



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs G Simmonds

**Respondent:** Magic (UK) Ltd

**Heard on:** 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> February 2020  
8<sup>th</sup> and 9<sup>th</sup> February 2022  
In chambers on 10<sup>th</sup> February and 4<sup>th</sup> March 2022

**Before:** Employment Judge Pritchard

**Members:** Ms C Edwards  
Mr S Sheath

**Representation**

Claimant: In person

Respondent: Mr J Vatcher, counsel

## JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed.
2. The Claimant's claim of direct disability discrimination is dismissed.
3. The Claimant's claim of harassment related to disability is dismissed.
4. The Claimant's claim that the Respondent failed to make reasonable adjustments is dismissed.
5. The Claimant's claim for notice pay is dismissed.
6. The Claimant's claim for holiday pay is dismissed.
7. The Claimant's claim that the Respondent made unauthorised deductions from her wages is dismissed.

# REASONS

## Introduction

1. By way of ET1 claim forms presented on 31 May 2018 and 17 September 2018 the Claimant claimed constructive unfair dismissal, sex discrimination, discrimination on grounds of marital status, disability discrimination, harassment, failure to make reasonable adjustments, breach of contract/wrongful dismissal, holiday pay and unauthorised deductions from wages (relating to sick pay). The Respondent resisted the claims. The Claimant withdrew her claims of sex discrimination and discrimination on grounds of marital status before the commencement of the hearing.
2. The hearing, originally listed for five days, commenced on 24 February 2020. On the third day the Claimant became unwell and the hearing was adjourned part-heard. Various factors caused re-listing to be delayed: the Claimant's requirement to shield during the pandemic; the Claimant's contention that she had limited broadband connection which prevented a video hearing during the pandemic; the requirement for the Claimant to undergo surgery; and unavailability of the Respondent's witnesses. The hearing recommenced before the same panel on 8 February 2022.
3. The Tribunal heard evidence from the Claimant and from the following witnesses on her behalf: Amanda Howard (Class Teacher); Sarah Cladinboel (former Trustee); Marion Freeman (Teacher); Karen Wright-Moseley (part-time, self-employed Teacher); Ian Grimley (Senior Teaching Assistant); Sian Ford (Chair of the voluntary organisation); Christine Hannon (unpaid volunteer); and Andrew Hopper (former Trustee). The Claimant also put in evidence the witness statement of Rob McPherson although he was unable to attend to give evidence. The Tribunal heard evidence from the Respondent's witnesses: Claire Cooper (Trustee and Director); Paul Thomas (Trustee and Director); Crispin Morris (Deputy Head Teacher of Sir Joseph Williamson's Mathematical School); Phillipa White (external Employment Law and HR Consultant); and Karen White (CEO of Castle Trust).
4. The Tribunal was provided with a bundle of documents containing over 1,000 pages to which the parties variously referred. The Claimant provided a supplementary bundle of documents. At the re-commencement of the hearing in February 2022, the Respondent produced copies of a number documents requested by the Tribunal and which were added to the bundle. The Claimant also produced a further clip of documents which were also admitted in evidence. At the conclusion of the hearing the parties made oral submissions.
5. The Tribunal made reasonable adjustments for the Claimant. These are recorded in a note to the case management order issued on 26 February 2020. Reasonable adjustments were also made for the Claimant during the 2022 hearing: providing frequent breaks and allowing breaks when requested; allowing the Claimant's husband to assist the Claimant; giving the Claimant time to find documents in the bundles; and providing a high back chair with arms as she requested.

## Issues

6. Preliminary hearings took place on 6 March 2019 and 6 August 2019 when the claims and issues were discussed and partly identified. Following the order of Employment Judge Freer, a list of issues was prepared by the Respondent. At the commencement of the hearing, the parties confirmed their agreement that the list contained the issues for determination by the Tribunal.
7. The list of issues reads as follows.

**Constructive unfair dismissal**

8. Did the Respondent, by its alleged actions as specifically identified in the particulars of claim, commit the alleged breaches of the Claimant's terms of employment (*the Claimant cited at PH on 6 March 2019 the following conduct which allegedly breached trust and confidence*):

- 8.1. Bullying.

*In the ET1, the Claimant appears to allege the bullying was carried out by a trustee "Paul Thomas"*

- 8.2. Failure to deal with her grievance

- 8.3. Unfair procedures

- 8.4. Forced to attend meetings

- 8.5. Suspension by trustees

- 8.6. Breach of data protection

- 8.7. Failure to pay contractual sick pay

*Claimant had sickness absence in the period 15 March 2018 to 9 May 2018. The Respondent paid SSP. The Claimant states was entitled to three months full pay and three months half pay.*

- 8.8. Sexual harassment

*The Claimant withdrew her sex discrimination claim at PH on 6 August 2019. The Respondent fails to understand why she is still arguing sexual harassment as part of her constructive unfair dismissal claim.*

*On the face of it, it appears to the Respondent that the Claimant is setting out a last straw argument based on alleged breaches occurring in the period November 2017 until her resignation on the 25 June 2018. However, it is unclear what the last straw will relied upon is?*

9. Did the Claimant resign in response to the alleged breaches or for any other unconnected reason (*Respondent states that Claimant resigned in the middle of a disciplinary hearing to avoid disciplinary sanction*)?

10. If the Claimant was dismissed, what was the reason for her dismissal and was that reason a potentially fair reason within the meaning of s.98 ERA 1996? (*Respondent states conduct*).
11. If so, did the Respondent act reasonably or unreasonably in all the circumstances in treating that reason as sufficient to dismiss the Claimant?
12. If the dismissal was unfair, did the Claimant contribute to her dismissal by blameworthy conduct (*Respondent states Claimant had been found guilty of acts of gross misconduct, including awarding herself unauthorised salary increase, making pay and benefit changes without the knowledge and agreement of the Trustees and awarding herself enhanced sick pay without the Trustees' approval*)?
13. If so, by what proportion, if any, is it appropriate to reduce any compensation payable to the Claimant (*Respondent states 100% reduction*)?
14. If the dismissal was unfair, what was the likelihood that the Claimant would have been dismissed in any event had a fair process being conducted, and is it just and equitable to reduce the Claimant's compensation accordingly? (*Respondent states Claimant it would have been dismissed in any event, so 100% reduction should apply*).

