EMPLOYMENT TRIBUNALS

Claimant:	**Mrs C Barker**		
Respondent:	**Northern Life Care Limited**		
Heard at	**Leeds**	**On:**	**17, 18, 19 and 20 May 2022**
			27 May 2022 (in chambers)
Before:	**Employment Judge Brain**		
Members:	**Mr Q Shah**		
	Mr D Fields		

Representation

Claimant:	**Mr B Frew, Counsel**
Respondent:	**Mr E Nuttman, Solicitor**

RESERVED JUDGMENT

1. BY CONSENT, the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of the mental impairment of emotional dysregulation.
2. The claimant is not a disabled person for the purposes of section 6 of the 2010 Act by reason of the impairments of anxiety and depression and dyslexia.
3. The complaint of discrimination arising from disability brought pursuant to sections 15 and 39(2)(c) of the 2010 Act fails and stands dismissed.
4. The complaint of indirect discrimination brought pursuant to sections 19 and 39(1)(a) of the 2010 Act fails and stands dismissed.
5. The complaint that the respondent was in breach of the duty to make reasonable adjustments brought pursuant to sections 20 and 21 and 39(5) of the 2010 Act fails and stands dismissed.
6. The complaints brought under section 19 and 39(1)(a) of the 2010 Act were brought outside of the time limit provided for in section 123. It is just and equitable to extend time to vest the Tribunal to hear it.
7. The complaint that the respondent made an unauthorised deduction from the claimant's wages brought under Part II of the Employment Rights Act 1996 fails and stands dismissed.

REASONS

Introduction and preliminaries

1. This matter was listed for a hearing to take place over five days between 16 and 20 May 2022 inclusive. Although the notice of hearing dated 29 November 2021 directed there to be a video hearing, in the event the matter proceeded in person before the Leeds Employment Tribunal.

2. The claimant presented her claim form on 25 February 2021. The claim was brought against the respondent and Gillian Bundy. She (Mrs Bundy) is employed by the respondent as an employment welfare manager.

3. The claimant's claim form was served upon the respondent accompanied by a notice that there was to be a preliminary hearing for case management to be heard on 4 May 2021. The respondent presented their response to the claim on 30 March 2021.

4. The case management hearing proceeded before Employment Judge Jones on 4 May 2021. He identified the issues in the case and gave case management directions. We shall set out the issues in the case in due course within these reasons.

5. Employment Judge Jones directed (amongst other things) that the claimant must indicate whether she wished to pursue her claims against Mrs Bundy. On 11 May 2021, her solicitors wrote to discontinue that claim. By a judgment sent to the parties on 14 June 2021 the proceedings against Mrs Bundy were dismissed following withdrawal. The complaint of unfair dismissal brought by the claimant against the respondent was also dismissed upon withdrawal. This leaves complaints brought by the claimant against the respondent under the Equality Act 2010 and for an unauthorised deduction from wages brought pursuant to Part II of the Employment Rights Act 1996.

6. Pursuant to Employment Judge Jones' Order, the respondent's solicitor presented amended grounds of resistance on 12 May 2021. This was in order to set out the respondent's position upon the unauthorised deduction from wages claim.

7. The matter was listed before the Employment Judge, Mr Fields (the trade union side non-legal member) and Miss Brown (the employer's side non-legal member). During the course of the Tribunal's reading in on the morning of 16 May 2022 Miss Brown raised a potential conflict of interest which she was concerned may give rise to an appearance of bias. After receiving the parties' submissions, the Tribunal ordered that Miss Brown shall recuse herself from hearing the case. Accordingly, the hearing was aborted that day and the matter was listed before a fresh Employment Tribunal panel (consisting of the Employment Judge, Mr Fields and Mr Shah) to commence on 17 May 2022.

8. During the afternoon of 16 May 2022, the Employment Judge directed that 17 May 2022 be listed as a reading day for the new panel. The parties' attendance upon that day was not required. Accordingly, the Tribunal heard live evidence from the parties on 18 and 19 May 2022. Helpful written and oral submissions were then received from Mr Frew and Mr Nuttman on 20 May 2022. The Tribunal reserved judgment upon the afternoon of 20 May

2022. The Tribunal now gives reasons for the Judgment that we have reached.

9. The Tribunal heard evidence from the claimant. On behalf of the respondent, we heard evidence from:

   (1) Julie Parker. She is employed by the respondent as regional manager for North Yorkshire.

   (2) Claire Emmott. She is employed by the respondent as registered manager.

   (3) Gillian Bundy.

   (4) Lesley Rattigan. She is employed by the respondent as lead manager quality and compliance.

   (5) Patrick Keenan. He is an independent consultant who was engaged by the respondent to consider the claimant's grievance appeal.

10. We shall make our findings of fact. We shall then go on to consider the relevant law and the issues in the case. We shall then set out our conclusions by applying the relevant law to the findings of fact in order to arrive at our conclusions upon the issues.

11. This is a case where there is no dispute about many of the facts. Where there is a dispute of fact, we shall say so and then indicate how we have arrived at our conclusions.

Findings of fact

12. The respondent is a health and social care provider who supports vulnerable people living in the community. The support provided by the respondent is aimed at enabling service users to live independently.

13. The claimant was employed by the respondent as an assistant service manager. She was employed in that capacity between 6 July 2020 and 23 September 2020. Upon the latter date, the claimant was informed by Mrs Bundy that her employment contract was summarily terminated (with one week's pay in lieu of notice).

14. The claimant worked at Mayfield Court in York. As Mrs Parker says in paragraph 5 of her witness statement, this is *"a service where people we serve live in their own separate flats and have their own individual tenancies. We do not own or manage the flats but are engaged by the local authority to provide support for them as vulnerable individuals living in the community. We call it a service because we provide services for people we serve there, but it is not a care home or managed centre."* She goes on to say in paragraph 6 that, *"At Mayfield Court the people we serve have complex needs ranging from autism, to physical disabilities, to mental health issues and/or learning disabilities. We support them with daily tasks such as getting dressed, washed, eating, cleaning and taking medication."*

15. Before she commenced employment with the respondent, the claimant had previous experience of work at Mayfield Court. She worked there through an agency. She undertook work at Mayfield Court as an agency worker for a period of just over a year from 24 May 2019. When undertaking agency work, she did so as an 'enabler'. This is a support worker role.

16. It is not in dispute that the claimant performed well in her role as an enabler. Her line manager was Suresh Pillai. In early June 2020, Mr Pillai invited the claimant to a Zoom meeting with Mrs Parker. Mrs Parker told the claimant that she had heard good things about her from Mr Pillai and encouraged her to apply for her role as an assistant service manager.

17. The claimant completed an application form. This is at pages 104 to 112. Amongst other things:

    (1) The claimant said that she was able to speak and write clearly and accurately in English.

    (2) She disclosed the fact of three convictions (including one of theft) from when she was 14 or 15 years of age.

18. On 9 June 2019 the claimant had been referred to see a mental health practitioner. On 27 June 2019 the mental health practitioner wrote to her following an assessment which had taken place on 25 June 2019. Amongst other things, the assessment findings were:

    (1) That the claimant felt that she has borderline personality disorder and an inability to control her emotions.

    (2) That her concentration and memory are impacted.

    (3) That some days, sadly, she feels *"low and worthless"* and will stay in bed.

    (4) The mental health practitioner suggested that she go to a counselling service. The claimant acted upon this advice.

19. Between 30 October 2019 and 27 November 2019 and then from 5 March 2020 the claimant was prescribed Sertraline (50mg tablets). In evidence given under cross-examination, the claimant said that Sertraline was a regular prescription which she takes daily.

20. Mrs Parker and Mrs Emmott interviewed the claimant. She was offered the role by way of a letter dated 16 June 2020 (pages 114 and 115).

21. Mrs Parker and Mrs Emmott were impressed with the claimant's application form and with her interview. They were unconcerned about the childhood criminal convictions. Both said that they were so old *"that there was no reason to hold it against her."* Both gave evidence that at no point during the interview did the claimant mention any medical condition. Both say that the respondent *"would not conduct any medical screening … until we had offered a role".* Presumably, this was in compliance with section 60 of the 2010 Act.

22. The letter at pages 114 and 115 enclosed (amongst other things) several forms to complete. They were to be returned within the ensuing three days.

23. The first form of significance in the case is the equal opportunities questionnaire at pages 119 and 120. This identifies the role (of assistant service manager) and the service location (at Mayfield Court). The claimant ticked *"no"* in answer to the question of whether she has any disabilities. She signed the declaration on 16 June 2020. Just above her signature was a statement from the respondent that, *"If you declare a disability or a health problem this will not prevent you from being given equal consideration. [The respondent] simply wishes to know about any disability or health problem*

which may affect either the recruitment process or job performance, in particular so as to consider any adjustments that might be necessary to give you equal opportunities."

24. The next document of significance is the medical screening form at pages 121 to 125. The following entries are of importance:

    (1) The claimant did not tick either the *"yes"* or *"no"* box in answer to the question as to whether she had a physical or mental impairment under the 2010 Act.

    (2) She ticked *"no"* in answer to the question as to whether there were any *"medical reasons"* impairing her day to day activities.

    (3) She ticked *"no"* in answer to the question as to whether there were any medical reasons impairing her ability to work shifts.

    (4) She left blank additional questions for "*Night Workers*".

    (5) She answered *"yes"* to the question as to whether she had a history of mental illness. An answer in the affirmative to any of the questions shown on page 122 (including that one) required the candidate to give further details. The claimant completed the relevant box at page 123 to say that she had *"anxiety and depression - does not affect my work."*

    (6) At page 123, she answered in the negative to the question *"do you regularly take tablets or medicine?"*

    (7) On page 124, she answered in the affirmative to the question as to whether she has anxiety, depression or any other nervous complaint. Answering in the affirmative required the candidate to give details. The claimant said that she had *"anxiety and depression in [the] past."*

    (8) She said that she was seeing a therapist when asked whether she has seen a doctor about her health during the past 12 months.

