse to give her information. The conversation became a difficult one, with Mrs D Murdoch talking over Mrs Jaconelli and threatening to phone back repeatedly and tie up the telephone lines. Mrs D Murdoch asked to speak to Mr Gill, however he refused to take the call. The call ended with Mrs D Murdoch advising that she was going to go to ACAS.

71. After this call took place Mrs D Murdoch contacted ACAS, the Information Commissioners in respect of what was thought to be a data breach by sending letters to the claimant's old address, and HMRC about non-payment of SSP.

72. The claimant then sent three emails to respondents. The first was at 11.41 and stated;

Can you explain to me why my sick pay hasn't been played when I have been sending in sick lines to cover

this?

I am currently suffering from MENTAL HEALTH issues and this is causing more stress having to deal with this.

73. A second email was sent by the claimant at 11.17 stating;

Also, I have provided you with my new address and also this is on my Sicklines and your staff are incapable of updating my file.

74. The claimant sent a third email at 12 noon stating;

After speaking with Employment Law and Info commissioners office, They have advised me that you have Breeched my Data by sending letters to the wrong address even though I updated you with this information. 1 with a note and 2 with my sick notes.

Also they have advised me that you could discuss information with My wife as she has explained to you the reason I can make or take calls.

Would someone please reply to my emails ASAP so I can sort out how to get My Sickness Pay.

75. Mr Gill considered that Mrs D Murdoch's telephone call to Mrs Jaconelli had been very upsetting and inappropriate, and that the tone of the claimant's correspondence was completely inappropriate. He was angry at the tone of the claimant's emails and at manner in which his staff had been spoken to on the telephone. Mr Gill's considered Mrs D Murdoch's conduct of the telephone call was 'disgusting and disgraceful', and the contemplated phoning the police about it. He was angry about the fact that the first time the claimant had emailed him, approximately one and a half hours after the telephone call, was to advise that was being reported for data protection for sending a letter to the address he held for her. He considered the claimant's email to be derogatory in that she was telling him that his staff were incompetent, and he found this insulting.

76. As a result of Mr Gill's reaction to the claimant and Mrs D Murdoch's behaviour, and because they did not have any medical certificates for the claimant, Mr Gill did not reply to this correspondence.

77. RCAL were contacted by HMRC by phone in October and asked to complete a form regarding payment of the claimant's statutory sick pay, which Mr Gill did on 28 October 2020.

78. Mr Gill did not consider that he was obliged to pay statutory sick pay if he did not have a fit note to cover the period, and he wanted to wait the outcome HMRC's decision about this before paying the claimant statutory sick pay for periods which had not been covered, in his view, by a fit note. Mr Gill believed that appropriate medical certification was needed in order to pay statutory sick pay.

79. The form which HMRC asked to be completed be completed contained a pro forma question along the lines of*; write why do you not believe the employees absence is genuine?* Mr Gill answered this explaining that the absence procedure had not been followed.

80. The claimant continued to be unfit for work. The respondent's next pay date was 18 November, but no payment was made to the claimant. The respondents had not received a fit note from the claimant in time to submit to their accountants for 18 November's pay day.

81. The claimant emailed a fit note to the respondents in an email sent on 18 November 2020 at 16.34. The fit note was sent as an email attachment. The claimant stated that it was sent in that format on the instruction of HMRC so that she could retain the original copy.

82. Mr Gill could not open the attachment, and he emailed the claimant on 19 November at 13.59 advising her of this. He also emailed her a copy of a letter she had sent to her by post on the same day in the following terms;

> *I am writing to invite you to a review probationary period meeting to be held at the Company Office on Thursday 26 November 20 at Ilam.*

The Company has previously tried to have Absence Review meetings with you and which you have

failed to attend. I would also again like to refer you to the Care Workers Handbook (Para. 32

Absence/illness procedure for long-term sickness which you have failed to adhere to.

I refer you to your Employment Contract Para. 3 'The Company may extend your probationary

period either verbally or by written notice, for all Care Workers who have two or more absences during the probationary period we will automatically extend this period to a further three months until the probation period is complete. The numerous absences in the time that you have been employed with the Company means that you are still within the Probationary Period. Until you complete the probationary period, your permanent position cannot therefore be confirmed.

I do hope you will take the opportunity to attend the review of your Probationary Period Meeting. I am sure that you will appreciate as we are working with vulnerable, elderly and disabled service users during this Covid-19 Pandemic, and if we are to provide a consistent service it is essential that we are able to plan ahead with present and future staffing.

83. The claimant responded on 28 November by email stating;

"I apologise that I have taken time to send this. Reason being I was waiting for our appointment with my employment lawyer. This appoiment was attended by my wife Deborah Murdoch as she is acting as my advocate in matters whilst I am unwell and unable.

Following the advice from the employment lawyer I shall not accepting your invitation to attend the probationary meeting tomorrow.

I have been advised that as I am currently unwell due to mental illness I can not be enforced to attend this meeting. If you could instead forward

me any thing you wish to address at this meeting via letter or email. That would be greatly appreciated. The meeting was titled a probationary review meeting. Not a return to work meeting. Probationary meetings are not essential and enforceable whilst employee is suffering a period of illness. This would hold no baring on my wellness or fittness to return to work. My General Practitioner has ckearly written in my Statutory Sick Pay medial note that I am not currently well enough to work. This is undisputable.

Furthermore as I have stated I am currently sufferering from a mental illness. For which I am being treated not just by medication by I have also been allocated a psycologist to aid in my recovery also. A recovery which I am working towards.

Can I point out the obvious that your failure to secure my sick pay while I am incapacitated has done nothing but increase this.

I have failfully sent you my sick lines. When staff where asked to forward originals to me they claimed only "you" have access to them.

In light of this it is easy to assume I have a sense of misstrust towards future dealings which is why I have sought legal advice.

If you are still unable to open attachment for my sickline I will post a copy out to you. I have sent a scanned attachment then when you claimed you could not open it I sent a photograph. As I have said in previous email I was advised by HMRC investigators not to forward original copies to protect myself."

84. Mr Gill took legal advice and decided to go ahead with the meeting in the claimant's absence.

85. Mr Gill decided to dismiss the claimant as of 3 December with one weeks' notice and he wrote to her on 25 November confirming this.