### **Disability discrimination**

#### **Disability (s.6 EqIA)**

15. Was the Claimant a disabled person as defined by section 6 of the Equality Act 2010 (EqIA) at the relevant time for which the following sub-issues arise:-
  - 15.1. Was the Claimant suffering from a physical or mental impairment (*at PH on 6 August 2019 it is noted that the Claimant stated there were three impairments relied upon:*
  - 15.2. Thrombosis/Edema
  - 15.3. Back pain
  - 15.4. Stress and depression

*The Respondent notes that in her impact statement the Claimant appears to have made no reference to back pain and appears to be substituting new conditions of "Urticaria Vasculitis/Spontaneous Urticaria and Angioedema")?*

16. Was the impairment above "long term" meaning it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the Claimant's life?
17. Did the impairment impact on the Claimant's ability to carry out normal day to day activities?
18. Was the impact substantial?

19. Did the Claimant have this disability at the relevant time (*Respondent notes that dates have not been provided for all of the alleged discriminatory acts*)?

Direct disability discrimination (s13 EqIA)

20. Did the Respondent treat the Claimant less favourably than they treated or would have treated a non-disabled person? (*At PH on 6 August 2019, Claimant alleged following unfavourable treatment:*

20.1. Respondent undertook work-related communications with her while she was off work through illness;

20.2. Respondent instructed members of staff not to contact her;

20.3. She was not allowed to return to work when she was signed fit to do so by her GP).

21. Was the less favourable treatment because of disability (*Claimant has not specified which alleged disability relied upon in relation to above, but Respondent denies knowledge of any disability at any relevant time*)?

22. What is the comparator to assess alleged discrimination? Are the circumstances materially similar?

Harassment (s.26 EqIA)

23. What is the alleged unwanted conduct? (*Claimant stated at PH on 6 August 2019 that she relied upon the same acts as alleged [under the heading direct discrimination] above*).

24. Is the alleged treatment claimed brought within time, extended as part of a continuing act and/or in respect of early conciliation (ss.123(1)(a) & (3) & s.140B EqIA)? (*The Respondent states the Claimant invoked EC procedure on 6 August 2018, the EC certificate was issued on 6 August 2018, and the claim was lodged on 17 September 2018. Any acts alleged to occur before 18 June would be out of time*)?

25. If not, is it just and equitable to extend time (s.123(1)(b))?

26. Did the alleged perpetrator engage in unwanted conduct with the Claimant (s.26(1)(a))?

27. Was the unwanted conduct related to the Claimant's disability (s.26(1)(a) & 26(2)(a) EqIA)?

28. Did the conduct have the purpose/effect of violating the Claimant's dignity (s.26(1)(b))?

29. If the answer is no, did the conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating, offensive environment for her (s.26(1)(b))?

30. If so, was the conduct deliberate/was it reasonable for it to have that effect (s.26(4))?

31. If so, what remedy should the Claimant receive?

Reasonable adjustments (s.20 EqIA)

32. Was the Respondent under a duty to make reasonable adjustments (*insofar as the conditions relied upon by the Claimant, as identified by the judge at the PH on 6 August 2019, Respondent had no knowledge of the alleged disabilities or the substantial disadvantage*)?

33. Are the alleged omissions claimed brought within time, extended as part of a continuing act and/or in respect of early conciliation (ss.123(1)(a) & (3) & s.140B EqIA)? (*The Respondent states the Claimant invoked EC procedure on 6 August 2018, the EC certificate was issued on 6 August 2018, and the claim was lodged on 17 September 2018. Any acts alleged to occur before 18 June would be out of time*).

34. If there was a duty and the claim is in time, did the respondent apply a PCP:

34.1. With regard to thrombosis/edema Claimant states PCP is working prescribed hours;

34.2. With regards to back pain, Claimant states PCP is working with the available office equipment;

34.3. With regards to stress and depression, Claimant states PCP working prescribed hours and operating (limited) welfare support.

35. If the Respondent did apply a PCP, did that PCP put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled persons?

35.1. With regards working prescribed hours, Claimant states due to thrombosis/edema she required a break from work of 10 minutes every two hours where she can keep her legs raised to alleviate her symptoms.

35.2. With regards working with the available office equipment, this caused back pain.

35.3. With regards working prescribed hours and operating (limited) welfare support, this exacerbated her stress and depression.

36. Did the Respondent take such steps as were reasonable to have to take to avoid the disadvantage?

36.1. With regards to [35.1] above, Claimant states the reasonable adjustment was to allow a break of around 10 minutes every two hours where she can keep her legs raised to alleviate her symptoms.

36.2. With regards to [35.2] above, the Claimant states the reasonable adjustment would be to provide a specialist chair.

36.3. With regards to [35.3] above, the Claimant states the reasonable adjustments would be that the Respondent should have provided: counselling; supervision and guidance about support; and a lone workers policy.

**Notice pay**

37. Did the Respondent by its conduct as alleged commit a repudiatory breach of the Claimant's terms of employment thus entitling the Claimant to resign?

38. If so, what is the amount of notice pay to be paid to the Claimant (*the Claimant appears to allege in her ET1 that she had an agreed notice period of 12 months. The Respondent would contend no such contractual notice period was agreed and notice should be based on statutory notice. This would be 6 weeks if continuity of employment commenced on 1 April 2012 as stated in the ET1*).

**Holiday pay (regs2, 13-14 & 30 Working Time Regulations 1998)**

39. When the Claimant's employment came to an end, was she paid all of the compensation to which she was entitled under Regulation 14 of the Working Time Regulations 1998?

40. What was the Claimant's leave year? (*Respondent states 1 January to 31 December*).

41. How much of the leave year had elapsed at the effective date of termination (*EDT was 25 June 2018 so 176/365ths from 1 Jan 2018 to 25 June 2018*)?

42. In consequence, how much leave had accrued for the year under Regulations 13 and 13A (*Respondent states 2.7 weeks @ 3 days per week 8.1 days*)?

43. How much paid leave had the Claimant taken in the year (*Respondent states 4 days*).

44. How many days remain unpaid (*Respondent states claimant was paid 4.5 days accrued holiday pay in her final pay on 30 June 2018 so zero*)?

45. What is the relevant net daily rate of pay (*Respondent states net daily rate of pay based on authorised salary of £42,000 pounds is £204.11; Claimant states salary is £45,000 pounds which gives net daily rate of pay £215.22*)?

46. How much pay is outstanding to be paid to the Claimant? (*Respondent states no pay is due. Claimant states 14 days' holiday pay outstanding*).

**Breach of contract (holiday pay)**

47. Was the Claimant entitled to be paid enhanced holiday pay, in accordance with the terms of her contract, following her dismissal (*Claimant appears to allege she was entitled to 35 days annual leave plus public holidays. Respondent states contractual leave entitlement was 17.5 days {29 days full time equivalent} per year inclusive of any public holidays*)?