    (9) At page 125, she answered in the negative to the question as to whether she was regularly receiving injections, pills, tablets or other medicines from a doctor.

25. Just above her signature was a declaration in the following terms:

    "I confirm that the above information is true to the best of my knowledge and belief. I also understand and acknowledge that it is important for the information to be true and accurate so that [the respondent] can protect both myself and the people we serve, such that if I am found to have failed to disclose information and/or disclosed any false statement when answering the above questions then this will be considered to be an act of gross misconduct and the likely consequence will be that my contract will be terminated."

26. In paragraphs 14 and 15 of her witness statement the claimant gave evidence that, *"I … like to get as many things done as quickly as I can. I do not like to sit and wait for it to be done another day and if I have time to do a task, I do so there and then. On the morning of 16 June 2020 I had a very stressful morning managing my daughter's extreme behaviour."* She goes on to say in paragraph 16 and 17 of her witness that, *"Early that morning, I was then sent a letter offering me employment form Gill Bundy, the employee welfare manager … I wanted to complete the documents and get*

them off my "to do" list as soon as possible. I was not sure if I would have time later that day with everything else that was going on with my daughter. I also wanted to make sure [the respondent] had everything they needed. I therefore filled them in the same morning and sent them back."

27. It appears from the electronic signature both upon the equal opportunities questionnaire and the medical screening questionnaire that the claimant signed the documents and returned them to the respondent at 11.33 on the morning of 16 June 2020. It appears from the record at page 116 that the documents were emailed to the claimant at 8.41. *(In fact, the same record confusingly shows the documents signed and emailed to the respondent at 10.33 and not 11.33. This may be to do with whether the time is reckoned by Greenwich Mean Time or British Summer Time. Either way, the claimant acted quickly by returning them in just less than two or three hours and at a time when she was contending with issues with her daughter).*

28. In paragraph 18 of her witness statement the claimant says that, *"On the equal opportunities questionnaire, I ticked the box to say that I do not have any disabilities. This is because I never thought that my depression, anxiety and dyslexia were classed as disabilities. I had always thought there might be something wrong with me and so I went to my doctor and she referred me to a consultant psychiatrist. It is only now that I understand that these conditions are classed as a disability."* She attributes not completing the question upon the medical screening form about the application of the 2010 Act (referred to in paragraph 24(1) above) to her dyslexia.

29. About the questions on the screening form concerning medication, she says in paragraph 20 of her witness statement that, *"I was on such a low dose of Sertraline and this did not impact my work at all and I wasn't on it all the time, only when my condition flared. In fact, I do not think that the medication was doing anything at all as it was making no difference to how I was feeling."* The claimant gave evidence to the same effect during cross-examination. (It also appeared from that evidence that the claimant had a short period on an increased dose of Sertraline and at one point on a dose of 25mg per day as opposed to 50mg per day. It was quite difficult for the Tribunal to piece together the chronology of the different doses of the Sertraline. At all events, the claimant did not dispute that this was prescribed for her upon a regular prescription).

30. Upon the issue of her dyslexia, the claimant says in paragraph 4 of her witness statement that *"while studying at York College, I was given extra time in exams to help with my learning difficulty of dyslexia."* She refers in support of this to pages 265 to 271 of the bundle which is a learning support assessment dated 19 April 2012. This recommends the claimant be given a yellow overlay to reduce visual stress when reading and extra time in tests and examinations. The claimant gave evidence that the dyslexia *"affects me in various ways including missing out words when reading, missing lines in paragraphs when reading information, having to re-read information several times in order to process and understand the meaning of words or sentences. In addition, I need to spend longer than average reading and processing written information."*

31. There was no reference to dyslexia in the medical screening form or in the application form. As we have observed, to the contrary, the claimant said

in her application (at page 107) that she was able to speak and write clearly and accurately in English.

32. On 16 June 2020, Julie Parker called the claimant to discuss the screening information. The *"risk assessment – medical questionnaire"* recording the conversation is at pages 126 and 127. Mrs Parker had been alerted by the claimant to the fact that she has or had depression and anxiety. Mrs Parker recorded that the claimant *"feels that there will be no issues at work and this will not affect her in any way and also stated that she has had no time off work due to this."* The condition was said to *be "ongoing but managed well under her current GP, this can affect her at different times due to her history but does not affect her work at all."* Mrs Parker noted that based upon this information no adaptations or adjustments were required. The health information was to be reviewed every three months.

33. Mrs Parker said in her witness statement (in paragraph 30) that the claimant's comment that she had not taken any time off work was consistent with her reporting no sickness absences in the previous six months. (This was a reference to her work for the respondent through the agency).

34. It is the claimant's credit that she had no time off work while working for the agency. However, this must be qualified by a pertinent observation made by Mrs Parker in paragraph 55 of her witness statement. She says that *"when she was working as a temp [the claimant] could simply decline work."* Mrs Emmott made a similar observation in paragraph 31 of her witness statement. (These comments arise out of what was said in a meeting between the three of them held on 19 August 2020 to which we shall come to in due course).

35. On 22 June 2020 the respondent wrote to the claimant to confirm her start date of 6 July 2020. She was issued with the contract of employment which is in the bundle commencing at page 74. She was employed to work 40 hours per week over five days in a seven days' week. She was initially employed upon a probationary period of nine months.

36. On 7 July 2020, the day after she started work for the respondent, the claimant received notification from the Department for Work Pensions that her application for a personal independence payment made on 19 February 2020 had been refused. The claimant had applied for a Personal Independence Payment to help with her daily living needs and her mobility needs.

37. That the claimant had made this application was not something which she disclosed to the respondent at the material time. It is clear from the DWP decision maker's letter that the claimant had applied for a Personal Independence Payment upon the basis that (amongst other things):

    (1) She had difficulty communicating verbally, reading and understanding signs, symbols and words.

    (2) She had difficulty engaging with other people face to face and making budgeting decisions.

    (3) There were difficulties managing medication or therapy on monitoring her health.

38. In the event, the claimant appealed against the decision. She had to do so within a month. Although the reconsideration or appeal application was not produced for the benefit of the Tribunal it follows that the claimant must have challenged the decision of 7 July 2020 no later than early August 2020. The challenge was successful, and the claimant was awarded a Personal Independence Payment backdated to February 2020 on 12 January 2021.

39. On 8 July 2020 Dr Ukonu, consultant psychiatrist, prepared a report for the benefit of the claimant's general practitioner. This is at pages 148 to 152. The report records this as following a re-referral of the claimant for a review of her diagnosis. The claimant was assessed during a telephone consultation on 23 June 2020. Dr Ukonu referred to the referral made the previous year and the claimant had been to see the counselling services as recommended. He recorded her medication as Sertraline and Propranolol. (The claimant only takes the latter as and when required).

40. Dr Ukonu said that the claimant *"presented with emotional dysregulation and low self-esteem which is in keeping with traits of emotionally unstable personality."* He said that she would benefit from continuing with the Sertraline and to consider increasing her dose if required. She was to be offered a *"brief psychological intervention"* and to consider obtaining support from occupational health over anxieties around her new role with the respondent.

41. Upon the latter issue, Dr Ukonu commented that the *claimant "was worried about suffering periods of low mood now she was going to be in permanent employment – working as agency staff for years, it was alright not to attend work if she did not feel well enough but this would be a problem as permanent staff."* This corroborates the evidence of Mrs Parker and Mrs Emmott to the effect that the claimant's impressive attendance record when working through the agency was to be qualified by the observation that she need not turn in (as an agency worker) if she did not feel well enough so to do. Although the claimant denied that she operated in this way, we prefer the respondent's case corroborated as it is by the observations of the claimant's own psychiatrist based upon what was said to her in consultation with the claimant.

42. The claimant did not mention the consultation that she had had with Dr Ukonu of 23 June 2020 to the respondent nor the diagnosis of emotional dysregulation until 19 August 2020. The claimant sought to explain this away by saying that she was coming to terms with the diagnosis.

43. Mr Nuttman handed the Tribunal medical literature about emotional dysregulation upon a medical website. We note from the summary at page 514 that, "*emotional dysregulation is a term used to describe an emotional response that is poorly regulated and does not fall within the traditionally accepted range of emotional reaction."* The passage goes on to say that, *"when someone is experiencing emotional dysregulation, they may have angry outbursts, anxiety, depression …"* Signs of emotional dysregulation include severe depression and anxiety.

44. The respondent does not dispute that the claimant is a disabled person for the purposes of section 6 of the 2010 Act by reason of emotional dysregulation. The claimant also claims to be a disabled person by reason of anxiety and depression. However, she gave no evidence in her witness

statement about how that condition affects her day to day activities. In any case, anxiety and depression appear to be symptoms of emotional dysregulation and the latter is conceded to be a disability in any case.

45. The claimant attended a training event on the morning of 19 August 2020. Her evidence is that she worked through the night from 2 o'clock pm on 17 August 2020 to 2 o'clock pm on 18 August 2020. She did not work after 2 o'clock pm on 18 August. However, she had further difficulties with her daughter which led to her not getting home until 11 o'clock pm that evening. Unsurprisingly, she felt exhausted.

46. The training session on the morning of 19 August 2020 was due to commence at 9.15am. The claimant washed her hair that morning, but it had not dried before the commencement of the course.

47. One of the tasks set by the trainers was for the group to share something that each of them were hoping for at that year. The claimant said that she was hoping for an autism assessment to take place.

48. The trainer was concerned about the claimant's appearance (with wet hair) and the inappropriateness of raising the autism issue with the group. The claimant was asked to stay on the Zoom meeting call at the call's conclusion. Mrs Parker and Mrs Emmott joined. The claimant became distressed and ended the call. Mrs Parker then telephoned her at about 1 o'clock pm. Mrs Parker in fact spoke to a friend of the claimant. It was arranged that the claimant, Mrs Parker and Mrs Emmott would speak at 3 o'clock pm.

49. It was during the 3 o'clock pm call that the claimant informed Mrs Parker and Mrs Emmott of the diagnosis of emotional dysregulation. She read Dr Ukonu's letter of 8 July 2020 to them.