86. His letter stated;

The review of probationary period meeting was held in absentia at the Real Care Company Office today.

In reviewing your probationary period, the Company noted that you have had an unacceptable level of absences and non-attendance at work, having 16 absences, totalling 125 days off work for various reasons.

The Company has previously tried to engage with you by leaving telephone messages and tried to arrange Absence Review meetings with you and which you have failed to attend. I also refer you to the Care Workers Handbook (Para. 32 Absence/Illnes procedure for long-term sickness which you have failed to adhere to.

I refer to your employment contract Para.13.1. Termination 'During any probationary period, your

employment may be ended either by you giving the Company or by the Company giving you one week's notice.' The Company is now giving you one week's notice and is terminating your employment with effect 3 December 2020.

87. In deciding to dismiss the claimant Mr Gill took into account the claimant's absences. He did not consider the claimant's level of absence was tolerable in light of the work which the respondents carried out as a care organisation with the needs of service users to attend to. Mr Gill also took into account that the claimant had failed to engage with the absence management procedure that she failed to comply with this, and she failed to attend meetings.

88. The claimant forwarded a further copy fit note which Mr Gill considered was too difficult to read and therefore he did not process it.

89. In a letter to the claimant dated 10 February 2012 HMRC stated that RCAL had told them that the reason for non-payment was that they did not believe

the claimant's illness was genuine as she did not follow company sickness procedure, which they advised was not a valid reason for disputing incapacity.

90. HMRC contacted RCAL in March 2021 to advises that SSP pay was due. This outcome was passed to RCAL's accountants and outstanding SSP was then paid to the claimant. Her entitlement to holiday pay was thereafter calculated on this basis, and paid to her.

91. The claimant was referred for psychological therapy by her GP in November 2020 which she began attending in July 2021. Her attendance at Counselling sessions is ongoing.

92. The claimant has remined unfit for work since her dismissal The claimant contacted the GP on 14 December reporting increased stress because she had been dismissed with fleeting thoughts of self-harm.

93. The claimant is in receipt of Universal Credit.

94. The respondents have to deal with staff absence on a regular basis and pay sick pay. Other members of staff have been absent and received SSP. The respondents record of this for the period from August 2020 to December 2020 is produced at page 189. One employee, Mrs McLaughlin, was paid SSP of £134.19 in October and £402.57 December. At one point Mr Gill believed she had sustained a broken limb while abroad.

Note on Evidence

95. There were a number of conflicts and the evidence in this case which the Tribunal had to resolve. It attempted to deal with material issues by considering the conflicting evidence of each of the witnesses, and reach a conclusion on that.

96. By way of general observation, the Tribunal found that the claimant's evidence, and that Mrs D Murdoch from time to time lacked credibility, and it appeared to the Tribunal that this was likely to be explained by the degree to which they both felt the claimant had been wronged by the respondents.

97. The Tribunal generally found Mr Gill's evidence, although from time to time given with considerable anger, was in the main reasonably credible. He was however unreliable in his recall of what exactly had occurred, or when. The tribunal did not draw any adverse inference in relation to his credibility from this, but was rather was prepared to infer that any deficiency in reliability was accounted for by the passage of time, and the fact that his interactions with the claimant where, as he said on several occasions, unremarkable.

98. The Tribunal found that Mrs Jaconelli was an entirely straight forward and credible and reliable witness, and had no agenda in giving evidence beyond recalling stating exactly what she knew about what she is being asked.

99. There was a significant conflict between the evidence of the claimant and Mr Gill as to the claimant's recruitment process. It was the claimant's evidence in her witness statement, that she met Mr Gill for interview on 3 May 2019.

100. The claimant corrected this date when adopting her witness statement as evidence, saying the interview had been on 1 May, and the induction date on the 3rd May. This was also volunteered by Mrs D Murdoch as an amendment to her witness statement.

101. It was apparent from the bundle that the claimant had signed her contract on the 3 May, which made it unlikely to be the date of the interview, and the Tribunal formed the view that her change in evidence (and that of Mrs D Murdoch) was influenced by this.

102. In her evidence in chief the claimant said the interview took place between her and Mr Gill with no one else present. She said she was pleasantly surprised that he remembered her. She gave him a list of qualifications and her driving licence, and what began was a very informal chat. Nothing taxing was discussed, and the only questions which she asked where opinion based. She said that he told her that she had a job already and just had a few forms to fill in to make it official. She said she remembered filling in a form where she was asked when she would be available and what hours she was she was working

for, and there was a discussion about how flexible the company was. She said that she was given a form for health and fitness to work which she filled out.

103. The claimant's evidence was that she told Mr Gill that she was on Citalopram for mild depression, but that she had been well with it for a number of years. Mr Gill joked that most folk are on something for mental health these days, and he went on to say how he struggled after the death of his disabled father. The claimant said that she also had to fill out a reference form her previous employer. Because of a change of management in her previous job, she could not get a reference. Her evidence was that Mr Gill's solution for this was for him to be her second referee, and he was so keen for her to start that he wrote her a reference himself at the interview.

104. The claimant went further in cross examination and said that she was given a form to fill in which she was asked to list her specific conditions and the medication she took, and that she completed this.

105. She also said that she discussed her PVG certificate which shows a conviction for fraud from 2010. She said that she told Mr Gill she had received overpayment of benefits, and Mr Gill had joked she did not seem the type. She said this was the only time it was spoken about, and that there was no discussion with Mr Gill about the wages arrestment which RCAL received in December 2019 as there was no need for that, as she had already explained the position to him.

106. Mr Gill's evidence was very emphatically that there had been no formal interview process. He said that he recruited the claimant without her having to complete an application form as she had already worked with RCAL and was known to them. He said in evidence in chief that he remembered her to be a good worker and she had a lot of experience.

107. Mr Gill's position as to whether he had met the claimant prior to the induction date was not clear. His position was to a degree inconsistent in that he said that he met her for the first time at the induction date, but he also accepted it was possible that he had met her, albeit not for a formal interview, prior to that.

108. He accepted that he had discussed the PVG certificate with her, and that it was likely that he had done that prior to she commencing employment or shortly thereafter. He did not accept the claimant's version of what was discussed. His position was that his focus was on whether the claimant could work in a care environment as a result of the disclosure, and he was satisfied that the disclosure did not prevent her working with RCAL.