48. Although categorised as a breach of contract claim, the Tribunal would be required to determine the claim for holiday pay under both the provisions of the Working Time Regulations 1998 and the unauthorised deductions from wages provisions of the Employment Rights Act 1996 having regard to the Claimant's legal entitlement to holiday pay under her contract of employment.

### **Unauthorised deductions**

49. Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with ERA section 13 by failing to pay contractual sick pay and if so, how much was deducted (*Claimant had sickness absence 15 March 2018 to 9 May 2018; Claimant states she was entitled to three months at full pay and three months at half pay. Respondent states Claimant has no entitlement to contractual sick pay and was only entitled to statutory sick pay during this period of sickness absence*)?

### **Mitigation**

50. Has the Claimant provided evidence that she has taken reasonable steps to mitigate her loss? (*The Claimant has ticked the box of her ET1 to say she has not found alternative employment – no evidence of mitigation provided but appears to be presently unfit for work – and has been since her resignation*)?

51. During the course of the hearing, the Respondent conceded that the Claimant was a disabled person by reason of having back pain (which the Claimant said was a symptom of Thrombosis/Edema). The Respondent otherwise denied knowledge of disability and resisted the disability discrimination and harassment claims. The Respondent did not concede that the Claimant was a disabled person by reason of stress and depression.

52. At the outset, the Tribunal informed the parties that it would consider liability only at the hearing. If the Claimant were to succeed in all or any of her claims, a further hearing would take place to consider the question of remedy/compensation.

### **Findings of fact**

53. In or about 2006, the Claimant was instrumental in the creation of an unincorporated association named the Medway Autism Group and Information Centre ("Magic") run by a voluntary management committee which included the Claimant. The Claimant was employed by Magic as Development Consultant.

54. In 2012, the Claimant caused the Respondent to be incorporated as a company limited by guarantee. Its Articles of Association were those of a charitable company. Its objects were specifically related to the following:

*To relieve the needs of children with autistic spectrum disorders and their families, within the Medway towns, in particular but not exclusively by*

*Providing a centre of information relating to autism and coexisting disorders,*

*Establishing and maintaining a parent based advisory group for information sharing,*



*Arranging activities for the purpose of social skills development for children with autistic spectrum disorders offering extra-curricular activities otherwise unavailable to them,*

*Providing a managing a drop-in centre within the Medway towns for use by the families and those working with children with autistic spectrum disorders, and*

*To create and make available a directory of local agencies offering services for families with children with autistic spectrum disorders and professionals working with such children*

55. The Articles of Association provided that no director or connected person could be employed by, or receive any remuneration from, the charity.
56. Following discussions with accountants in 2013 and 2014, it was decided that the Respondent company would pursue charitable registration. This would facilitate the purchase premises, charity status being crucial for a mortgage to be raised.
57. The Claimant was aware that she could no longer be a director and receive a salary. She resigned as a director on 1 January 2015. The Respondent achieved charitable status in October 2015. It was proposed that Sarah Cladinboel, Paul Thomas and Andrew Hopper would become Trustees.
58. The Respondent remained a dormant company until November 2015. The process of transferring the activities of Magic, the unincorporated association, to the Respondent company began on 1 November 2015. Employees transferred to the Respondent's payroll on 1 March 2016
59. From March 2016, the Claimant was employed as the Respondent's CEO. The Claimant's husband, Chris Suckling, was employed as Office Manager. The Claimant's son, Oliver Simmonds, was also employed.
60. The Report of the Trustees for year ended 30 April 2016 record that the Respondent was organised by the members of the management committee and the management committee had delegated the responsibility of the day-to-day operation of the organisation to the Claimant.
61. Discussions took place at an early stage about the terms of the Claimant's employment. This included consideration of enhanced sick pay provision and additional leave. However, the discussions were not conclusive and nothing was agreed.
62. The various wage slips produced in evidence show that when employed by Magic (the unincorporated association) the Claimant was paid £3,500 gross per month from September 2013 and that this monthly salary continued into her employment by the Respondent. £3,500 per month gives an annual salary of £42,000.
63. In August 2017, the Claimant's husband gave instructions to the Respondent's external payroll providers to increase the Claimant's salary from £42,000 to

£45,000 and for his salary to be reduced from £38,000 to £35,000. The Claimant confirmed to the payroll provider:

*This email is just to confirm my Salary has been 45k for at least 2.5 years but as Chris and I were married it made more sense for my Salary (42k) to remain and Chris took my increase. I believed this meant I would pay less tax, however this has not been the case. As we are legally separated soon to be divorced I would rather my Salary is now paid directly to me which is why we need the change*

64. In her August Report to Trustees, the Claimant refers to the amended salary of another member of staff, but she did not mention any changes to her own salary or that of her husband.

65. On 10 August 2017, the Claimant sent to the Trustees a Preliminary Project Plan regarding a project known as Magic Train. This document noted:

*... [the Claimant] will be increasing her working days from 3 to 5 to ensure stable management for MAGIC and that enough time can be allocated to making the training successful*

66. Paul Thomas, as Chair of the Trustees, suggested that the project should be discussed at a meeting.

67. On 21 August 2017, the Claimant's husband informed the Respondent's payroll provider:

*Also, I've just been informed that [the Claimant's] salary has gone up from £45,000 P.A. to £75,000 P.A. [The Claimant] is also copied in to this email and will follow it up with confirmation to you.*

68. A Trustee meeting took place on 11 September 2017. The Trustees present included Paul Thomas (Chair), Claire Cooper, Jennifer Daly, and Chris Pocock. A further Trustee, Andy Barnwell, was appointed at the meeting. Further meetings took place on 19 September 2017 and 27 November 2017. There is nothing to suggest in the minutes of the Trustee meetings that the Claimant's salary increase was notified to them.

69. In September 2017, the Respondent was visited by Ofsted.

70. There was often conflict between Paul Thomas and the Claimant. In December 2017, Paul Thomas communicated to the Trustees his intention to resign as a Trustee, in part due to his poor relationship with the Claimant.

71. The Trustees were concerned that the Claimant had asked for money to treat staff to a night out at the dogs. They asked the Finance Manager to provide details of all income and expenditure from September 2017 to 8 January 2018 and noticed a number of gifts and items of other expenditure which caused them concern. They were also informed by the Respondent's accountants that the Claimant's salary was £75,000.