50. Mrs Parker said in evidence before the Tribunal that it was uncomfortable to listen to the claimant reading out Dr Ukonu's report. The claimant's evidence is that Claire Emmott suggested that she [the claimant] give up work. Mrs Emmott and Mrs Parker deny this. Mrs Parker says that Mrs Emmott simply said that the respondent was there to help and there were other opportunities for her within the respondent which may think about. The Tribunal accepts the respondent's evidence. We accept that it was a difficult call for all concerned. Upon the respondent's evidence, Mrs Emmott did suggest that the claimant should think about her position with the respondent, and it is understandable that in her heightened emotional state the claimant interpreted this as an indication that she may be better ending her employment. We do however accept that Mrs Emmott left matters open and endeavoured to be supportive.

51. Mrs Parker and Mrs Emmott asked the claimant for a copy of Dr Ukonu's letter and also for consent to obtain a medical report from her general practitioner. It was agreed that the claimant would take a week's annual leave.

52. Mrs Emmott said that she was concerned to read Dr Ukonu's report. In paragraph 42 of her witness statement she says that the claimant *"had been supporting vulnerable people and would have made numerous critical decisions without a risk assessment to consider and seek to mitigate risk. We had a duty of care to Catherine and the people we serve and yet*

Catherine would have provided lone support at times when her concentration could have been impacted, whether by medication or her condition itself and at times in which her condition could have adversely impacted on her interaction with people we serve." She goes on in paragraph 43 to say that, *"If any member of staff had or developed any condition at all, whether physical or emotional, that could potentially impact on people we serve they have an absolute duty to disclose it. This is very clear in our sector."* This the claimant accepts. She answered in the affirmative when Mr Nuttman put it to her that she has a duty of candour.

53. In paragraph 66 of her witness statement, Mrs Parker says that, *"We had a duty of care to Catherine and the people we serve. The assistant service manager role involved vulnerable people who could display challenging behaviour. I was concerned that they could have been placed at risk: if she had traits of emotionally unstable personality; or by potential side effects of medication; or the suggestion that her concentration was poor and she was easily distracted".* Mrs Parker and Mrs Emmott therefore referred the matter to Mrs Bundy.

54. Mrs Bundy commissioned a report from the claimant's general practitioner. Her letter of instruction dated 24 August 2020 is at pages 159 to 164.

55. The claimant's GP responded promptly to Mrs Bundy's letter. A report was prepared on 27 August 2020 (page 165). To expedite matters, the claimant collected it from the surgery on 27 August 2020 and sent it to Mrs Parker.

56. On 28 August 2020 the claimant received a letter from Mrs Bundy (page 166). This gave the claimant notice of medical suspension on basic pay until further notice. This was to enable the respondent to obtain a medical report *"and support you at work."*

57. The claimant says, with justification, that her suspension *"came as a complete shock. I thought that because they had received a letter from my doctor, I would be able to go back to work. My anxiety became much worse after this as I was so worried that I would lose my job."*

58. The claimant also reflected upon the report from her GP Dr Wiley. She felt there was unfair criticism within it. An amended report was therefore obtained on 3 September 2020. This is at pages 167 to 168.

59. In the report of 27 August 2020 Dr Wiley reports:

    (1) That the claimant is currently receiving treatment for anxiety and depression and that she has consulted her GP with symptoms related to those conditions for a period of over 10 years.

    (2) She can have periods of low mood and periods when she feels much better.

    (3) She takes Sertraline at 50mg per day.

    (4) When her mood is low she finds concentration difficult. The GP went on to say that she would not feel it *"appropriate for her to be in a position where she was asked to make critical decisions whilst she is feeling low."*

    (5) Dr Wiley said that she was not *"an expert in personality disorder and perhaps any specific questions you have might be better directed to a*

psychiatrist. However, there is nothing in her records to suggest a history of anger or aggressive behaviour."

(6) Dr Wiley said that she *"had no reason to believe she would have any difficulty recognising right from wrong".*

60. The addition in the second report of 3 September 2020 at pages 167 and 168 was to the effect that the claimant felt that Dr Wiley's comment about her not being asked to make a critical decision when feeling low was unfair. The GP reported that the claimant *"has always been able to make decisions when at work."* Dr Wiley said that the claimant had reminded her that she had had *"years of caring for her daughter who has learning difficulties and whose behaviour can be challenging. There has never been a suggestion that she was not able to provide care for her."*

61. On 7 September 2020 Mrs Bundy instructed Fiona Walsh, occupational health advisor, to prepare a report.

62. She set out a description of the claimant's role at pages 168A and 168B. She then set out nine questions at pages 168B and 168C.

63. Fiona Walsh reported as follows:

(1) That the claimant had been diagnosed with emotional dysregulation and had also had a diagnosis of depression over 10 years. It was hoped that now that a diagnosis had been made, the depressive symptoms may reduce or even resolve with the assistance of her counsellor.

(2) The claimant presents with a complex combination of conditions. This includes autism which had yet to be confirmed. Mrs Walsh says that the claimant was able to carry out normal day to day activities without significant hindrance.

(3) She confirmed the claimant was taking Sertraline for depression. Stopping it would not have a great effect on her day to day activities.

(4) Mrs Walsh was asked whether the nature of the role (supporting vulnerable people and supervising other staff in their support of vulnerable people) presented a risk. Fiona Walsh said that*, "Catherine does have some troubling symptoms as outlined above but the effect of the symptoms on work could be mitigated by putting some measures in place in the workplace.* She went on to say that the claimant *"appears to have sufficient insight into her condition to allow her to appropriately seek advice and guidance from management should she need it in any given situation."* She recommended that there be planned regular welfare and supervision meetings with her line manager. She went on to recommend several workplace measures including: clear and agreed objectives with realistic and achievable timescales; support from her line manager; appropriate shift patterns to enable rest particularly after a sleep-in nightshift; avoiding her having to move facilities to ensure continuity; and assisting handover by providing information in writing.

(5) The claimant does not present with the more concerning symptoms of emotional dysregulation such as angry outbursts, the throwing of objects and aggression.

(6) The claimant was able to recognise right from wrong.

64. Fiona Walsh opined that the claimant was likely to be a disabled person under the 2010 Act. Although she does not expressly say so, it appears that she said so in reference to the emotional dysregulation.

65. There was also an issue about the circumstances leading up to the incident of 19 August 2020. Fiona Walsh said that the claimant had informed her that she *"attended the training session whilst still tired after a particularly eventful nightshift."* Certainly, on one reading, this seems to suggest that the claimant had worked a nightshift on 18/19 August 2020 which was not the case.

66. On 23 September 2020, Mrs Bundy wrote to the claimant (pages 174 to 177). It was by this letter that the claimant was informed that she was dismissed without notice (but with one week's pay in lieu of notice). Mrs Bundy's reasoning, as set out in the letter, may be summarised as follows:

    (1) That the claimant has emotional dysregulation with some concerning features and for which adjustments in the workplace were required yet the claimant had knowingly worked without disclosing that to the respondent thus depriving the respondent of the opportunity of assessing the risk and mitigating the risk with adjustments.

    (2) That the failure to disclose the emotional dysregulation in a timely manner caused service users to be put at unnecessary risk.

    (3) That the claimant had failed to disclose the extent of her medical condition in the health questionnaire and had deliberately misled the respondent by downplaying the condition.

    (4) That the medication Propranolol has common side effects including feeling tired, dizzy or lightheaded with difficulties in sleeping and that the medication Sertraline can cause seizures, confusion, loss of co-ordination, unsteadiness and excessive tiredness both of which should have been disclosed to the respondent to enable them to mitigate the risk.

67. Mrs Bundy also took the view that the claimant had deliberately misled Mrs Walsh as she had told her that she had worked the night before the training event. Mrs Bundy said that the *"deliberate misleading of occupational health as to the cause of your conduct [on 19 August 2020] and appearance when attending the training shows that you cannot be relied upon to tell the truth. This actually impacts on much of the occupational health report and risk for [the respondent]. If you would mislead occupational health on that issue, then what else is unreliable?"* Mrs Bundy concluded that, *"In the circumstances, whilst I am sympathetic to your condition, I do not trust you and do believe that you potentially deliberately exposed people we serve, your team and [the respondent] to risk."* Mrs Bundy said that there was no right of appeal as the claimant was in her probationary period.

68. Mrs Bundy makes reference in her evidence to her mental health practitioner having made reference to prior claims brought by the claimant in the Employment Tribunal (at page 100, being part of the mental health practitioner's report of 27 June 2019). Mrs Bundy said that she was unaware of this at the time of her dealing with the matter. This featured in

the course of these proceedings (and was in fact the matter which led to the decision for Miss Brown to recuse herself upon the first day of the hearing).

69. During the course of the first day of the hearing, the claimant (after some hesitation) disclosed the pleadings in a claim brought by her against the Wilf Ward Family Trust (claim number 1806945/2018). This was a claim brought upon the basis of the physical and mental impairment of fibromyalgia. The claimant pleaded in the complaint against the Wilf Ward Trust that at all material times she suffered from symptoms of fibromyalgia including cognitive problems and anxiety and depression. It is not absolutely clear when *"the material time*" is for the purposes of that complaint. It appears to be from around 2016 to when her employment there ended on 3 April 2018.

70. On 24 September 2020 the claimant raised a grievance. This is at pages 178 to 181. She took issue with Mrs Bundy's decision to dismiss her. She alleged that the respondent had treated her unfavourably because of something arising in consequence of her disability and had failed to comply with the duty to make reasonable adjustments.

71. The grievance hearing took place 7 October 2020. The grievance decision maker was Mrs Rattigan. The claimant brings no claim against the respondent arising out of the grievance (or, for that matter, the grievance appeal). We therefore only need deal briefly with those two processes.