109. Mr Gill gave evidence to the effect that in December 2019 he received a direct earnings attachment notice from the DWP, and that he spoke to the claimant about this at the time. He said that he understood from speaking to the claimant the total amount she had to pay back was over £9000, the claimant told him that she had been overpaid by the DWP, but we decided to keep it to see if she could get away with it, and he was surprised that.

110. On balance, even taking into account Mr Gill's difficulty in giving straightforward evidence about when he first met the claimant, the Tribunal preferred his version of events. It was satisfied that Mr Gill had met the claimant prior to the induction day, offering her employment. In reality there may not be a great deal between the claimant's position (that it was a formal interview), and Mr Gill's position (that he met the claimant) the claimant's evidence being that the discussion was informal, and that nothing taxing was discussed.

111. Thereafter, the Tribunal was satisfied that Mr Gill had offered the claimant employment without her having to complete an application form, a fitness declaration, or any other form detailing her medical condition. In reaching this conclusion Tribunal attaches some weight to its view generally of the claimant's credibility, as opposed to that of Mr Gill. Furthermore it attaches weight to the fact that Mr Gill, and Ms Jaconelli, (whom the Tribunal found to be a credible witness), gave convincing evidence to the effect that there was no form for employees or prospective employers to complete detailing their medical conditions. Furthermore Mrs Jaconelli gave convincing evidence in support of Mr Gill's evidence to the effect that he did from time to time recruit employees who had previously worked with RCL without them having to complete a job application form.

112. In reaching its conclusions as to what occurred, the tribunal also attaches some weight to the claimant's evidence as to the discussion she had about the PVG disclosure, and her refusal to accept that Mr Gill had discussed the earnings arrestment in December. This in the Tribunal's view lacked credibility. It was entirely credible that Mr Gill, as he said, would have discussed any earnings arrestment with any employee at the time when it was recieved, so that they were aware monies were going to be deducted from their wages, and that this was done when with the claimant when he received the earnings in December 2019.

113. The key issue however is whether at the interview discussion stage prior to commencing work with RCAL the claimant disclosed that she suffered from depression and was on a maintenance dose of Citalopram to Mr Gill. Having regard to the other elements in the claimant's evidence about pre-employment discussions with Mr Gill, which the Tribunal found lacked credibility, it was not persuaded that she had been so. In reaching this conclusion the Tribunal that also took into account that Mr Gill was prepared to make an entirely appropriate concession to the effect that he had knowledge that the claimant may have been suffering mental health issues from the time he was in receipt of the first fitness for work note. The fact that he was prepared to do so was a factor which in the Tribunal's view supported his credibility generally.

114. The next relevant conflict related to whether the claimant had provided the respondents with fit notes, other than the first note which it was accepted by the respondents they had received, and whether she had given them a note of her new address, as she claimed to have done, when she submitted her second fit note.

115. It was the evidence of the claimant and Mrs Deborah Murdoch that Mrs Deborah Murdoch had driven the claimant and their three children to the respondent's premises on each occasion when the fit note was delivered, and the claimant had posted the fit note through the door, having typed in the security code to gain access. The claimant also said that she wrote a note of the new address and posted it through the door along with the second fit note.

116. Mr Gill and Mrs Jaconelli both spoke to the fact that they did not receive a change of address note, or fit notes.

117. The Tribunal was satisfied that their evidence on this was to be accepted. In reaching this conclusion takes into account employees being absent from work through ill health and submitting fit notes was a not an unusual occurrence for the respondents, and they processed payment of SSP when they received fit notes. They had processed the claimants first payment of SSP, when they had received a fit note, without difficulty. Nor was any reason for them to have not processed the claimant's change of address note at the received this.

118. Added to this, it lacked plausibility the Tribunals view, that the claimant and her partner and their three children, would have travelled to the respondent's premises to submit the fit note, in circumstances where the claimant, because of her ill health, said she found it difficult to leave the house, when the fit notes could have been posted or the claimant would have emailed details of her change of address to the respondents.

119. The claimant's position was that the respondents should have picked up change of address from the fit notes. Firstly however they did not receive any fit notes with the claimant's new address until November, and secondly, although the duplicate fit notes which the claimant produced all contained her new address, her evidence as to when this new address was put onto the fit note was unclear. Her initial position was that her new address was on the third fit note but she later changed that to say was in fact on the second fit note.

120. The Tribunal preferred the evidence of Mrs Jaconelli over that of Mrs Deborah Murdoch as to the tone and content of the telephone conversation which took place. The Tribunal reached this conclusion, taking into account its impression of Mrs Jaconelli as a credible and reliable witness, and of the fact that she produced a contemporaneous note of the telephone call. The timing of the note was attested to by not only by Mrs Jaconelli but also and by Mr Gill, who confirmed he had asked her to produce this note at the time.

121. The Tribunal formed the impression Mr Gill was very angry at the manner in which his staff were treated by the claimant, and her wife in the course of the telephone, and at the tone of email's sent by the claimant on 21 October. Indeed, he accepted that in his evidence in chief, and he conceded in cross examination that he considered the telephone call and the tone of the claimant's emails to be insulting of staff and entirely inappropriate ,and that he thought Mrs D Murdoch's behaviour on the telephone was disgraceful and that he had contemplated phoning the police.

122. There was also conflict as to whether Mr Gill had spoken to the claimant on more than one occasion about her absences. This not entirely material to the issues that could arise to consider, but on balance the Tribunal was satisfied that Mr Gill did speak to the claimant, in all likelihood of more than one occasion, and certainly in June, which both parties spoke to.

123. The Tribunal was satisfied that Mr Gill made some attempt to telephone the claimant to speak to her prior to asking her to attend the first meeting in September, but he was unable to contact her on the telephone, and that he did not leave any messages for her. The Tribunal was also satisfied that even if Mr Gill had attempted to telephone, the claimant had not received any telephone messages from Mr Gill during this period.

Submissions

124. Both parties helpfully prepared written submissions, which the supplemented with oral submissions. In the interests of brevity these are not reproduced here, but the salient points are dealt with bellow.