72. By letter dated 10 January 2018, the Claimant made a formal complaint against Paul Thomas alleging:

*Bullying, intimidation and threatening verbal behaviour including making consistent derogatory remarks...*

*Clearly, there is no trust associated with the CEO and the Trustees...*

*I would be willing to address all of my concerns today if Paul is removed from the room with a view to him being removed from the Board of Trustees, our working relationship has become untenable, how can I work productively with a person who has not confidence in me or my management decisions (please see printed e-mail discussions with are left for you with a hard copy of this letter)*

73. The Claimant's complaint was not communicated to Paul Thomas by the Trustees.

74. A meeting of the Trustees took place on 10 January 2018. Among other things, the note of the meeting records:

*The trustees called this extra meeting following advice given by the Charities Commission*

*Clarification was sought by the trustees as to the reasons for Paul's decision to resign. Paul commented that there were two issues. A) Work commitments B) The CEO's abuse following the trustees' decision to limit expenditure for staff and volunteer appreciation*

*Jenny clarified, following her discussion with the Charities Commission, that charitable money cannot be spent on 'appreciation'*

*All trustees acknowledged that Paul's departure will be a great loss to MAGIC*

*All trustees have requested the Charity Commission be contacted and an independent review of Magic requested to ensure correct governance and protocols are in place*

*All trustees agreed that if it is for the good of the charity that people move on, including the CEO, then that is for the benefit of the charity*

*Trustees understand Paul's decision to resign as chair, but have not accepted Paul's decision to resign as trustee and have asked Paul to reconsider over the next two weeks, as all believe Paul remaining in post would be to the benefit of Magic*

*All trustees want to resign but can't. All trustees agreed that they have been reasonable but the CEO is undermining the Board of Trustees*

75. In the event, Paul Thomas was persuaded by fellow Trustees that he should not resign.

76. On 24 January 2018, the Claimant created a contract of employment in her own name. Among other things, it states that:

*This document dated 4th October 2016 sets out the main terms of your employment.*

*Commencement of employment*

*Your employment with Magic (UK) LTD commenced on 25th April 2012*

*Pay*

*Your salary is agreed at £45,000 per year... The hourly rate of £48.07 will be paid in arrears for additional hours accrued unless previously agreed as Time off in lieu (TOIL)*

*Hours of work*

*Your normal days and hours of work are 18 hours per week*

*Holiday entitlement*

*The holiday year runs from 1st January to 31st December*

*Your annual holiday entitlement in any holiday year is 35 which is exclusive of recognised public holidays*

*If you work part-time your annual holiday entitlement will be calculated and applied on a pro-rate basis.*

*Statutory sick pay*

*You will be entitled to 12 weeks full pay followed by 12 weeks at half pay for any period of absence due to sickness ...*

*Notice*

...

*You are entitled to receive the following written notice of termination of employment from Magic (UK) Ltd*

***Length of service***

*Less than one month*

***Notice period***

*No notice*

*At least one month but less than two years' continuous employment*

*One week*

*Two years' or more continuous service*

*One week per completed year of service up to a maximum of 12 weeks*

77. The Claimant entered her signature on the document, purporting to have signed it on 7 October 2016.

78. Following a meeting Claire Cooper and Chris Pocock held with the Respondent's accountants on 24 January 2018, the Trustees decided that the Claimant should be suspended pending an investigation. They engaged an external HR Consultancy, Mentor, to consider both the Claimant's grievance and disciplinary issues of concern which had come to light.

79. On 1 February 2018 Lynn Kennedy of Mentor met with the Claimant to inform her that she was suspended. Lynn Kennedy confirmed the Claimant's suspension by email dated 5 February 2018, the allegations being investigated described as follows:

*An unauthorised salary increase from approximately 45K to 75K from August 2017 without the knowledge and agreement of the trustees*

*Breach of contract as CEO of Magic (UK) Ltd regarding unapproved pay and benefit changes without knowledge and agreement of the trustees*

*The introduction of an enhanced sickness policy within your personal contract without the knowledge and agreement of the trustees (12 weeks full pay, followed by 12 weeks half pay)*

*Expenditure for staff appreciation and gifts (which is in contradiction to the charities Commission regulations) without the knowledge and agreement of the trustees*

*Further salary discrepancies, including a loan, in relation to other employees, including Jill Bunion and Oliver Simmonds*

*The introduction of a new Financial Policy without the knowledge and agreement of the trustees*

*Non-disclosure of family members employed to work at magic (UK) Ltd and the potential conflict of interest this may cause*

80. The email also instructed the Claimant that she was not to contact anyone connected to the allegations except to arrange a companion for any disciplinary meeting unless authorised by Claire Cooper, Trustee or Lynn Kennedy.

81. With regard to the written complaint the Claimant had raised on 10 January 2018, by email dated 9 February 2018 Lynn Kennedy invited the Claimant to a grievance meeting to be held on 13 February 2018 with Philippa White. In the event, grievance meetings took place on 15 and 20 February 2018. At the grievance hearing of 15 February 2018, the Claimant provided a further comprehensive document detailing her complaints and giving examples. As part of her investigation into the Claimant's grievance, Phillipa White interviewed: Paul Thomas; Claire Cooper; Jennifer Daly; Andrew Hopper; Roy Lee; Chris Pocock; Elizabeth Lee; Sarah Cladinboel; Andy Barnwell and Jackie Pierce.

82. By email dated 12 February 2018, Helen Sykes of Mentor invited the Claimant to attend an investigation meeting on 26 February 2018 to discuss the disciplinary allegations. At this meeting the Claimant produced a document seeking to explain the allegations against her.

83. In advance of the disciplinary investigation meeting, Helen Sykes interviewed Sarah Cladinboel. Among other things, Sarah Cladinboel thought the Claimant's salary was £45,000. She remembered discussions about the Claimant's contractual terms but could not remember if anything was agreed.

84. Helen Sykes went on to interview: Chris Pocock; Claire Cooper; Jennifer Daly; Paul Thomas; Roy Lee (a recently appointed Trustee); and Clair Rayner (Account Partner with the Respondent's accountants).