72. During the course of the grievance meeting of 7 October 2020 Lesley Rattigan asked the claimant whether she could do her role without adjustments. The claimant replied (at page 196) to the effect that she could as *"I have been doing this type of work for over 10 years with no incidents".* Mrs Rattigan asked the claimant whether the dyslexia impacted upon the claimant's day to day activities. The claimant replied, *"Reading, it just depends if I am tired or if my concentration, and I always put it on my application form. Just a genuine mistake."* Mr Nuttman suggested, correctly in our judgment, that this was the first mention of dyslexia made by the claimant to the respondent.

73. On 9 October 2020, Dr Ukonu wrote in support of the claimant's grievance. Her letter is at pages 199 and 200. This confirmed that the claimant was referred to mental health services in June 2019. No formal diagnosis was made. Dr Ukonu says that the claimant *"does not have a diagnosis of emotionally unstable personality disorder as her history and presentation did not fully meet the criteria for this disorder. She however presented with traits of emotionally unstable personality – emotional dysregulation and issues around self-image."* She said that there was no evidence of significant difficulties and, *"from the information she provided, she [the claimant] has worked with vulnerable people for several years without any problems."* She was therefore supportive of the claimant's case. There was no history or risk of violence.

74. A letter in support was also obtained from the claimant's counsellor. This is at pages 206 and 207 and is dated 9 November 2020. This confirmed that the claimant had been receiving psychological support and therapeutic counselling for the past 12 months. She said that Dr Ukonu's recent diagnosis *"had a significant impact on [the claimant] and as a result was unable to continue with her employment. The ongoing impact of these*

issues has significantly affected her ability to concentrate, sleep effectively and make decisions."

75. On 23 November 2020, Dr Ukonu wrote a letter to the Department of Work and Pensions in support of her application for a Personal Independent Payment. This said that the *claimant's "mental health difficulties have had a significant impact on her ability to work as she worries excessively about other people's opinion of her at work; worries excessively about being judged at work; and would ruminate on work issues to the point of having thoughts of self-harm. Mrs Barker has struggled to maintain employment because of her difficulties and recently lost another job. In my opinion Mrs Barker will not be able to work for the foreseeable future and I therefore support her application for a Personal Independent Payment claim."*

76. Mrs Rattigan did not have the letter of 23 November 2020 before her when she made her decision.

77. On 27 November 2020 Mrs Rattigan wrote to the claimant with her decision upon her grievance. She accepted the claimant's case that Mrs Walsh may have been mistaken in her understanding that the claimant had worked a nightshift upon 18/19 August 2020. Mrs Rattigan said that*, "I will give you the benefit of the doubt and find that you were not dishonest on this issue. Internal records will be amended to reflect that."*

78. Mrs Rattigan did not uphold the claimant's grievance that it was inapt to describe her as appearing at the training event in a dishevelled state. This appears to have been a reasonable conclusion as the claimant accepted that she had appeared on screen with wet hair.

79. Mrs Rattigan did not uphold the claimant's grievance that she had not misled the respondent when completing the pre-employment questionnaires. She did not uphold the claimant's grievance that the respondent failed to comply with the duty to make reasonable adjustments. She said that the claimant had told her that she was able to undertake work and had been doing so successfully for a period of around 10 years *"with no incidents".* Mrs Rattigan concluded that the reasonable adjustments duty is only triggered where the employee's condition impacts on their ability to do their job.

80. The claimant appealed against Mrs Rattigan's decision. The appeal came before Mr Keenan. The notes of the appeal hearing are at pages 223 to 238R.

81. The parties played, for the benefit of the Tribunal, an excerpt of the audio visual recording of the grievance appeal hearing. The excerpt which we reviewed relates in particular to the exchanges recorded between pages 238I to 238L. During an adjournment Mr Keenan (thinking, it seems, that the claimant had left) commented to Sarah Lindsay of the respondent (who accompanied him), that "*we're getting there Sarah, we're getting there, we'll get her."*

82. Mr Keenan explains, in paragraph 27 of his witness statement, that by this he meant *"we'll get her to admit that she should have disclosed the information".* He went on to explain that *"The phrase comes from my time in the police and used where we believe that we'll get a suspect to admit what they've done."*

83. Mr Keenan is an independent consultant and was engaged by the respondent to consider the claimant's grievance appeal. He is still a serving police officer in Northern Ireland. (He attended the hearing by CVP). The police officer role is one which he has held for 15 years.

84. It is, to say the least, unfortunate that Mr Keenan approached matters in this way. This was a grievance appeal hearing concerning an employment dispute involving a disabled employee. To approach matters (consciously or sub-consciously) with a view to seeking to elicit an admission from such an individual is inappropriate. The '*ACAS Guide: discipline and grievances at work (2011')* says about grievances that they are *"not the same as a disciplinary hearing."* The focus is to allow the employee to state their grievance and indicate how they would like matters to be resolved. While the Tribunal is pleased that Mr Keenan has acknowledged (in paragraph 28 of his witness statement) that this mindset was inappropriate we trust that he will reflect further upon matters.

85. On 23 December 2020 Mr Keenan wrote to the claimant with the grievance appeal outcome. Upon the issue of the alleged misleading of the occupational health advisor about the events of 17-19 August 2020, Mr Keenan said that he did not believe that the matter *"unduly or disproportionately led to your probation being terminated."* He did not uphold the claimant's remaining appeal points and endorsed Mrs Rattigan's decision.

86. The following evidence was given by the claimant and Mrs Bundy during the course of their cross examination:

    (1) The claimant said that she took Sertraline on and off as required and would not take it some weeks.

    (2) She maintained that her condition did not affect her work. She said, with some justification, that her work through the agency had been sufficiently impressive for the respondent to seek her out as an employee. Mr Nuttman put to her that her pleaded case was that the emotional dysregulation and anxiety and depression induced (amongst other things) symptoms of extreme tiredness which is something which Mrs Bundy has noted in the dismissal letter was a side effect of Sertraline. The claimant said that she would have *"reported it had I had this."*

    (3) The claimant accepted the evidence of Mrs Parker (in paragraph 43 of Mrs Parker's witness statement) that the respondent had had cause to speak to the claimant about tone and abruptness when speaking to service users. Although she accepted this to be the case, the claimant maintained that she had worked successfully with different users in Mayfield Court hence the respondent's suggestion that she apply for the role of assistant service manager.

    (4) The claimant said that the recommended adjustments in Fiona Walsh's occupational health report (set out at page 171) would have helped her "*to succeed, I didn't know about them before I got the occupational health report."* She went on to say that she could have managed in her role without them*, "but it would be better with the adjustments."*

(5) Upon the issue of dyslexia, the claimant said that she prefers to do without the overlays recommended in the additional learning support assessment carried out by York College (at page 628 of the bundle).

(6) In her evidence given under cross-examination, Mrs Bundy said that she did not trust Fiona Walsh's occupational health advice. In paragraph 7 of her witness statement she says that Fiona Walsh was a new occupational health provider who *"did not yet fully understand [the respondent] or our roles."* In paragraph 13 she criticises the report, in particular by failing to include within it an explanation of emotional dysregulation, the symptoms which the claimant had, the chance of a recurrence of those symptoms, an explanation of the medication and whether the condition, the symptoms or the side effects of medication pose a risk to service users. This deficiency was, she said, made up for by Mrs Bundy's own research into emotional dysregulation and the medication. Mrs Bundy is not medically qualified.

87. This concludes our findings of fact.

The relevant law

88. We now turn to consideration of the relevant law. We shall start with the complaints brought by the claimant under the 2010 Act. All these complaints are of discrimination related to or upon the grounds of disability. The respondent concedes that the claimant is a disabled person within the meaning of section 6 of the 2010 Act because of emotional dysregulation. No such concession is made upon the impairments of dyslexia and anxiety and depression.

89. Accordingly, it is necessary for us firstly to consider the provisions of the 2010 Act upon the issue of disability. For the purposes of section 6 of the 2010 Act, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities. It is for the claimant to show that she has a disability.

90. The definition in section 6 requires that the effect which a person may experience must arise from a physical or mental impairment. These terms must be given their ordinary meaning. It is not necessary for the cause of the impairment to be established nor does the impairment have to be the result of an illness.

91. The impairment must have a substantial and long term adverse effect upon the ability to carry out day to day activities. The word *'substantial'* in this context means *'more than minor or trivial.'* In paragraph B1 of the *'Guidance on matters to be taken into account in determining questions relating to the definition of disability'* (published by the Secretary of State in 2011), *"the requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."*

92. Where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, the word '*likely'* should be interpreted as meaning '*could well happen'.* The

practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question. As a straightforward illustration, if a person with a hearing impairment wears a hearing aid the question as to whether or not their impairment has a substantial adverse effect is to be decided by reference what the hearing level would be without the hearing aid.

93. Where the impairment has had a substantial adverse effect on a person's ability to carry out normal day to day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. Again, the word *'likely'* in this context means *'something that could well happen.'*

94. The substantial adverse effect must be long term. This means that the impairment must have lasted at least 12 months or is likely to be of at least 12 months' duration from the time of the first onset or which is likely to last for the rest of the life of the person affected.

95. The 2010 Act does not define what is to be regarded as normal day to day activities. Paragraph D3 of the Guidance says that, *"In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day to day activities can include general work-related activities and study and education related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."*

96. In **Paterson v The Commissioner of Police of the Metropolis** [2007] UK EAT 0635 it was held that the taking of examinations is a day to day activity. As was said by Elias P (as he then was) in paragraph 66, *"… carrying out an assessment or examination is properly to be described as a normal day to day activity. Moreover, as we have said, in our view the act of reading and comprehension is itself a normal day to day activity."*

97. The claimant complains that the dismissal of her was unfavourable treatment for something arising in consequence of disability. She says that, accordingly, the respondent discriminated against her. By section 15 of the 2010 Act, a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. A defence will also be available to A if A can show that they did not know and could not reasonably have been expected to know that A had a disability.

98. We do not understand any issue of knowledge to arise out of the emotional dysregulation. Indeed, on the contrary, the respondent was well aware of the emotional dysregulation and the impact upon her at the time of the claimant's unfavourable treatment. As we shall see, we find that knowledge was a reason for the treatment The issue of knowledge does arise upon the issues of disability and anxiety and depression. The dyslexia is not relied upon as a relevant disability for the purposes of the complaint under section 15 of the 2010 Act

99. The unfavourable treatment of an employee for something arising in consequence of their disability is conduct which is prohibited in the workplace pursuant to the provisions of Part 5 of the 2010 Act. By section 39(2)(c), an employer (A) must not discriminate against an employee of A's (B) by dismissing B.