Consideration - Disability Status

125. The Tribunal began by considering the relevant legislation.

1. Section 6 of the Equality Act 2010 provides:

(1) A person (P) is disabled if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

2. Schedule 1 provides:

PART 1

DETERMINATION OF DISABILITY

…

2. Long-term effects

(1) The effect of an impairment is long-term if –

(a) it has lasted at least 12 months

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as *continuing to have that effect if it is likely to recur.*

Schedule 1 paragraph 5 provides;

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

126. The time at which the Tribunal has to assess disability status, is at the time when the alleged discrimination took place. That spanned from October 2020 to the date of dismissal in November 2020, and then March 21.

127. For current impairments which have not lasted 12 months at the date of the alleged discrimination, the Tribunal has to consider if the substantial adverse effects of the condition are likely to last at least 12 months. C4 of the Guidance makes clear that anything occurring after that date will not be relevant. The Guidance also provides that account should be taken of the typical length of such effects on an individual, and any relevant specific factors, such as age or general state of health.

128. Paragraph 5 (1) of Schedule 1 of the EQA provides that assessing disability an impairment is to be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities, if measures are being taken to correct it and, but for that, it would be likely to have that effect. The effect of this is that in assessing whether there is substantial adverse effect on the ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.

129. The impairment relied upon is depression, and there is no issue that the claimant has this impairment. What is an issue, is whether the effects of that impairment has a substantial long term adverse effect on the claimant's ability to carry out day-to-day activities.

130. A considerable part of the claimant's evidence in chief dealt with her reaction to her changes in medication, a point which is relied upon by Mr Milligan, who submitted that the claimant's reaction to the change in medication was not an effect of the impairment itself. However the claimant suffered from low mood, anxiety, an inability to concentrate, and heightened irritability which was the reason she was prescribed the new medication in the first place, albeit she has an adverse reaction to it. In cross examination, while clearly accepting that some issues arose from the change in medication, the claimant denied that effects of her condition were all side effects of drugs she was taking, giving as an example of this night terrors, and the Tribunal was not persuaded that

the effects on her day to day activities which the claimant gave evidence about could not be attributed to her impairment of depression, but were all attributable to the side effects of her changing medication.

131. Further, even taking into account the extent to which the claimant's evidence dealt with her reaction to medication, she did give evidence about the effect of her condition on her ability to carry to day activities. In particular she gave evidence to the effect that in August 2019, prior to her changing her medication, every time she left her home she was in tears, and that she burst into tears and the client's house. She also gave evidence to the effect that she was suffering from insomnia, stress, and night terrors. Thereafter she gave evidence to the effect that after she came off Citalopram, prior to commencing a new medication, she experienced severe problems with concentration, heightened anxiety, and irritability, and that after she commenced her new medication she was negligent in her self-care such as washing and eating, and found it difficult to leave the house.

132. Washing, eating, and leaving home are day to day activities, and the Tribunal considered whether the effect of the claimant's condition all of these are day-to-day activities was a substantial adverse effect. Substantial adverse effect means something which is more than trivial or minor. Having regard to the extent to the claimant's evidence about how these activities were affected, the Tribunal was satisfied the effect of the claimant's condition was a substantial adverse effect. In reaching this conclusion that the Tribunal take into account that the claimant found it difficult to leave the house at all, that she found it difficult to get up to go to the toilets to wash, and that she had to be reminded to eat by her wife.

133. The Tribunal then went on to consider whether that substantial adverse effect was a long-term, taking into account the relevant sections of the EQA and the Guidance referred to above. Long terms means likely to last 12 months. 'Likely' means could well happen.

134. The Tribunal agrees with Mr Milligan's submission that the report produced by Dr Simmons, the claimant's GP, is of little assistance. Dr Simmons states that

during the period from June 2019 until November 2020, the claimant was suffering from depression which prevented her from carrying out day-to-day activities. She states that the claimant was still impaired while on medication and had a seizure and hallucinations.

135. The claimant's evidence is inconsistent with this, in that she said she was functioning reasonably well, albeit on a low dose of Citalopram, in the period up until August 2020.

136. Mr Milligan submitted that the effects of the claimant's condition were not long term. He submitted that the claimant's evidence did not support the conclusion that there were significant adverse effects arising from the claimant's condition when her medication was not taken. In support of this he referred to the claimant's evidence on re-examination when she was asked about her condition when she was not taking medication. The claimant stated there were periods when she was pregnant when she did not take medication. He relied on the claimant's evidence in cross examination to the effect that her sleep pattern had changed, and she cried at TV adverts, and that she would occasionally skip meals and avoid busy places. This, he submitted, did not amount to a significant adverse effect on day to day activities.

137. The claimant's evidence on re-examination however also included that she avoided busy places, and avoided taking part in social gatherings.

138. Taking part in social activities is a normal day to day activity. The Tribunal was satisfied that avoiding busy places which are busy and avoiding taking part in social gatherings, was a substantial adverse effect on the ability to carry out normal day to day activities. It was therefore satisfied that the claimant's condition was long term, having lasted more than 12 months as at the dates of the alleged discrimination

139. Knowledge of disability is dealt with below where relevant.

Consideration - Merits

140. The Tribunal began by considering the claims of Disability Discrimination under the EQA.

141. In considering the discrimination claims before it the Tribunal reminded itself of the burden of proof which it has to apply under Section 136 of the EQA.

142. That is at stage 1, the Tribunal must consider if there are facts from which to decide, in the absence of any explanation that a person (A) contravened the provision concerned. All the evidence must be considered at this stage, and not just the claimant's evidence.

143. In the event the Tribunal is satisfied that stage 1 has been met, then the burden shifts to the respondents, and the Tribunal must hold the contravention occurred unless the respondents prove otherwise.

144. A claim under section 13 involves a comparative exercise between the claimant, and an employee whose circumstances are not materially different to the circumstances of the case.

145. The Tribunal also reminded itself that in considering claims of discrimination it would be unusual for a respondent to admit a discriminatory act or motive, and it is open to the Tribunal, to draw inferences from primary facts where appropriate.

Section 13 claim

Section 13 states;

> (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> …

Section 23 provides;

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

146. A claim under Section 13 involves a comparative exercise between the claimant, and an employee whose circumstances are not materially different to the circumstances of the case.