85. After a number of staff approached the Trustees with concerns regarding the Claimant, Helen Sykes also interviewed nine individuals who wished to remain anonymous. Helen Sykes also interviewed Chris Suckling and Kieron Yates. As a result of further concerns coming to light, on 9 March 2018 the Claimant was informed that the following further allegations would be investigated:

- *Bullying and harassment of a number of Magic staff members*
- *Breaching the Companies [sic] code of conduct by falsifying your whereabouts on the signing in sheet, in particular for the dates of 4<sup>th</sup> and 6<sup>th</sup> September 2017*
- *Breaching the terms of suspension by using the Companies [sic] email account to send emails whilst suspended from duties*
- *Breaching the Companies [sic] code of conduct by taking charity donated B&Q furniture for private use, and retaining charity purchased items from Bookers for personal use*
- *Inappropriate use of charity funded staff resource, namely requesting a member of staff to complete private DIY work at your personal residence*

86. On 15 March 2018, the Claimant was certificated by her GP as being unfit for work because of stress at work and thereafter further certificated with stress and depression until 9 May 2018. During The Claimant then remained suspended from work.

87. By letter dated 21 March 2018, Philippa White provided the Claimant with her grievance outcome. Philippa White concluded that although there had been a clash of personalities, there was insufficient evidence to support an allegation of bullying and harassment against Paul Thomas.

88. By letter dated 3 April 2018, the Claimant appealed against Philippa White's grievance outcome. Because of the costs of engaging a further third party consider the Claimant's appeal, the Respondent initially proposed that Chris Pocock would consider it. However, following protestations from the Claimant that her grievance was against all the Trustees and that Chris Pocock could not be impartial, the Respondent appointed Crispin Morris to hear the Claimant's appeal.

89. Helen Sykes completed her investigation into the disciplinary allegations on 16 April 2018 and produced a comprehensive report. The following allegations were dropped due to insufficient evidence, and a lack of official process or procedures outlining spending limits:

- *Expenditure for staff appreciation and gifts without the knowledge of the trustees*
- *Non-disclosure of family members employed to work at Magic (UK) Ltd and the potential conflict this may cause*
- *The introduction of a new Financial Policy without the knowledge and agreement of the Trustees*
- *Further salary discrepancies, including a loan, in relation to other employees, including Jill Bunion and Oliver Simmonds*

90. Helen Sykes concluded that there was sufficient evidence to warrant further exploration of the case within a formal disciplinary hearing.

91. By letter dated 15 May 2018, the Claimant was invited to attend a grievance appeal meeting.

92. By further letter of the same date, the Claimant was informed that there was a disciplinary case for her to answer.

93. The grievance appeal meeting took place on 21 May 2018. Crispin Morris provided the Claimant with his decision on 8 June 2018 that her grievance appeal should not be upheld.

94. By letter dated 12 June 2018, the Respondent invited the Claimant to attend a disciplinary hearing to be chaired by Karen White. The allegations were set out in the letter. The Claimant was informed that they were viewed as gross misconduct and that summary dismissal was a possible outcome. Relevant documentation and the Respondent's disciplinary policy was included with the letter.

95. The disciplinary hearing took place on 20 June 2018. After about 40 minutes, the Claimant handed her pre-prepared letter of resignation to Karen White and left the meeting. Karen White decided to carry out her independent review in the Claimant's absence. Although finding that allegations of bullying and harassment of staff members and using the Respondent's email while suspended were not substantiated, Karen White recommended to the Respondent that the remaining allegations of gross misconduct were upheld. The Tribunal notes that no decision was made by the Trustees with regard to the disciplinary procedure given the Claimant's resignation.

96. The following day, the Claimant was asked to clarify if she was resigning with immediate effect. The Claimant replied:

*I am giving the notice agreed under my original role of CEO. I've explained many times what that is but you have continually ignored me. I can only suggest you contact the previous Trustees and discuss to ensure you do not break the law any further.*

97. The Respondent informed the Claimant that as she was still an employee, the disciplinary process would continue. By email dated 25 June 2018, the Claimant tendered her resignation with immediate effect.

## **Applicable law**

Constructive dismissal

98. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

99. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

99.1. that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach).

99.1.1. The final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA.

99.1.2. Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

99.2. that the breach caused the employee to resign – or the last in a series of events which was the last straw;

99.2.1. An employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069.

99.2.2. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI);

99.3. that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

100. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

101. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by



acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

### Disability

102. Section 6 of the Equality Act 2010 provides that a person has a disability if s/he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his/her ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. 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 measures are being taken to correct it and but for that it would be likely to have that effect.

103. Under paragraph 5 of Part 1 of Schedule 1 of the Equality Act 2010, an impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day to day activities if measures are being taken to treat or correct it and but for that, it would be likely to have that effect.

104. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.

### Direct discrimination

105. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, dismissing him or subjecting him to a detriment.

106. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

107. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason. This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

108. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case.

### Harassment

109. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee.

110. Section 26(1) of the Equality Act 2010 provides that a person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (disability in this case); 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.

111. Section 26(4) provides that 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.

112. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment? Third, was that conduct related to the Claimant's protected characteristic?

113. As explained in the Code of Practice on Employment (2011), unwanted conduct "related to" a protected characteristic has a broad meaning in that the conduct does not have to be because of a protected characteristic.

114. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity: the accusation was the lying and the maternity was only the background.

115. The relevant principles guiding harassment claims were set out in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 as follows:

- 115.1. The test of whether conduct was related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic;
- 115.2. Although in many cases the characteristic relied upon would be possessed by the complainant, that is not a necessary ingredient. The conduct merely had to be found to relate to the characteristic itself;
- 115.3. Whether or not the conduct was related to the characteristic in question was a matter for the tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact;
- 115.4. The fact that a complainant considered that the conduct related to that characteristic is not determinative.

#### Duty to make reasonable adjustments

116. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.
117. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.
118. In the case of the Environment Agency v Rowan [2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-
  - 118.1. the provision, criterion or practice applied by the employer;
  - 118.2. the identity of non-disabled comparators where appropriate; and
  - 118.3. the nature and extent of the substantial disadvantage suffered by the Claimant.
119. In Ishola v Transport for London [2020] IRLR 368 the Court of Appeal made it clear that although a one-off decision or act could amount to a practice, it was not necessarily one; in fact, all three words (provision, criterion and practice) carry the connotation of a state of affairs indicating how similar cases are treated or how a similar case would be treated if it occurred again.
120. The approach to the question of knowledge is informed by the Code, which provides:

*It is not enough for the employer to show they did not know that the disabled person had a disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether*

*a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition disability may think of themselves as a 'disabled person'.*

*An employer must do all they reasonably can be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially"*

*It is not incumbent upon employer to make every enquiry where there is little or no basis for doing so.*

### The burden of proof

121. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

122. Thus, the Tribunal must consider a two-stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

123. If the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

124. In Laing v Manchester City Council [2006] ICR 1519 (although a race discrimination case the same principles apply to all types of discrimination) the EAT stated, among other things, that:

*No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case... An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls*

*pointed out in Shamoon .... it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. ...*

*It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"*

#### Time limits under the Equality Act 2010

125. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable.