100. For discrimination arising from disability to occur, a disabled person must have been treated unfavourably. The Equality and Human Rights Commission's *Code of Practice on Employment (2011)* says, in paragraph 5.7, that, "*This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious, and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment."*

101. The Code goes on to say in paragraph 5.8 that the unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment on the one hand and the disability on the other hand.

102. As Mr Nuttman says in paragraph 92 of his written submissions, in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** [UK EAT/0397/14] EAT, Langstaff P held that there were two distinct steps to the test to be applied by tribunals in determining whether the discrimination arising from disability has occurred. Firstly, it must be asked whether the disability has the consequence or result of *"something"* and whether the employer treated the claimant unfavourably because of that *"something".*

103. The unfavourable treatment must be caused by the thing that arises as a consequence of the disability. In **Pnaiser v NHS England and another** [2016] IRLR 170, EAT Mrs Justice Simler considered the authorities upon section 15 of the 2010 Act (including **Weerasinghe**) and summarised the proper approach to establishing causation under section 15. Firstly, the Tribunal has to identify whether the claimant was treated unfavourably and by whom. The Tribunal then has to determine what caused the treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought process of that person. The Tribunal must then determine whether the reason was "*something arising in consequence of the claimant's disability"* which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought process of the alleged discriminator.

104. In **Secretary of State for Justice and another v Dunn** EAT 0234/16, Simler J addressed matters in the following terms*: "[counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a Tribunal to assess the question whether the unfavourable treatment is because of something arising in consequence of disability … it need not be the sole reason, but it must be a significant or at least a more than trivial reason. Just as with direct discrimination, save in*

the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary." The enquiry into such thought processes is required to ascertain whether the *"something"* that is identified as having arisen as a consequence of the claimant's disability formed any part of the reason why the unfavourable treatment was metred out.

105. That disability need only be an effective cause of the unfavourable treatment was confirmed in **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893, EAT. It was sufficient that the disability was a significant influence or an effective cause of the unfavourable treatment. All that is required is a loose connection between the claimant's unfavourable treatment and the *"something"* arising in consequence of the disability. It is sufficient that the disability is an effective cause of the conduct. However, any connection that is not an operative cause or influence on the mind of the putative discriminator will not be sufficient to satisfy the causation test. What is needed is that the something arising in consequence of the disability influences or operates on the minds of the discriminator (consciously or subconsciously) to a significant extent thus amounting to an effective cause.

106. We shall look at the question of objective justification shortly. Before doing so, we shall look at the relevant law as it relates to the claimant's complaint of indirect discrimination. By section 19, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice *("PCP")* is discriminatory in relation to a relevant protected characteristic of B's if:

    (a) A applies or would apply it to persons with whom B does not share the characteristic;

    (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

    (c) It puts, or would put, B at that disadvantage; and

    (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

107. The claimant's complaint of indirect discrimination arises in connection with the job application process. It relates to the dyslexia only. Accordingly, section 39(1) of the 2010 Act is engaged. This provides as an employer (A) must not discriminate against a person (B) in the arrangements A makes for deciding to whom to offer employment, as to the terms on which A offers B employment or by not offering B employment. It is the arrangements which the respondent made for deciding whether to offer employment to the claimant which gives rise to the indirect discrimination claim.

108. The phrase *"provision, criterion or practice"* is not defined by the Act. It should however be construed widely to include formal or informal policies, rules, practices or arrangements.

109. The PCP must be applied to everyone in the relevant group. It must be neutral. As the EHRC Code says in paragraph 4.6*, "If it is not neutral in this*

way, but expressly applies to people with a specific protected characteristic, it is more likely to amount to direct discrimination".

110. The word *'disadvantage'* is also not defined in the 2010 Act. Paragraph 4.9 of the Code says the word *'disadvantage' "could include denial of an opportunity or choice, deterrents, rejection or exclusion."*

111. A comparative approach is required between workers with the protected characteristic and those without. The circumstances of the two groups within the pool for comparison must be sufficiently similar for that comparison to be made and there must be no material differences in circumstances between them. A comparison must be made between the impact of the PCP upon those without the relevant protected characteristic and the impact on those with it.

112. It is not enough for the PCP to put at a particular disadvantage a group of people who share a protected characteristic. It must also have that effect on the individual concerned. In an indirect disability discrimination case, when making the comparison, the claimant's group is restricted to those with the same disability. As is said in the Code (at paragraph 4.16) the comparison is not with *"disabled people as a whole but people with a particular disability – for example with an equivalent level of visual impairment".* The comparator group therefore consists of those without any disability and those with different disabilities.

113. There is nothing in section 19 to indicate that the employer must be aware of the disability in order to be liable for indirect discrimination. By contrast, factual or constructive knowledge of the disability is required upon a complaint of unfavourable treatment for something arising in consequence of disability and (as we shall see) upon a complaint of a failure to make reasonable adjustments.

114. The same objective justification defence is open to an employer upon an indirect discrimination claim as it is upon a complaint of unfavourable treatment for something arising in consequence of disability. The test of justification is that the treatment complained of is a proportionate means of achieving a legitimate aim. The test is an objective one for the appreciation of the Tribunal and not a band of reasonable responses test (as arises upon an unfair dismissal complaint). Tribunals must therefore weigh an employer's justification against the discriminatory impact, considering whether the means adopted by the employer to achieve the aim in question corresponded to a real need of the undertaking, are appropriate with a view to achieving the aim in question and the reasonably necessary to that end.

115. However, a claim under section 15 does not involve the application of a provision, criterion or practice giving rise to group disadvantage. Accordingly, the authorities upon section 19 which focus on how group disadvantage feeds into the justification test are not of direct assistance in considering the defence under section 15.

116. The EHRC Code sets out guidance on objective justification. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. As to proportionality, the Code notes that the measures adopted by the employer do not have to be the only possible way of achieving the legitimate aim, but the treatment will not

be proportionate if less discriminatory measures could have been taken to achieve the same objective.

117. As Mr Nuttman recognises in paragraph 110 of his written submissions, the burden of proof on justification rests upon the employer. The measures adopted must correspond to a real need, be appropriate with the view of achieving the objective pursued and be reasonably necessary to that end. An objective balance is to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact upon the complainants, the more cogent must be the justification for it. It is for the Tribunal to weigh the reasonable needs of the undertaking against a discriminatory effect of the employer's measure and to make its own assessment of whether the reasonable needs outweigh the discriminatory impact.

118. During the course of closing submissions, reference was made to a couple of cases both of which involved the police. In **Homer v Chief Constable of West Yorkshire Police** [2012] UK SC15, the Supreme Court held that a requirement to have a law degree for career progression worked to the comparative disadvantage of the complainant who was approaching compulsory retirement age and did not have sufficient time to obtain a law degree. This was held to be indirectly discriminatory upon the grounds of age as the PCP (the requirement to have a law degree) worked to the comparative disadvantage of older workers within the comparison group when compared to the impact of the PCP upon younger workers. The PCP was held not to be reasonably necessary to achieve the aim. **Homer** is authority for the proposition that it is the PCP that must be justified as opposed to the discriminatory effect on the individual although part of the assessment includes comparing the likely impact of the criterion on the affected group as against the importance of the aim to the employer.

119. We also considered **Harrod v Chief Constable of West Midlands Police** [2017] EWCA Civ 191. In this case, the Chief Constable faced budget cuts and wished to achieve the maximum practicable reduction in the numbers of officers. This was held to be a legitimate aim. Police officers can only be compelled to leave the force once they have attained 30 years of service (absent gross misconduct). There being no other lawful way of achieving the aim, it was held that reliance upon a Regulation entitling the Chief Constable to impose compulsory retirement on older police officers was a proportionate means of achieving the legitimate aim. There was no other way of achieving the aim. Accordingly, it was proportionate. It was not open to the Tribunal to reject a justification case on the basis that the respondent should have pursued a different aim which would have had a less discriminatory impact.

120. Upon this authority, in our judgment, Mr Nuttman is correct to say that it is not for the Tribunal to substitute a different aim than that being pursued by the respondent. Provided the respondent's aim is legitimate, then the Tribunal cannot enquire further but must consider whether the means chosen were a proportionate way of going about the aim and whether the aim has been justified.

121. We now turn to a consideration of the relevant law upon the reasonable adjustments claim. Employers are required to take reasonable steps to

avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled person puts the disabled person at a substantial disadvantage compared to those who are not disabled. The word '*substantial'* in this context means *'more than minor or trivial.'*

122. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion or practice disadvantages the disabled person. Accordingly, there is no requirement (as there is in a direct discrimination claim) to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances. A comparison can be made with non-disabled people generally.

123. The phrase *"provision, criterion or practice"* is not defined by the 2010 Act in the context of reasonable adjustments. As with indirect discrimination, it broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

124. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and is placed at a substantial disadvantage by the application to them of the relevant provision, criterion or practice.

125. The duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take in order to make adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely has to be a prospect that the adjustment may benefit the disabled person.

126. The following are some of the factors which, according to the ECHR Code, might be taken into account when deciding what is a reasonable step for an employer to have to take. These are:

    - Whether taking any particular step would be effective in preventing the substantial disadvantage.
    - The practicality of the step.
    - The financial costs of making the adjustments and the extent of any disruption caused.
    - The extent of the employer's financial or other resources.
    - The availability to the employer of financial or other systems to make an adjustment.
    - The type and size of the employer.

127. Ultimately, the test of the reasonableness of any step an employer may have to take is an objective one and will depend upon the circumstances of the case. Adjustments may include transferring the disabled person to fill an existing vacancy, altering the disabled person's working hours or providing them with training or assigning a disabled worker to a different place of work, or arranging home working.