147. Mr Smith referred the Tribunal to *Law Society v Bahl (2003) IRLR 640* and *Nagaragan v London Regional Transport (200) 1 AC 500,* in support of the proposition that, unlike the claim under Section 104, the claimant does not require to prove that discrimination is the sole or principal reason for dismissal. It is enough that it is significant influence. Mr Smith submitted that the claimant's impairment was such a significant influence

148. The 4 allegations of direct discrimination are as follow;

(1) Failure to pay the claimant sick pay in the period from 9/10/20 to 10/3/21.

Mr Smith asked the Tribunal to draw an inference that the reason why the claimant was not paid sick pay was because of her disability on the basis that the respondents did not accept the claimant was ill; this was supported by the letter from HMRC. Mr Smith also submitted that Mr Gill clearly did not trust the claimant or believe her. Mr Smith submitted that Mr Gill's evidence as to whether he accepted the claimant's disability was genuine, was ambivalent, and he was unhappy with her failing to attend meetings and taking days off by swapping shifts. Mr Smith also submitted that Mr Gill was not happy about Mrs Deborah Murdoch's conduct of the telephone call on 21 October, and as a result of this, he retaliated against the claimant.

The Tribunal did not consider the matters relied upon by Mr Smith gave rise to an inference that the respondents directly discriminated against her by failing to pay sick pay. The Tribunal did not consider a great deal turned on the terms of the letter from HMRC. It accepted Mr's Gill's evidence that he responded to a pro forma question asked by HMRC as he explained in evidence, and it did not gave rise to the conclusion Mr Gill did not accept the claimant was ill. Mr Gill accepted that when he received the first sick note identifying depressed mood as the reason for absence it flagged that the claimant may have been suffering from mental illness, which is inconsistent with the suggestion that he did not believe her.

The Tribunal agreed with Mr Smith that Mr Gill was very unhappy about the telephone call made by Mrs D Murdoch. As indicated in the findings in fact the Tribunal concluded that he was angry about Mrs D Murdoch speaking to Mrs Jaconelli in the way she did during the telephone call. That however did not give rise to any inference capable of supporting the direct discrimination claim. Mr Gill's anger at the way his staff were spoken to by Mrs D Murdoch may have had a significant influence on how he dealt with the claimant, but that was not the basis for section 13 claim on the grounds of the claimant's disability.

The claimant did not identify any named comparators, and there was no application to amend to include such comparators. She did lead evidence about other individuals who were absent, and who have received SSP. The respondents accepted that other members of staff who were absent received SSP, however the Tribunal has to consider the implications of Section 23 of the EQA, and whether the circumstances of any real or hypothetical comparator were materially the same as the claimant's.

There was no evidence to support the conclusion that those members of staff, who were paid sick pay, and had not submitted fit notes to the respondents, which was a circumstances material to the claimant's case.

The Tribunal was satisfied that the reason why the respondents did not pay the claimant SSP, initially was that they received no fit notes at all, and

thereafter the claimant submitted a fit note late by email in November, which Mr Gill could not open as an attachment and then by post which Mr Gill considered to be illegible.

The Tribunal was satisfied that Mr Gill wanted to await the outcome of HMRC's investigation before paying the claimant ,as he did not consider he had an obligation to process SSP unless he had a valid fit note covering the relevant period. This explained why he did not pay sick pay until he had the outcome from HMRC in March 2021.

As submitted by Mr Milligan, there was no evidence, or inference that could be drawn from primary fact found to support the conclusion that others would have been dealt with differently in the same circumstances. The Tribunal did not find this claim to be well founded.

(2) Invitation to the meeting to discuss probationary period and dismissal.

The comments above in relation to comparators apply here and no named comparator is identified, The claimant did not seek to identify the aspects of a hypothetical comparator beyond to stating that someone who did not have the claimant's disability would not have been treated in the manner complained of.

There is no dispute that the claimant was treated in the manner complained of. The respondent's position is that the reason for that treatment was the claimant's period of absence and failure to follow the absence management procedure. The Tribunal was satisfied that these were the reasons why the claimant was invited to attend the meeting, and subsequently why she was dismissed.

The Tribunal did not consider that a sufficient inference could be drawn from the matters relied upon by Mr Smith to support this conclusion. that someone who did not have the claimant's disability, but who had been absent the same period of time as the claimant, and who had also failed to follow the absence management procedure to the extent which the claimant had, would not have been dismissed.

Mr Smith relied on the fact that the claimant had not been told her probationary period was being extended (a matter which is dealt with more fully bellow) and fact that Mr Gill appeared to doubt the claimant's explanation (that she had moved house) as to why she had not attended the two earlier meetings arranged. The Tribunal did not consider a great deal turned on this second point. It formed the impression that Mr Gill's answer in cross examination to the effect that he did not give the claimant '*the benefit of the doubt'* about her change of address being the reason she did attend the meetings, saying that she could have informed the respondents about that properly, was generated by his anger about way he and his staff had been treated by the claimant and Mrs D Murdoch. This evidence in cross examination followed on a passage of quite heated evidence on Mr Gill's part, in which he said that he thought Mrs D Murdoch's conduct of the telephone call was 'disgusting and disgraceful', and that he had contemplated phoning the police about it. He also expressed anger about the fact that the first time the claimant had emailed him, approximately one and a half hours after the telephone call, was to say that he was being reported for a data protection breach for sending a letter to the address he held for her on file. He stated and that he considered the claimant's email to be derogatory; she was telling him that his staff were incompetent, which he found insulting. The Tribunal formed the impression that Mr Gill's no lack of trust in the claimant was informed by these factors, rather than as a result of her disability.

The Tribunal took into account that at the point when Mr Gill took the decision to dismiss the claimant she had made it clear to him that she would not attend the meeting, and furthermore that that she continued to be unfit for work. This is not a claim which rests on the claimants being dismissed on the grounds of absences which arise as a result of her disability, and indeed such a claim is not before this tribunal.

The Tribunal was satisfied that Mr Gill would have similarly dealt with an employee who had a substantial period of absence, continued to be unfit for work, had less than one year of service, and was still caught by the provisions

of their contract of employment with regard to the probationary period as a result of the extent of their absences.

(3) The extension of the claimant's probationary period.

Again the claimant relies upon a hypothetical comparator, which is as the Tribunal understands someone in her circumstances, who did not have her disability.