126. Under section 123(3):

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

127. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:

- (a) when P does an act inconsistent with doing it; or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

128. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA. At a preliminary hearing when a Claimant, otherwise out of time, seeks to show an act extending over period, he must show a prima facie case; see Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548 CA.

129. In a reasonable adjustment claim, failure to act is an omission and time begins to run when an employer decides not to make a reasonable adjustment; see Humphries v Chevlar Packaging EAT 0224/06.

130. Where an employer is not deliberately failing to comply with the duty to make reasonable adjustments, and the omission due to lack of diligence or

competence, or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission as provided by section 123(4); see Kingston Upon Hull City Council v Matuszowicz 2009 ICR 1170, CA.

#### Just and equitable extension

131. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
132. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.
133. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.
134. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

#### Wrongful dismissal

135. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.
136. A claim for notice pay is a claim for breach of contract; see Delaney v Staples 1992 ICR 483 HL.

#### Holiday pay

137. Regulations 13, 13A and 16 of the Working Time Regulations read together provide that a worker is entitled to 5.6 weeks (up to a maximum of 28 days) paid leave in any leave year. A worker's contract may provide an entitlement in excess of this statutory minimum. Regulation 14 provides that a worker is entitled to be compensated for accrued but untaken leave upon termination of his employment. The leave entitlement in Regulation 13 may only be taken in the leave year in which it is due; Regulation 13A provides that a relevant agreement (such as a workforce agreement, incorporated collective agreement or any other legally enforceable written agreement between the employer and employee) may provide for leave to be carried forward into the following leave year.
138. The entitlement to paid leave under the Working Time Regulations is the minimum entitlement that an employer must provide to a worker and without prejudice any greater contractual entitlement granted to the worker by the employer.
139. Under Regulation 30 a worker may present a complaint to the Employment Tribunal that his/her employer has failed to pay holiday pay.

#### Deductions from wages

140. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.
141. Section 13 does not apply in respect of an overpayment of wages.
142. A claim from holiday pay may also be brought as a claim for deductions from wages: HM Revenue and Customs v Stringer 2009 UKHL 31.

#### **Conclusion and further findings of fact where relevant**

##### Constructive unfair dismissal

###### *Bullying*

143. The evidence clearly shows that the Claimant wrongly considered herself the proprietor and owner of the Respondent. There is little doubt that there was friction between the Claimant and Paul Thomas. However, the Tribunal concludes that this was caused by the Claimant's resistance to Mr Thomas's desire and direction that the Respondent should develop a more structured and professional approach to its organisation and control of its finances. The Claimant was the CEO of a charitable organisation: she could be expected to absorb such lesser blows. The Claimant has not persuaded the Tribunal that Mr Thomas bullied her as alleged.

###### *Failed to deal with grievance*

144. The thrust of the Claimant's allegation is that the Respondent failed to deal with her complaint, raised in the document she put forward at the grievance meeting, that Paul Thomas had kissed the top of her head and patted her with his arm round her. This aspect was indeed overlooked in the grievance outcome. However, it was addressed during the grievance appeal and investigated by Mr Morris. His finding was that Paul Thomas had no specific memory of the incident; it was a case of conflicting evidence as to which no firm conclusions could be reached. Overall, the Respondent dealt with the Claimant's lengthy list of grievances with care and thoroughness and any minor shortcomings do not detract from the generality of that conclusion.
145. The Claimant complains that the Respondent unreasonably delayed dealing with her grievances and refers to the Respondent's grievance policy which states: "you will be invited to a meeting to discuss the grievance, *normally*, within five working days of the Company receiving your grievance" [emphasis added]. The Claimant raised her written complaints in a letter dated 10 January 2018 but it was not until 9 February 2018 that the Respondent invited the Claimant to attend a grievance hearing. However, these were not "normal" circumstances: the Claimant, as CEO, had raised a number of grievances (expanded considerably at the first grievance hearing) while at the same time disciplinary issues had come to light suggesting serious wrongdoing on her part. The Trustees undoubtedly needed time to discuss the situation in order to find a way forward. The Respondent felt obliged to appoint external HR consultants and it would have taken time to appoint and instruct them.
146. The Claimant appealed the grievance outcome of 21 March 2018 on 3 April 2018. The Respondent promptly made arrangements for Chris Pocock to hear the Claimant's grievance appeal. Upon the Claimant's objections, the Respondent appointed Mr Morris to hear her appeal. The Claimant was invited to attend the grievance appeal meeting on 15 May 2018, the appeal meeting taking place on 31 May 2018.
147. The grievance procedure was more prolonged than might typically be seen in a usual case. However, in light of the circumstances detailed above, the Tribunal is not persuaded that the Respondent unreasonably delayed dealing with the Claimant's grievance.

*Unfair procedures*

148. As for the Claimant's allegation that the Respondent followed unfair procedures, the thrust of Claimant's complaint was that Claire Cooper had sought to influence Crispin Morris and referred the Tribunal to the comments Ms Cooper had made on a number of emails sent to Mr Morris in advance of the grievance appeal meeting. The comments were unnecessary; indeed, it might be thought that Claire Cooper held a particular view of the Claimant and/or her actions.
149. Having heard his evidence, the Tribunal is satisfied that Crispin Morris was in no way influenced by what Ms Cooper had written on the emails. Mr Morris was appointed as a professional person with no prior involvement in the matters in question. Importantly, there was no evidence to suggest that the Claimant was aware of the comments at the time she decided to resign and could not, therefore, have influenced her decision.



150. The Claimant also complained that Mr Morris was known to the Trustees and was not, therefore, independent. There was no credible evidence to suggest that Mr Morris had anything other than a professional relationship with Trustees.

*Forced to attend meetings*

151. The Claimant was of course reasonably required to attend various meetings, not least so she could give her explanations in response to the very serious allegations raised against her. No meetings took place during the period in which the Claimant was certificated as being unfit for work. There was no credible evidence to suggest that the Claimant was “forced” to attend meetings.

*Suspension*

152. The decision to suspend the Claimant was no mere knee-jerk reaction. The disciplinary allegations arose from actions taken by the Claimant in her role as CEO of a registered charity. The allegations were serious. The Respondent properly and reasonably suspended the Claimant from her role pending an investigation. Contrary to the Claimant’s contention, there was no credible evidence to suggest that she was suspended because she had raised a grievance against Paul Thomas.