128. By section 136 of the 2010 Act there is a burden upon the claimant to show a *prima facie* case of discrimination. Once there are facts from which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to provide a non-discriminatory explanation. The two stage "*shifting burden of proof*" (as it is known) applies to the three forms of discrimination with which the Tribunal is concerned in this case. The bare fact of a difference in status and a difference in treatment only indicates a possibility of discrimination. Something more must be shown before a Tribunal could conclude that an unlawful act of discrimination has taken place and the burden of proof shift.

129. By section 123 of the 2010 Act, proceedings must be brought before the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks to be just and equitable. Conduct extending over a period is to be treated as done at the end of that period.

130. Time limits are exercised strictly in employment cases. It is for the complainant to convince the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. In considering whether to exercise discretion under section 123 to extend time, all factors must be considered including in particular the length and the reason for the delay.

131. The Tribunal's discretion to extend time upon an out of time complaint is a wide one. The factors which are almost always relevant are the length of and the reasons for the delay and whether the respondent suffered prejudice. There need not be a good reason for the delay. It is not the case that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is whether there is any explanation or apparent reason for the delay and the nature of any reason are relevant matters to which the Tribunal ought to have regard. However, there needs to be something to convince the Tribunal that it is just and equitable to extend time. Authority for these propositions may be found in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640.

132. Tribunals are vested with a wide discretion when applying the just and equitable test. There needs to be something to persuade the Tribunal that it is just and equitable to extend time. There is no presumption that time will be extended unless the claimant can justify a failure to present the complaint in time. The exercise of the discretion is the exception rather than the rule. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

133. The Tribunal may take into account any factor which it considers to be relevant. The strength of the claim may be a relevant factor when deciding whether to extend time. In disability cases, the Tribunal may recognise that disabled claimants may find it difficult to comply with the three months' time limit.

134. It is necessary for the Tribunal to weigh the balance of prejudice between the parties. A refusal to extend time will inevitably prejudice the claimant. However, the claimant needs to show more than that the loss of the claim

because of the application of the relevant limitation period will prejudice them. If that were to be sufficient, it would emasculate the limitation period. Plainly, Parliament has legislated for relatively short limitation periods in employment cases. The limitation period must be applied unless the claimant can convince the Tribunal that time ought to be extended.

135. The other side of the coin is that some prejudice will of course be caused to the respondent if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that. Otherwise, such would emasculate the discretion invested in tribunals by Parliament to consider a just and equitable extension of time.

136. By section 13 of the Employment Rights Act 1996, an employer shall not make a deduction from wages of a worker employed by them unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction. Where the total amount of the wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable on that occasion the amount of the provision shall be treated as a deduction made by the employer from the worker's wages on that occasion. Where a Tribunal finds that a complaint of an unauthorised deduction from wages is well founded, then the Tribunal shall make a declaration to that effect and order the employer to pay to the worker the amount of the deduction.

137. Wages are "*properly payable"* where the complainant establishes some legal entitlement to the sum in question. A determination of whether wages are *"properly payable"* will require tribunals to resolve disputes as to the meaning of the contract. Tribunals must therefore decide, on the order of principles of common law and contract law, the total amount of wages properly payable on the relevant occasion. This requires a consideration of the relevant terms of the contract and any relevant implied terms.

138. In the absence of any contractual right to suspend without pay, the worker's wages are "*properly payable"* while they are suspended from work so long as the worker is ready and able to work as required.

139. This concludes our summary of the relevant law.

The issues in the case

140. We shall now turn to the issues in the case. The issues are set out in the case management of Employment Judge Jones. They are copied into the bundle at pages 67 to 69. They shall now be set out here:

Time limits

4. With respect to the complaint of indirect discrimination, was there conduct extending over a period, the last part of which fell within three months and any extension for early conciliation (the primary period)?

5. If not, was the claim made within such other period that the Tribunal thinks is just and equitable?

6. With respect to the duty to make adjustments, was the claim brought within the primary period starting with when the respondents made a

decision about the adjustments? Or, if no decision was made when the respondents acted inconsistently with making the decision? Or, if neither, when the respondents might reasonably have been expected to have made the adjustment?

7. If it was outside the primary period, did it form part of conduct which extended over a period, the last part of which fell within the primary period?

8. If not, was the claim made within such further period that the Tribunal considers just and equitable?

Disability

9. Did the claimant have a disability as defined in section 6 of the EqA in the form of anxiety and depression and dyslexia. It is accepted that the claimant had a disability in the form of emotional dysregulation.

9.1 Did she have a physical or mental impairment of anxiety and depression or dyslexia?

9.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

9.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

9.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

9.5 Were the effects of the impairment long-term? Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur? Discrimination arising from disability (Equality Act 2010 section 15).

Discrimination arising from disability (Equality Act 2010 section 15)

10 It being accepted that dismissal would be unfavourable treatment was it because of something, namely the perceived effects of her medication and, if so, did that arise in consequence of her disability?

11. Did the respondents know or could they reasonably have been expected to know that the claimant had the above disabilities?

Indirect discrimination (Equality Act 2010 section 19)

12. Did the respondents apply a provision, criterion or practice (PCP) of requiring prospective employees to complete a written pre-employment questionnaire?

13. Did the respondents apply the PCP to persons who were not disabled by way of dyslexia or would it have done so?

14. Did the PCP put disabled persons who have dyslexia at a particular disadvantage when compared with people who were not disabled?

15. Did the PCP put the claimant at that disadvantage?

16. Was the PCP a proportionate means of achieving a legitimate aim?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

17. Did the respondents know or could it reasonably have been expected to know that the claimant had the disabilities? From what date?

18. It being accepted that the respondents had a PCP of requiring the claimant to discharge her duties, did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disabilities?

19. Did the respondents know or could they reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

20. Was it reasonable for the respondents to have to take steps to have avoided the disadvantage by implementing the recommendations of its occupational health advisor?

Remedy for discrimination or victimisation

21. Should the Tribunal make a recommendation that the respondents take steps to reduce any adverse effect on the claimant?

22. What financial losses has the discrimination caused the claimant?

23. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

24. If not, for what period of loss should the claimant be compensated?

25. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

26. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

27. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

28. Did the respondents or the claimant unreasonably fail to comply with ACAS Code of Practice on Disciplinary and Grievance Procedures such that the award should be increased or decreased by up to 25%?

Unauthorised deductions

29. Did the first respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

30. How much is the claimant owed?

Discussion and conclusions

141. We now turn to our conclusions. We shall start with the unauthorised deductions from wages claim.

142. No issue was raised by Mr Nuttman that the claimant was not ready, willing and able to work during her period of suspension. Accordingly, she was entitled to be paid wages from 28 August 2020. The claimant in fact indicated a willingness to work in her email of 15 September 2020 (page 173). Her willingness to help to procure her GP's medical report is further evidence of her willingness and wish to work. She said in her email of 15

September 2020 she was very keen to get to work. She asked when she was able to return.

143. No issue was raised by the claimant that she had not been paid her basic hourly pay of £10 per hour for her contracted 40 hours per week pursuant to clauses 5 and 6 of the contract of employment (at pages 76 and 77). The claimant's argument however was that she was rostered to do sleep-in duties during the period of suspension. Because she did not, of course, undertake those duties she was not paid for them. The issue that arises therefore is whether remuneration for the sleep-in duties was properly payable to her.

144. The evidence was that in addition to her normal working hours the claimant may be required to work additional hours and undertake extra shifts and extra sleep-in duties. It is clear from clause 5.3 of the contract at page 76 that the sleep-in duties are over and above the normal hours of work. A clear distinction is drawn between normal hours of work on the one hand and sleep in duties on the other. By clause 6.4, an entitlement arises to be paid in arrears for the hours and the sleep-ins worked.

145. There was no submission from Mr Frew to the effect that the claimant had a contractual right to be paid for the sleep-in duties other than if she actually worked them. Mr Frew submitted that the issue arises upon the complaint brought under the 1996 Act is whether there was a contractual right to be paid for the sleep-in duties. He then simply said that he would leave the matter with the Tribunal.

146. We prefer the respondent's case upon this issue. We find that the claimant would only be paid for sleep-in duties if she worked them. Of course, once she did a sleep-in duty then she would be entitled to be paid for it and any deduction from the wages earned without lawful authority would be unauthorised. However, that is a different thing from saying that remuneration was properly payable to her for sleep in shifts which she was rostered to undertake but which she did not do. Those are not properly payable and accordingly we find that the respondent did not make any unauthorised deduction from the claimant's wages.

147. We shall now turn to the claims brought under the 2010 Act. We must start with the issue whether the claimant has proven that she is a disabled person by reason of the dyslexia and the anxiety and depression (in addition to the emotional dysregulation). We remind ourselves that the burden of proof is upon her so to do.

148. We agree with Mr Nuttman that there was simply no evidence advanced by the claimant upon which basis for the Tribunal to find her to be a disabled person by reason of anxiety and depression. Mr Frew accepted that such were symptoms of emotional dysregulation in any case. As the latter was conceded to be a disability by the respondent, Mr Frew accepted that the claimant was not prejudiced by a failure to establish anxiety and depression as a distinct disability. We agree with Mr Nuttman (in paragraph 85 of his written submissions) where he says that the claimant has failed to discharge the burden of proving that the anxiety and depression is anything distinct from emotional dysregulation.

149. The claimant did not lead any evidence from which the Tribunal could safely conclude that the anxiety and depression (as a distinct impairment from emotional dysregulation) has a substantial and long term adverse effect upon her day to day activities. She describes the symptoms in paragraph 3 of her witness statement but not say how day to day activities are impacted by them. In any case, it is difficult for the Tribunal to disentangle what, if any, of those symptoms she attributes to anxiety and depression as opposed to emotional dysregulation. The two appear to be inextricably linked. Further, the medial evidence referred to in paragraph 63 says that there was no impact upon day to day activities because of the depression and anxiety (even were she to stop taking the medication).