The treatment complained of is not in issue. The respondents extended the claimants probationary period.

There was no evidence to support the conclusion that the contract, which the claimant had signed was a sham.

Mr Smith submits that the contract stated probation may be extended by giving verbal or written notice. The probationary period would have had to be extended 5 times and on no occasion was the claimant told about this. The extension of the probationary period was a contrivance, to cover the real reason why it was done.

However as pointed out by Mr Milligan, the contract at clause 3 provided for automatic extension of the probationary period where absence was unsatisfactory. It was that category into which the claimant fell.

The Tribunal was satisfied that that while it was not good practice not to confirm the position in writing, the absence trigger was the reason why the claimant's probationary period was extended. The claimant had an considerable history of absence, unconnected to swapping shifts. All of the claimant's absences up until August 2020 were for reasons unconnected to her disability.

Even if the Tribunal is wrong, and the probationary period was extended in breach of the claimant's contract, this did not give rise to an inference that the claimant had been treated less favourably than a relevant comparator. There was no evidence to support the conclusion that an employee with the claimant's absence record, and who had signed the contract which the

claimant signed, would not also have had their probationary period extended in the same way without written notice.

(4) The letter of 19 November inviting the claimant to the Probationary review meeting did not mention that dismissal could be an outcome.

The position with regard to comparators is again as outlined above. There is no named comparator, and there was no submission on the attributes of a hypothetical comparator, beyond being someone who did not have the claimant's disability.

The Tribunal understood Mr Smith to ask the tribunal to draw an inference of discrimination form the fact that that Mr Gill did not accept in cross examination that the reason why the claimant had not received his earlier letters was because she had moved house; that he had failed to take the opportunity of responding to the claimant's email stating she did not intend to attend the meeting by advising her of the potential consequences; and that the respondents had not followed a fair procedure.

Mr Milligan submitted that the letter did alert the claimant to the fact that dismissal was a potential consequence. The meeting was a probationary review meeting, and the contract of employment expressly stated at section 3 that employment will be reviewed and may be terminated at the end of the probationary period.

The Tribunal considered that while the letter could have been better drafted, so that the potential outcome of dismissal was made more clear, the letter did alert the claimant to dismissal as a potential consequence to the extent that it advised her that it was a probationary review meeting and it was clear from her contract that her employment could be terminated on review of her probationary period.

Even if the Tribunal is not correct in this conclusion, there was no evidence to support the conclusion that someone who did not have the claimant's disability would have received a letter stating that dismissal was a possible outcome.

Mr Gill's reluctance in cross examination to accept that the claimant's change of address was the reason why she had not received the earlier letters, and failure to respond to her emails, was in the Tribunal's view explained by his anger at the behaviour of the claimant and her wife, for reasons which are dealt with above.

The Tribunal was satisfied that any lack of procedure was explained by the claimant not having the requisite qualifying service to present a complaint of unfair dismissal, and the fact that she was still as far as the respondents were concerned on her probationary period.

The Tribunal agreed with Mr Milligan's submission that there was no link made out between the letter and the claimant's protected characteristic.

5. **Non Payment of holiday pay**

It is accepted that the claimant was not paid holiday pay in respect of leave accrued but taken at the point when her employment was terminated. This was paid to her, along with the outstanding SSP, in March 2020.

The claimant again relies upon a hypothetical comparator. Mr Smith asked the tribunal to draw the inference that the respondents discriminated directly against the claimant by this failure from the fact that firstly he continued to not pay the claimant SSP until 10 March in circumstances where the claimant had been advised by HMRC on 10 February that RCAL had been told to pay; secondly the respondents did not pay holiday until 10 March.

The Tribunal accepted that the reason why Mr Gill did not pay the claimant SSP was that he wanted to await the outcome of the HMRC investigation, and that when he received this he passed to his accountant to process. This was a plausible reason, against the background of him not having processed SSP in the absence of fit notes. The Tribunal was also satisfied, that this was also the reason why he did not pay her holiday pay. The Tribunal did not draw the inference that the reason why the claimant was not paid holiday play was because of her protected characteristic. The Tribunal agreed with Mr Milligan

that there was no link between non-payment of SSP, and the claimant's protected characteristic

149. The Tribunal did not find the claims under section 13 to be well founded.

B - Discrimination arising from disability – Section 15

Section 15 provides;

(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.

150. As pleaded in the claimant's further particulars of claim (page 33), the unfavourable treatment complained of is that the claimant's failure to attend a meeting was a factor which the respondents took into account in deciding to dismiss the claimant.

151. There seemed to be a shift in the claimant's position on this in submissions, where it appeared to be suggested that the less favourable treatment was of the respondent's refusal to speak to Mrs D Murdoch.

152. The 'something arising' relied upon by the claimant is her stammer which is said to arise during bad periods of depression.

153. There is an issue of knowledge disability.

154. Mr Milligan submitted that while there could be no wilful blindness towards disability that was not the case here, and in the circumstances there was no requirement for the respondents to take further steps to investigate the claimant's condition, and that had not been contended for by the claimant.

155. He also submitted that he even if that was contended, enquiry into possible disability is not in itself sufficient to invest and employ with constructive knowledge; it is also necessary to establish what the employer might reasonably have been expected to know that it made such an enquiry. Mr Milligan referred the case of *A ltd v Z 2020 ICR 199 EAT* in support of his position.

156. He submitted that there was no mention in the claimant's medical records of a stammer and there was no contemporaneous reference to it by the claimant as a reason why she could not attend the meeting. Mr Milligan submitted the claimant's evidence that she did not raise directly with Mr Gill that she had a stammer, but he should have known from speaking to her was unsustainable.

157. In considering the question of knowledge, the Tribunal take into account that Mr Gill accepted that from when he first received the claimant's medical certificate stating depressed mood he had an awareness that she may have been suffering mental health issues. In addition to that the claimant emailed Mr Gill advising him in very specific terms that she had mental health issues, the Tribunal was satisfied that this was a sufficient basis upon which the respondents could reasonably have been expected to make enquiry.

158. The Tribunal however agree with Mr Milligan that had they done so they could not have reasonably been expected to know that the claimant had a stammer which was made worse by her depression. There was no medical evidence to support the claimant's contention in this regard in the medical records produced.