*Breach of data protection*

153. In an email dated 14 April 2018, the Claimant told Chris Pocock “I would be grateful if you would pay my salary on Monday and in cash. You can either give this to Chris Suckling or I can give you my account details to pay it into my account direct. Chris also had my bank details”.

154. The Respondent had difficulty making the wage payment from its own account and it was decided that it would be paid from a personal account. The Tribunal understands that Chris Pocock and his wife, Linda, hold a “slush fund” within a bank account in Linda Pocock’s name. The Claimant complains that her personal bank details had been disclosed to Linda Pocock. The Respondent considered the grievance the Claimant raised in this regard. Chris Pocock confirmed that he is the only one who does, or indeed knows how to do, electronic transfers and that the Claimant’s bank details were never shared with any third party. The grievance outcome also noted that upon completion of the bank transaction, the Claimant’s details were immediately erased. The Tribunal accepts the Respondent’s explanation.

155. To the extent that this payment mechanism amounted to a breach of data protection, it was not of such seriousness as amount to a breach of contract. In any event, the arrangement clearly benefited the Claimant who received her wages.

156. The Claimant referred the Tribunal to a medical questionnaire dated 2 November 2017 which, she asserts, must have gone missing because it was not disclosed to her following her request for documents. There was no credible evidence to suggest this amounted to a breach of data protection or that any

such potential breach was known to the Claimant at the time such that it might have informed her decision to resign.

157. Insofar as the Claimant's allegation is to be categorised as a breach of data protection by reason of the document having "gone missing", the Tribunal notes that the Claimant herself would have had responsibility for the safe retention of personnel records during the period of employment other than during periods of sickness or suspension.
158. The Claimant also refers to the content an email mistakenly sent to her on 24 July 2018. By this time, the Claimant had already resigned and it could not have influenced her prior decision to do so.

*Failure to pay contractual sick pay*

159. The Claimant's alleges that the Respondent breached her contract by failing to pay enhanced sick pay from 15 March 2018 to 9 May 2018. The Tribunal first considers the written contract the Claimant asserts contains the terms and conditions of her employment. The Claimant conceded, in effect, that she fabricated and backdated this document in order to satisfy the requirements of Ofsted. The Tribunal concludes that it would be unsafe to rely on the terms of a fabricated document to ascertain the Claimant's entitlement to sick pay.
160. The Claimant's evidence was that it had been previously agreed with Sarah Cladinboel and Andrew Hopper that she would be entitled to three months full pay followed by three months half pay for periods of sickness. Sarah Cladinboel told the Tribunal that there were discussions about providing enhanced sick pay for the Claimant but could not say whether the issue was resolved and finalised. Andrew Hopper said he could not remember the discussions but was clear that if it had been agreed it would have been documented. During the Respondent's investigation into the matter, Sarah Cladinboel told Claire Cooper that although the Trustees had been asked to consider the terms of the Claimant's contract, if the Trustees had agreed the terms then all three Trustees would have signed to confirm them.
161. No written document was placed before the Tribunal to show that the Trustees had agreed that the Claimant would be entitled to contractual sick pay as alleged. No oral evidence was adduced to that effect save for that of the Claimant.
162. In further support of her argument, the Claimant told the Tribunal that she had many previous periods of sick leave when she had had been paid full salary. However, her own evidence was that despite taking such sickness absence, she continued to work from home and had never previously been signed off by her GP. In submissions, the Claimant confirmed that the period in question was her first formal sickness absence.
163. The Respondent's policy is to pay SSP to employees during periods of sickness.
164. The Claimant has failed to show, on the balance of probabilities, that she had a legal entitlement to the enhanced sick pay for which she contends.

*Sexual harassment*

165. Finally, the Tribunal considers the Claimant's allegation that Paul Thomas sexually harassed her by kissing her on the on the head and patting her.
166. Mr Thomas conceded that he might have hugged the Claimant or put his arm round her but denied any sexual harassment.
167. Any personal contact between the Claimant and Paul Thomas on this occasion, the date of which was never made clear, must be set in context. Any personal contact on this occasion followed a disagreement. The Claimant was upset. The Claimant adduced no evidence to suggest that she had raised the issue contemporaneously that she had been offended or humiliated as later alleged.
168. The Claimant has failed to persuade the Tribunal that Paul Thomas had kissed the top of her head.
169. The evidence made it clear that the Claimant was herself a tactile person. The Tribunal is not persuaded that any personal contact that might have taken place between Paul Thomas and the Claimant was unwanted conduct.

*Conclusion in relation to constructive dismissal*

170. The Claimant has failed to show that the Respondent engaged in conduct or a course of conduct which fundamentally breached her contract of employment. To the extent that there was conflict and disagreement between the Claimant and Paul Thomas, the Claimant was expected to absorb "lesser blows" as described in Croft above.
171. The Claimant was not constructively dismissed and her unfair dismissal claim does not succeed.

Disability

172. The Respondent conceded that the Claimant was a disabled person by reason of physical mobility impairments said to be caused by thrombosis and edema leading to back pain.
173. Turning to the Claimant's contention that she was a disabled person by reason of stress and depression, it is clear from the Claimant's GP records that she was prescribed antidepressants over a considerable period from at least 2012 to the date of her resignation. She was periodically reviewed because of her depression. In March 2018 she felt suicidal and in April 2018 that she was seeing a psychotherapist. The Claimant's disability impact statement describes how her depression affected, in particular following her suspension: loss of concentration, sleeplessness, tearfulness and distress.
174. As to any adverse effect on her ability to carry out day to day activities caused by her mental impairment, the Tribunal finds it is likely that, but for the

medication, the Claimant's depression would have had such an adverse effect, in particular loss of concentration, sleeplessness, tearfulness and distress. The impairment lasted more than 12 months. The Tribunal concludes that the Claimant was a disabled person at relevant times by reason of stress and depression.

#### Direct discrimination

175. It is clear that the Respondent undertook work-related communications with the Claimant during the period she was off work in the period 15 March 2018 to 9 May 2018.

176. It is also clear that the Respondent instructed members of staff not to contact the Claimant following her suspension.

177. It is also correct that the Claimant was not allowed to return to work when she was signed fit to do so by her GP.

178. The Tribunal turns directly to the reason for that treatment (as permitted in Laing; see above). The Tribunal finds the reason for that treatment as follows:

178.1. The reasons for communicating with the Claimant during her period of sickness related to her grievance, the disciplinary investigation other work-related matters. It is clear from the context of the correspondence that the Respondent had fully adequate explanations as to why it corresponded with the Claimant and there was no evidence to suggest it was because of the Claimant's disability.