150. The Tribunal determining that the claimant has not succeeded in establishing the mental impairment of anxiety and depression has not adversely impacted the complaints of unfavourable treatment for something arising in consequence of disability or the reasonable adjustments claim. The outcome upon those complaints would have been the same even had anxiety and depression been established as stand alone impairments.

151. The issue of dyslexia was more difficult. The dyslexia is only relevant to the recruitment process and the claim brought under section 39(1) of the 2010 Act.

152. As we have observed, the claimant gave evidence in paragraph 4 of her witness statement about the dyslexia and its affect upon her ability to undertake examinations. As we have seen, taking examinations is a normal day to day activity.

153. It was difficult to reconcile the evidence of her needing additional time for examinations in 2012 with what was said by the claimant in her application form at page 107 to the effect that she was able to speak and write clearly and accurately in English. For this, she was assessed at 10 out of 10. *(It is not clear whether this was a self-assessment, or an assessment made by the respondent of the claimant).*

154. There was no evidence from which the Tribunal could safely conclude that the dyslexia was a past disability. Of course, an individual may be discriminated against upon the basis of having had a disability in the past. The claimant had not, it seems, taken an examination (or at any rate needed extra time so to do) for around nine years. We agree with Mr Nuttman that there was a paucity of evidence from the claimant as to the impact of the dyslexia upon normal day to day activities. The credibility of the claimant's brief assertions in paragraph 4 of her witness statement about difficulty with reading was substantially undermined by what she said in the contemporaneous application form for employment with the respondent.

155. We therefore find on balance that the claimant has not established that she was a disabled person by reason of dyslexia. We note that Mr Frew declined the invitation from the Tribunal to make submissions upon this point.

156. That being said, we shall look at the indirect discrimination case in the alternative in any case. It is convenient to do that now. Although we have found that the claimant has not established that she was a disabled person by reason of dyslexia, we find that even had she established that then the

complaint of indirect disability discrimination would have failed in any case. We agree with Mr Nuttman that the respondent could not have known about the claimant's dyslexia. It was revealed for the first time only during the course of the grievance process. That does not however provide the respondent with a defence to the indirect discrimination claim.

157. Upon the indirect discrimination claim, we find that the respondent did apply a provision, criterion or practice of requiring candidates for employment to complete a medical screening questionnaire. We accept that within a comparison pool of candidates for employment with the respondent this would place those with dyslexia at a particular disadvantage in comparison with those within the pool without a disability or with a different kind of disability to dyslexia. Completing a written application form will disadvantage those with dyslexia.

158. The difficulty for the claimant upon this issue however is with seeking to establish that she was placed at a particular individual disadvantage in addition to the particular group disadvantage of those with dyslexia. There was no evidence that at the time that the claimant made the application she was put to a particular individual disadvantage. On the contrary, the application form completed by her indicates, as we have said, an ability to speak and write clearly and accurately in English. The form is very well presented by the claimant. There was no evidence that she protested to the respondent that she was having difficulty in completing it.

159. The explanation which she gave for answering "*no"* to the question in the equal opportunities questionnaire (at page 119) as to whether she had a disability is that she did not know that dyslexia (and anxiety and depression) were disabilities. She did not say that she was unable to read the form because of dyslexia. She gave no such evidence about her ability to complete the medical screening form.

160. Even if the Tribunal were to accept that the claimant had been subjected to a particular disadvantage by reason of the application of the PCP requiring her to complete the relevant forms, we would have held that the respondent was able to objectively justify the PCP in any case. The respondent is looking after vulnerable people. Mr Frew fairly accepted that the respondent has a duty to check the fitness of prospective employees for that responsible task. There can be no question that the respondent's aim is not legitimate. The means adopted of achieving the aim is to have candidates complete an equal opportunities and medical screening questionnaire (amongst other things). We accept that the means adopted by the respondent has the potential to have a discriminatory effect upon those with dyslexia. However, in our judgment, the reasonable needs of the employer to screen candidates to ensure fitness to work with vulnerable people outweighs the discriminatory impact upon those with dyslexia. This is particularly so in circumstances where the declaration at the top of page 121 assures candidates that they will not be prejudiced by declaring a disability and that if they do then adjustments may be made by the respondent to afford equal opportunity.

161. It is possible that there may be a less discriminatory way of going about screening candidates. None were suggested by Mr Frew. However, candidates could for instance simply be asked if they wished someone to

go through the form with them. That said, a less discriminatory way of achieving the aim does not mean that the means chosen are necessarily incapable of objective justification particularly where there is a safeguard for candidates provided at the outset when they begin to complete the medical screening questionnaire.

162. The recruitment process was a course of conduct. It ended on 6 July 2020 when the claimant took up her position with the respondent. For the purposes of section 123 of the Act, therefore, time began to run with effect from 6 July 2020. The claimant needed to present her complaint within three months of that date (in addition to any time spent in early conciliation). The claimant did not commence early conciliation with ACAS until 18 December 2020. Accordingly, the claimant presented her indirect discrimination complaint out of time. (No time issue arises upon the section 15 claim or the reasonable adjustments claim).

163. In the Tribunal's judgment, it is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the indirect disability discrimination claim. Firstly, the recruitment process was dealt with by Julie Parker and Claire Emmott both of whom were involved in the events ultimately leading to the claimant's dismissal. They reported matters to Gillian Bundy following the issues arising out of the training event held on 19 August 2020. From the claimant's perspective therefore the dealings that she had at recruitment and then investigation stage were with the same people. Secondly, there was no submission from the respondent or evidence given on their behalf that they suffered any forensic prejudice in the delay in presenting the indirect discrimination claim. Claire Emmott and Julie Parker were available to give evidence. They had a clear recollection of matters. The recruitment process was well documented.

164. We also take into account that at all material times the claimant suffered from the impairment of emotional dysregulation. We accept that this may have impacted upon her ability to commence proceedings sooner. It is understandable that she did not do so as she sought to invoke the respondent's grievance procedures before resorting to litigation.

165. The prejudice to the claimant of refusing to extend time would greatly outweigh that to the respondent of permitting time to be extended. The claimant would suffer her claim of indirect disability discrimination not being heard. The respondent merely faced dealing with that claim in circumstances where they were able to defend it. It is in the public interest that discrimination issues be aired. Accordingly, time will be extended (albeit that the claim fails in any case).

166. We now turn to the complaint of unfavourable treatment for something arising in consequence of disability. On any view, the claimant was unfavourably treated by the respondent. She was dismissed from her employment. That is unfavourable treatment. (Although her grievance and grievance appeal were rejected, the claimant raises no complaint of unfavourable treatment arising out of those decisions).

167. Mr Nuttman argues that the unfavourable treatment was not for something that arose in consequence of the claimant's disability. He contends that her dismissal was for conduct in failing to make a full and frank disclosure about her symptoms.

168. As we have said when we analysed the relevant law upon this issue, the key consideration is the thought process of Mrs Bundy. We accept that she was concerned about the claimant's conduct and that was a material reason for her decision to dismiss the claimant's employment. This was made clear in her decision letter (in particular at page 176). She said that she had lost trust in the claimant because she suffers from emotional dysregulation and failed to disclose the condition, the symptoms of the condition, that she was taking medication and the side effects of the medication. We agree with Mrs Bundy that the claimant downplayed matters in the medical screening questionnaire.

169. It was, frankly, impossible to reconcile what the claimant had said in the medical screening questionnaire on the one hand and the report from her consultant psychiatrist on the other.

170. However, that Mrs Bundy's concern went beyond issues of conduct alone is made plain in her witness statement. In paragraph 37 she refers to the claimant having referred herself to mental health services in 2019 believing that she had a borderline personality disorder. She goes on to say that, *"Given that [the claimant] was responsible for vulnerable people this was clearly information which could and should have been brought to our attention."* In paragraph 43 of her witness statement Mrs Bundy says that the claimant had *"knowingly worked without disclosing [the emotional dysregulation] and deprived us of the opportunity to assess the risk and mitigate with adjustments."* In paragraph 48 of her witness statement, she says that the claimant had *"potentially deliberately exposed people we serve, her team and [the respondent] to a risk and that I could not trust her to continue in her role."*

171. In evidence given in cross-examination, she reiterated that she was *"concerned about risks highlighted which we had not been able to assess."* She also said that the claimant had failed to "disclose the medication or the full extent of the health problems." Mrs Bundy said that the claimant should have made a full declaration as she has a duty of candour.

172. From the evidence in chief given by Mrs Bundy (as set out in her printed witness statement) and the answers given in cross-examination, the Tribunal concludes that a material reason for Mrs Bundy's decision to dismiss the claimant was because of the impact of the emotional dysregulation upon her ability to care for vulnerable residents at Mayfield Court. The symptoms of the emotional dysregulation and the side effects of the medication taken for it were clearly factors which materially influenced Mrs Bundy's decision. The symptoms and the side effects of the medication arise in consequence of the claimant's disability. As they presented an enhanced risk to the claimant's ability to undertake her role it follows that Mrs Bundy unfavourably treated the claimant for something that arose in consequence of the disability. While we accept that this was not the only reason, it was certainly a material factor.

173. For the avoidance of doubt, the Tribunal does not hold against the claimant the failure to reply to the questioning the medical screening questionnaire about the application of the Equality Act 2010. We agree with Mr Frew that this is a legal question. Indeed, it can be a difficult issue as to whether an individual is disabled within the meaning of the 2010 Act. We take note that

Mrs Parker struggled to explain it when Mr Frew asked her to do so. We also do not hold against the claimant that she did not complete the questions addressed to Night Workers. It was not clear to the claimant that she fell within the category of Night Workers when completing the form. There is no evidence from the respondent that this was ever explained to her. We accept that the claimant may have anticipated undertaking sleep-in shifts in addition to her normal hours. However, it was not made clear to the claimant that this brought her within the category of Night Worker for the purposes of the form. The onus was upon the respondent to make it clear that that question applied to her. For all that the claimant knew, some of the respondent's employees may be employed to work upon nights alone.