159. Further this was not advanced as a reason for the claimant not attending the meeting in her email of 28 November when she made it clear that she would not attend, and give fairly detailed reasons for this. Nor, contrary to Mr Smith's submission was this information which was given to the respondents on 21 October. Mrs D Murdoch's witness statement did not contain evidence to that effect, and nor was spoken to by Mrs Jaconelli.

160. Nor was the Tribunal satisfied that it would not have been apparent to Mr Gill from speaking to the claimant that she had a stammer, or that it was made worse by stress or anxiety. In reaching this conclusion tribunal take into account its own observation of the claimant giving evidence over extended period, including lengthy cross-examination, which she did with great competency and fluency.

161. If the Tribunal is wrong in its conclusion about knowledge then it would have had to go on to consider whether the claimant was unfairly treated because of her stammer. The unfavourable treatment appears to be that the respondents took into account the claimant's failure to attend the probationary review meeting in deciding to dismiss her, and their failure to speak to Mrs D Murdoch.

162. There was no evidence to support the conclusion that the claimant did not attend the meeting because of her stammer. She sent the respondents a detailed email explaining why she was not attending, which did not include that she had a stammer.

163. Nor should it be concluded that the failure to speak to Mrs D Murdoch was in any way connected to the claimant's stammer.

164. The Tribunal did not find the claimant's claim at section 15 to be well founded.

C Failure to make reasonable adjustments- section 20

Section 20 provides;

(20) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with

persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Schedule 8 Part 2

20(1)A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(*a*) *in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

(2) An applicant is, in relation to the description of A specified in the first column of the table, a person of a description specified in the second column (and the reference to a potential applicant is to be construed accordingly).

165. Before considering the question of knowledge, the Tribunal considered the PCP relied upon.

166. The PCP pled is that the respondents adopted a practice of dealing only with the claimant in meetings and by telephone.

167. In his submissions, Mr Smith stated that the PCP which would have been a reasonable adjustment would have been agreeing to discuss matters relating to the claimants pay, including her attendance with Mrs Debra Murdoch by telephone. In support of his position he referred to the case of *Ishola Transport for London (2020) ICR 1204,*which dealt with the definition of a PCP, holding that a one off act cannot be a PCP, but that it is not necessary for the PCP to be applied to anyone else.

168. The Tribunal considered part of this submission appears to conflate the PCP with an adjustment, however Mr Smith went on to suggest that Mrs Jaconelli's

evidence supported a PCP which was that that the respondents refuse to give out information to a non-employee about an employee due to data protection.

169. Mrs Jaconelli did give evidence to the effect that she told Mrs D Murdoch that she was unable to give out information about an employee to a non-employee due to data protection and company policy. However she went on to say that she told Mrs D Murdoch that she would not speak to her about the claimant's employment because she did not have the claimant's instructions to do so. What is to be taken from that is that the respondents' practice was not an simply a refusal to give out information to non-employees about employees, but rather a refusal to so do so because of data protection issues, unless they had authority to do so.

170. That is a practice and would constitute a PCP, but it is not the PCP pled.

171. The PCP which is identified in the ET1, is the case which the respondents have come ready to meet, and the tribunal considered that it was necessary for them to consider that PCP, and not one introduced on submission.

172. Mr Milligan argues that no valid PCP is identified. There was an insufficient element of repetition about it, and must be applicable to both the disabled person and her nondisabled comparators.

173. The Tribunal considered the alleged PCP lacked the necessary element of repetition; it was only on 21 October that there was a refusal on the part of the respondents to speak to Mrs D Murdoch, (and by inference only deal with the claimant) on the basis they had no authority to do so. There was no insistence that the claimant attend meetings. She was asked to attend, however she never requested that anyone else attend on her behalf. That cannot support the proposition that the respondents insisted on dealing only with the claimant.

174. The Tribunal concluded that no valid PCP had been identified and this claim fails.

175. If the Tribunal is wrong in that conclusion, and a valid PCP has been identified, then it would have to consider the disadvantage which the application of the PCP would have placed the claimant at.

176. Mr Smith made clear on submission that the claimant's case on this is that she was placed at a disadvantage because of her worsening stammer as a result of her depression which made it difficult for her to articulate her position.

177. The respondents would have been required to know that the claimant would have been likely to be placed at that disadvantage, by the application of the PCP. The Tribunal's conclusions on knowledge are set out above, and therefore the respondents did not have the requisite knowledge.

178. The Tribunal did not find the claim under Section 20 to be well founded.

D **- Harassment – Section 26**

Section 26 of the EQA provides;

(*1) A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii))creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

179. The complaints of harassment were allowed in by way of an amendment, however the question of time bar was reserved to the final hearing.

Section 123 of the EQA provides;

(*1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…..

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

180. There are three matters which are complained of acts of harassment. The first is failure to pay SSP. The second matter complained of is dismissal, and the third is failure to pay holiday pay.

181. Mr Milligan accepts that it is only the complaint of dismissal as an act of harassment which is out of time. He reminded the tribunal the test set out in the case of *Robertson v Bexley CC (2003) IRLR 434* and that there is no presumption that time should be extended. On the contrary the claimant needs to persuade the Tribunal that it should exercise its discretion, and the exercise of that discretion is the exception rather than the rule.

182. Mr Milligan accepted that the allegation arises from facts already pled. He argued that while it may be said that there was little or no prejudice to the respondents this gave the claimant another opportunity to re-categorise claims already pled, and that was higher prejudice to the respondents than to the claimant in having to answer that additional claim which has already been

argued under multiple heads of the EQA, and an automatically unfair dismissal claim.

183. In considering the issue of time bar the Tribunal takes into account that when the claim was initially raised the claimant had been in consultation with Strathclyde law clinic, but not formal legal advisers. It also takes into account the balance of prejudice. In circumstances where the Tribunal has already heard the evidence, and the claim rests on the same factual basis, the Tribunal was persuaded that there could potentially be prejudice to a claimant in being prevented from presenting a claim, which may succeed under one head but not another; there was little or no prejudice to a respondents in that they did not require any additional witness evidence or documentation to resist the claims given the factual basis of the claim is no different to the ones which they already face. Accordingly the Tribunal exercised its discretion under section 123 to allow the claim that dismissal was an act of harassment to be considered.