178.2. Similarly, the Respondent has given fully adequate explanations as to why staff were instructed not to contact the Claimant, namely to avoid the investigation being hampered. This was not because the Claimant was a disabled person.

178.3. The Claimant was not allowed to return to work after she was signed fit to do so by her GP because she remained suspended. This was not because the Claimant was a disabled person. It had nothing whatsoever to do with the Claimant's disability.

179. The Respondent did not directly discriminate against the Claimant.

#### Harassment

180. In agreeing the list of issues, the Claimant confirmed at the commencement of the hearing that the three allegations said to be acts of direct discrimination were the same acts relied on for the purposes of her harassment claim.

181. The Tribunal notes that the Respondent has not raised time limit issues with regard to direct discrimination.

182. As set out in the list of issues, the Respondent avers that any acts alleged to have occurred before 18 June 2018 would be out of time. The Tribunal does not agree. Under section 123 of the Equality Act 2010, as

amended by the ACAS early conciliation provisions, the Claimant had three months to contact ACAS with regard to any alleged act of discrimination or unlawful conduct. She contacted ACAS on 6 August 2018 therefore any act alleged to have occurred before 7 May 2018 would fall outside the primary time limit.

*The first allegation of harassment*

183. The Claimant's period of sickness ended on 9 May 2019, the period in which the Respondent communicated with the Claimant. The first allegation of harassment was presented within the applicable time limit.

*The second allegation of harassment*

184. Although staff were instructed not to contact the Claimant, this was an ongoing situation and amounted to conduct extending over a period. This allegation will be considered as falling within the applicable time limit.

*The third allegation of harassment*

185. The Respondent did not allow the Claimant to return to work after she was certificated fit to do by her GP. This prohibition remained in place until her resignation and amounted to a continuing state of affairs amounting to conduct extending over a period. This allegation too will be considered as falling within the applicable time limit.

*Conclusion as to whether the Claimant was harassed as alleged*

186. The Tribunal is unable to conclude that any of the allegations were "related to" the Claimant's disability. The Claimant's disability was merely in the background to the circumstances which had arisen.

187. The Claimant was not harassed as alleged.

Reasonable adjustments

188. There was no evidence pointing to a conscious refusal on the Respondent's part to make reasonable adjustments. The question of time limits must therefore be considered under section 123(4). There was nothing to suggest that the Respondent did any act inconsistent with such a duty. The question as to when time limits ran for the purposes of the Claimant's reasonable adjustments claims must therefore be considered under section 123(4)(b), namely when the Respondent might reasonably have been expected to make a reasonable adjustment.

189. To the extent that the alleged PCPs were applied at all, they would have had the alleged adverse effects for a considerable period of time. Thus, with regard to any adjustment that might have been required in respect of each alleged PCP, the Respondent might reasonably be expected to have made such adjustments in or about November 2015 when the Respondent undertook responsibility for the employees of Magic in about November 2015.

190. The Claimant provided no explanation as to why she presented the claim a significant time outside the statutory time limit and why it would be just and

equitable for time to be extended. The Respondent would be seriously prejudiced if the claim were allowed to proceed: not only would the Respondent lose a limitation defence but witnesses would have difficulty trying to recall decisions and events taking place several years ago. The balance of prejudice falls in the Respondent's favour.

191. The Tribunal concludes that the reasonable adjustments claims were presented outside the statutory time limit and the Tribunal has no jurisdiction to consider them.

192. Even if the claims had been presented in time, the Tribunal would nevertheless conclude that the claims should not succeed.

192.1. Although the Respondent ought reasonably have known that the Claimant was a disabled person by reason of bad back/mobility problems caused by thrombosis / edema, there was no evidence to suggest that the Respondent was put on notice that the Claimant might be placed at substantial disadvantage compared to persons who are not disabled: the Claimant was autonomous in her role and was able to choose the hours she worked and the office equipment she chose to use.

192.2. The Tribunal prefers the evidence of the Respondent's witnesses that they did not know the Claimant suffered from depression. There was no credible evidence to suggest that the Respondent ought reasonably have known that the Claimant was so disabled or that she might be have been put at a substantial disadvantage.

192.3. It must be doubted whether the Respondent actually applied the PCPs alleged. The Claimant herself dictated her hours of work and it would have been open to her to purchase suitable office equipment and to propose welfare benefits for consideration by the Trustees.

192.4. The Tribunal further notes that the Claimant herself provided a specialist chair because of her back pain. In this sense, the reasonable adjustment was in any event made.

192.5. The Tribunal heard scant evidence as to what limited welfare support was said to be inadequate. There was no evidence to show the effectiveness of the proposed adjustment and it cannot be concluded that it would have been reasonable to have made it.

#### Notice pay

193. The Claimant was not dismissed but resigned with immediate effect. She is not entitled to notice pay.

#### Holiday pay

194. It was not in dispute that the leave year was the calendar year.

195. The Tribunal places no reliance on the fabricated contract of employment as described above as evidence of the Claimant's leave entitlement.

196. The Tribunal prefers the Respondent's clear evidence, in particular that of Claire Cooper, that the Claimant was entitled to 29 days in each leave year adjusted pro rata in accordance with the Claimant's three day working week.
197. The calculation is therefore: of  $29 \times 3/5 = 17.4$  days.
198. There were 176 working days in the 2018 leave year ending with the termination date.  $17.4 \times 176/365 = 8.4$  days.
199. The Claimant had taken 3 days leave plus one day on 2 January 2018 when the Respondent was closed.
200. The Claimant therefore had 4.4 days accrued outstanding leave upon termination.
201. The Claimant was paid 4.5 days outstanding holiday pay in her final salary payment.
202. As to the rate of payment, there was some suggestion in the evidence, as stated above, that the Claimant's salary should have been £45,000 per annum. However, that is not the salary the Claimant was paid. In what can only be described as an attempt to avoid paying income tax she arranged for her husband to be paid the extra £3,000.00. The Claimant is seeking to enforce a contract tainted with illegality. It would be contrary to the public interest for the Tribunal to enforce such a contract.
203. The Claimant's claim for holiday pay does not succeed.

#### Deductions from wages

204. The Tribunal refers to its conclusions under the heading "failure to pay contractual sick pay" above.
205. The Claimant was entitled to statutory sick pay only which was paid to her.
206. The Respondent did not make deductions from the Claimant's wages.

Note

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**Case No: 2302043/2018 &  
2303396/2018**

Employment Judge Pritchard  
Date: 11 March 2022