174. We do agree with Mrs Bundy that the claimant gave misleading answers in several important respects and that a conduct issue therefore arose. Firstly, she answered in the negative to the two questions about taking medication. We do not accept the claimant's explanation that her choosing to do so on an irregular basis entitles her to answer in the negative to those questions. We accept that it would have come as an unwelcome surprise to the respondent to discover that the claimant was taking Sertraline which, from Mrs Bundy's research, had the potential to have adverse side effects impacting upon the ability to look after vulnerable residents.

175. We also agree that the claimant gave the impression that the anxiety and depression was in the past. The medical screening questionnaire was completed only a matter of days before her appointment with Dr Ukonu. The Tribunal takes judicial notice of the fact that these things are not arranged overnight. The claimant had been to see her GP to seek a referral to a consultant psychiatrist. She failed to mention that to the respondent. Even if the appointment had been arranged after 16 June 2020, there was an onus upon the claimant to inform the respondent of the position. We agree with Mrs Bundy that the claimant gave a misleading impression.

176. It was argued on behalf of the respondent that the claimant would have been dismissed had the misconduct in question not impacted upon patient care. While that may be the case, we have to decide whether matters arising from disability materially influence Mrs Bundy's decision making. We find that they did so for the reasons given. Further, we note that the respondent was prepared to overlook the fact of the claimant's childhood criminal convictions which had no impact upon her ability to do her role. That may tend to suggest that the respondent would have overlooked conduct not impacting upon patient care (albeit that this issue must be treated with some caution as matters in question were over 25 years old). We accept that the respondent may have taken a different view upon more recent convictions (which did not of course arise in this case). The debate upon the issue of the respondent's view conduct not impacting upon patient care is academic given our findings upon Mrs Bundy's thought process.

177. Our judgment that the claimant misled the respondent is reinforced by two further matters. The first is the Personal Independent Payment application form. We do not have the claimant's reconsideration application following the rejection of the claim on 7 February 2020. However, it is plain from reading the reasons for the initial rejection that the claimant was making representations to the Department of Work and Pension to the effect that she had a number of difficulties some of which must impact upon her ability

to act as an assistant service manager in this environment. One such is the difficulties claimed by the claimant in engaging with other people face to face and making budgeting decisions. Effective communication with vulnerable residents at Mayfield Court (including assisting with financial decisions) is one of the roles to be performed. An inability (as claimed in the PIP application) to prepare her own food and monitor her health condition must be matters of concern in an employee for an employer in this sector.

178. Further, in the earlier proceedings brought by the claimant against the Wilf Ward Family Trust she claimed to have had cognitive problems and anxiety and depression. Cognitive problems arising from the emotional dysregulation and the medication taken for it were at the heart of Mrs Bundy's concerns leading to her decision to dismiss.

179. Mrs Bundy was, of course, not aware what the claimant had told the DWP or had pleaded in the earlier Employment Tribunal claim. Therefore, these were not factors impacting upon her thought process. Nonetheless, the Tribunal takes them into account as tainting the claimant's credibility that she had not given a misleading account to the respondent. The misleading account was of concern to Mrs Bundy as an act of misconduct and because of the impact of it upon the respondent's decision to employ the claimant because of safeguarding issues.

180. There being no issue that Mrs Bundy knew that the claimant had emotional dysregulation, it is only open to the respondent to defend the section 15 claim upon the basis of objective justification. Here, what has to be justified is the respondent's treatment of the claimant. Upon a section 15 claim, the Tribunal is not concerned with issues of group disadvantage or the application of a PCP.

181. The legitimate aim in question is the support of vulnerable people living in the community. That is the aim being pursued by the respondent at the material time. On any view, it is plainly a legitimate aim.

182. The means of achieving the aim, as submitted by Mr Nuttman in paragraph 102 of his written submissions is, *"a strict policy of requiring a full disclosure of any health condition or medication that could potentially impact on an employee's duties ("a duty of candour")."*

183. The Tribunal was not taken to a policy document containing a duty of candour. The Tribunal takes judicial notice of the fact that in some healthcare organisations (for example in the NHS) a duty of candour is encapsulated in a written policy document. Mr Nuttman drew us to page 117 which is the respondent's handbook and code of conduct booklet. The booklet was not produced for the benefit of the Tribunal. It is not clear whether a duty of candour is included within it.

184. Mr Frew submitted that there was no absolute requirement to observe a duty of candour. Mr Nuttman expressed surprise that the duty of candour was being questioned and had understand that to have been conceded by the claimant. Indeed, we note that in cross-examination the claimant was asked by Mr Nuttman whether she accepted that she had a duty of candour to which she replied in the affirmative. The Tribunal should therefore proceed upon this basis. Indeed, Mr Frew fairly accepted that there was a

duty upon the respondent to check the fitness of those working with vulnerable patients.

185. In passing, the Tribunal observes that the respondent did not help themselves by failing to clearly lay out for the benefit of the Tribunal the legal basis upon which they contend there to be a duty of candour in this field. Mr Nuttman spoke rather vaguely (it has to be said) about legislation *"under a Social Care Act*." The Tribunal takes judicial notice of the fact that this is a complex area with different applicable legislation depending upon the provider of the care in question and the sector in which the work is undertaken.

186. It having been conceded by the claimant that there is a duty of candour, it must follow that she was in breach of it for the reasons which we have given. We agree with Mr Nuttman when he sounded a note of caution that it was not for the Tribunal to substitute a different aim for that being pursued by the respondent. The respondent's aim being legitimate, the question that arises is whether the means taken to pursue the aim were reasonably necessary with a view to achieving the object being pursued. In other words, was the dismissal reasonably necessary to achieve the aim.

187. The object or aim being pursued was a safeguarding of vulnerable residents in a sheltered housing environment. The dismissal of the claimant for failing to comply with the duty of candour as a means of achieving that objective plainly has a serious disparate impact upon the claimant. She has lost her career with the respondent. It follows therefore that the respondent must advance cogent justification for taking that step.

188. We agree with Mr Nuttman that the respondent has satisfied the burden upon it to show that the dismissal of the claimant was a proportionate means of achieving the legitimate aim in question. In reality, Mr Nuttman is right to submit that there is no other way of achieving the aim then to ensure that employees are candid. Employers in this field must eb able to rely upon what employees are telling them. To overlook the claimant's lack of candour would be to expose vulnerable residents to harm. That would defeat the object of the legitimate aim being pursued by the respondent.

189. The Tribunal raised the issue of the claimant standing down from the assistant service manager role and being employed as an enabler or indeed reverting to working in that capacity through the agency. This was not a suggestion advanced by Mr Frew on behalf of the claimant. As Mr Nuttman submitted, this would come with the difficulty of the respondent allowing the claimant to work with vulnerable residents in circumstances where they were aware that the claimant had breached her duty of candour with the attendant safeguarding concerns.

190. When she worked through the agency prior to July 2020, this was not an issue which arose. The respondent had a contract with the agency. It was for the agency to vet the agency workers. This is the whole purpose of the agency arrangement – so that the respondent may call upon agency workers to carry out work from time to time without the need for the respondent to make enquiries upon fitness to work. Different considerations arise where the agency workers then become employees of the respondent. The responsibility for vetting then passes to the respondent.

191. The claimant's failure to be candid with the respondent cannot be excused by the haste with which she completed the medical screening form. As we have seen, she did so within only a few hours of receiving it in circumstances where she had three days to complete the form. Significantly, in our judgment, both the occupational health physician (in answer to question 7 on page 172) and the claimant's general practitioner (in the penultimate paragraph at page 167) say that the claimant is able to recognise right from wrong. Hence, there is no medical explanation which exculpates the claimant from her decision to be less than candid with the respondent when completing the pre-employment forms.

192. In those circumstances, while we accept that the claimant was unfavourably treated for something arising in consequence of disability, we hold that the respondent has justified the unfavourable treatment as a proportionate means of achieving their legitimate aim.

193. We now turn to a consideration of the reasonable adjustments complaint. The relevant PCP is requiring the claimant to discharge her duties. There was no evidence that the claimant was not satisfactorily doing so. As we have said, there is some reference (in paragraph 43 of Mrs Parker's witness statement) that concerns were raised about the claimant's performance. We do not accept Mr Frew's categorisation of this as "*mudslinging"*. Nonetheless, those concerns were not sufficiently serious to warrant the respondent embarking upon any formal (or even informal) capability management process. The height of matters appears to be that the claimant was spoken to about the tone she used when speaking to staff and on one occasion a service user. No further action was deemed necessary (or at any rate there was no evidence that any further action was taken against her arising out of these matters).

194. It follows therefore that it is difficult to see how the PCP of requiring the claimant to undertake her duties presented her with a substantial disadvantage when comparing her position with that of non-disabled comparators. The claimant's evidence before the Tribunal was that she was able to satisfactorily undertake her job. Indeed, the claimant said that she was able to undertake her role satisfactorily both before the Tribunal and during the course of the grievance investigation. We refer in particular to the excerpt from the notes of the grievance hearing at page 196. In evidence under cross-examination, the claimant said that the adjustments recommended by Fiona Walsh may have helped her *"to succeed".* This falls short of evidence from the claimant that she was unable to satisfactorily comply with the PCP to do her job.

195. It is not clear, therefore, how the adjustments recommended by Fiona Walsh would have alleviated any disadvantage caused to her by the emotional dysregulation, no substantial disadvantage caused by it in the fulfilment of her role having been identified by her. Had she been allowed to return to work then it may have been to her advantage to have put the adjustments recommended by Fiona Walsh in place. That however is not the same thing as reasonable adjustments being required to enable her to fulfil her role in the first place or to alleviate any disadvantage caused to her by her disabilty.

196. Once the respondent determined that the claimant was in breach of the duty of candour, then it follows that it would not be reasonable to require the respondent to make any adjustments in any case given their objectively justifiable decision to bring the claimant's contract of employment to an end. It follows therefore that the reasonable adjustments complaint must also stand dismissed.

197. It follows therefore that the claimant's complaints stand dismissed in their entirety.

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Employment Judge Brain

_____

Date 29 June 2022

Reserved Judgment & Reasons Sent To The Parties On

Date: 6 July 2022