184. The Tribunal then considered each of the allegations of harassment.'

A. Failure to pay SSP.

It is accepted that there was a failure to pay SSP, and that this was unwanted conduct.

The Tribunal then had to consider if this was conduct related to the claimant's protected characteristic of disability. Mr Smith argued that because Mr Gill did not believe the claimant was disabled he refused to pay sick pay .

The Tribunal did not find this argument persuasive. Even if it was satisfied that Mr Gill did not believe the claimant was genuinely unwell, (and it reached no such conclusion), it was difficult to see how this could be the basis of conduct related to the protected characteristic of disability.

In event for the reasons given above the Tribunal was satisfied that the reason why Mr Gill did not pay SSP to the claimant was because he had not received fit notes, which he believed he required in order to process SSP, and that he

was waiting for the outcome of HMRC's enquiry. None of this related to her claimant's disability.

B Dismissal

Again there is no issue that dismissal was unwanted conduct. The claimant did not want to be dismissed.

Mr Smith submitted that this was unwanted conduct related to the claimant's depression. The respondents had not notified her of the extension of her probationary period, nor had they told her that the outcome of the probationary review meeting could be dismissal. They had taken into account her failure to attend meetings and her absences in taking the decision to dismiss her.

The Tribunal has to consider if dismissal was an act relating to the claimant's depression. 'Related to' is broader that on the grounds of, and the claimant does not need to show that her disability was the direct reason why she was subjected to the alleged harassment

The claimant was dismissed for absences ,some of which arose as a result of the depression, and the tribunal has to consider if this conduct had the proscribed purpose or effect.

The Tribunal was not persuaded against the facts found, that Mr Gill dismissed the claimant with the purpose of harassing her.

The Tribunal then went on to considered whether dismissal had that effect. That required the Tribunal to consider Section 26 (4) which contains both a subjective and objective element. The Tribunal was satisfied that the claimant considered the conduct unwanted and was upset by it , however in considering the subjective element the Tribunal has to take into account Section 26(4) (b) and (c). The other circumstances of this case are that the claimant had a poor absence record, had not followed the absence management policy, was on an extended probationary period, was unable to return to work , and the respondents were under significant pressure in terms of staffing. Objectively

in light of these circumstances, it could not be said that the act of dismissal had the proscribed effect .

Furthermore, while a one off act or comment can amount to harassment, the tribunal accepted that, as submitted by Mr Milligan, dismissal was an incident, not an environment as submitted (*General Municipal and Boilermakers Union v Henderson 2015 (IRLR EAT).*

C Non-payment of Holiday pay

There is no issue that this is unwanted conduct.

It appears to be argued that this was not paid to the claimant on the basis that Mr Gill did not believe she was disabled.

The same considerations as set out at **A** above apply here.

As indicated above even if the Tribunal was satisfied that Mr Gill did not believe the claimant was genuinely unwell, it was difficult to see how this could be the basis of conduct related to the protected characteristic of disability.

In any event for the Tribunal was satisfied that the reason why Mr Gill did not pay holiday pay to the claimant was because he was waiting for the outcome of HMRC's enquiry. This did not relate to the claimant's disability.

The Tribunal did not find the claims under Section 26 to be well founded.

Section 104 of the ERA- Automatically unfair dismissal

185. Section 104 provides;

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal

(b) the right conferred by section 86 of this Act,

(c) the rights conferred by sections 68, 86, 145A, 145B, 146, 168, 168A,] 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off).

(d) the rights conferred by the Working Time Regulations 1998, the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003 , the Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008, and

(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006

(5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3).

186. The right which it is said the claimant asserted his right to payment of SSP, which it is said the claimant asserted in her email of 21 October 2020.

187. Mr Smith's position was that the RCAL where under a legal obligation under the Statutory Sick Pay (General) Regulations 1982 (as amended) to pay the claimant SSP. The claimant had an entitlement to claim that the non-payment of SSP was an unlawful deduction from wages in terms of Section 13 of the ERA. Mr Smith submitted that effectively accreting a failure to pay SSP and a claim of non-payment of wages came to the same thing.

188. Mr Smith submitted that the decision to dismiss the claimant in November 2020 was influenced by the claimant having asserted this right and that she acted in good faith in doing so.

189. Mr Milligan accepts that assertion right under section 13 is a relevant statutory right, but his position is that that asserting the right to payment of SSP is not relevant statutory right.

190. There is no issue of good faith.

191. The first element is to consider whether the claimant had asserted a relevant statutory right.

192. Section 104 sets out the relevant rights, and includes at subsection 4*(a)any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.*

193. SSP is included in the definition of wages in section 27 of the ERA, however, at the point when the claimant wrote her email, and when she was dismissed, there was a dispute between the parties as to whether SSP was due. The

claimant's position was that it was due; the respondents disputed this. In circumstances where there is a dispute as to the entitlement to SSP, it is the Inland Revenue who have the jurisdiction to determine this, and the Tribunal do not have a parallel jurisdiction do so.

194. The claimant was therefore asserting a right (the right to be paid SSP) which the Tribunal does not have jurisdiction to consider, and therefore is not caught by the provisions of section 104.

195. If the Tribunal is wrong in this conclusion then it would have had to go on to consider the issue of causation. For reasons which are gone into the above, the tribunal was satisfied that the principal reason why the claimant was dismissed was because of her absences and her failure to engage in the absence management procedure.

196. While the Tribunal concluded that Mr Gill was angry about the claimant and Mrs D Murdoch's behaviour 21 October, it appears that the main target of his ire was the tone of the emails and telephone conversation, and how they reflected on his staff and his organisation. In his evidence he appeared to particularly irked about the complaint about a data protection breach.

197. The Tribunal is further fortified in its conclusion that the claimant's reporting matters to HMRC was not the principal reason for the claimant's dismissal in that a month elapsed between the claimant alerting Mr Gill to the fact that she had contacted HMRC, and his taking the decision to dismiss her, and that he did so after again inviting him to attend a meeting to discuss her absences, which she did not attend.

198. The Tribunal did not find the claim under section 104 to be well founded.

Employment Judge: Laura Doherty
Date of Judgment: 09 February 2022
Entered in register: 10 February 2022
and copied to parties