EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms D Lowers **V** **Staffordshire County Council**

Heard at: Birmingham **On**: 23 to 29 September 2022

Before: Employment Judge Broughton

Appearances:
For Claimant: Ms K Anderson, counsel
Respondent: Mr D Jones, counsel

JUDGMENT

The respondent's application for a postponement was refused. Having been struck out they were, nonetheless, allowed to participate to a limited extent.

Subject to the outcome of the respondent's appeal against the striking out of their response:

1. The claimant's claims of unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and wrongful dismissal succeed.

2. Her claims of victimisation and detriment on the grounds of raising a health and safety issue and/or as a result of making a protected disclosure succeed in part.

3. Her claims of automatically unfair dismissal fail and are dismissed.

4. The claims of indirect discrimination and harassment are dismissed on withdrawal.

Further directions in relation to remedy will be given at a telephone case management hearing before me at 10am on 2 December 2022 (time estimate 3 hours).

The respondent has agreed to set out in a position statement any arguments they may be seeking to make about the likelihood of the claimant's employment

ending at some future point after her effective date of termination, together with proposed directions for a remedy hearing by no later than 3 November 2022.

The parties will cooperate to agree as much as possible at least 7 days in advance of the next hearing and will also concisely set out their position on any matters requiring determination in the same timescale.

The remedy hearing has been listed for 24 to 26 April 2023.

The respondent requested written reasons at the hearing.

REASONS

Postponement application

1. The respondent's response was struck out by EJ Noons on 5 August 2022.

2. As a result, the original full merits hearing was shortened and converted to this hearing before me by REJ Findlay under rule 21(2) Employment Tribunal Rules of Procedure 2013 ("rules").

3. The respondent has subsequently appealed the strike out decision. They made a written application to postpone this hearing on 16 September 2022.

4. I determined that it was in the interests of justice to hear the respondent's application under rule 21(3).

5. The respondent was, effectively, asking for a stay of the proceedings pending the outcome of their appeal to the EAT.

6. Why the application was not made sooner was unclear. Whilst it is reasonable to wait for the written reasons prior to any appeal, oral reasons had been given by EJ Noons and the respondent must have known of their intention to appeal.

7. In delaying the application, it was inevitable that the claimant would be incurring further costs in preparation for this hearing.

8. In any event, the claimant objected to the postponement application. Both parties referred principally to the overriding objective (rule 2) in support of their respective positions.

9. The respondent conceded that the parties were on an equal footing by virtue of their representation.

10. In relation to proportionality, the respondent argued that the case was both complex and important and, as a result, they should be heard and able to

mount a full defence or we should, at least, await the outcome of their appeal.

11. To allow the former would effectively overturn EJ Noons decision which is not within my power. It would also suggest that the tribunal's power to strike out does not apply to complex cases.

12. If the latter were permitted as of right, it would potentially allow unscrupulous respondents to significantly delay a just outcome for claimants by not complying with directions and appealing any sanction. For the avoidance of doubt, I am not suggesting that this was the case here.

13. There was no dispute that the case was complex, with a 17-page list of issues. There were significant factual disputes and a schedule of loss claiming £1.2m.

14. In addition, the claimant had been dismissed for gross misconduct, which was potentially career ending, with the respondent relying on what they said were serious child protection issues.

15. All of those matters, of course, would have already been considered by EJ Noons. She concluded that a fair trial, in this trial window, was no longer possible. She was also concerned that the respondent's history of non-compliance with tribunal orders and directions may continue.

16. It is worth observing, at this stage, that, whilst the respondent was contending that a fair trial was not possible this week without hearing from their witnesses, they were not in a position to call any. In fact, despite being in possession of the claimant's witness statement, they still have not provided any of their own.

17. If I were to postpone, therefore, the respondent would have an unfair advantage at any future hearing before consideration of the potential disadvantages to the claimant of further delay.

18. It was confirmed that it was always intended that there would be a split trial, not least because of the potential need for expert evidence, such as from one or more medical or actuarial specialists.

19. The list of issues for this trial window did, however, include consideration of the potential arguments on Polkey and contributory fault.

20. It was clear, therefore, that if I were to proceed to determine liability under rule 21 we would then need to list a remedy hearing in, I suspected, around 6 months.

21. If I were to postpone, however, it was agreed that it was unlikely that we would receive a final determination from the EAT within 12 months and it was likely to be a further 12 months before this liability hearing could then

be relisted, whether the respondent was then permitted to fully participate or not.

22. There would still be a strong argument for a split trial and so, if the claimant were successful, it would still be likely to take a further 6 months before any outcome on remedy.

23. As a result, whatever the outcome of the appeal, a postponement was likely to result in a two-year delay, or more, although that could, potentially, be reduced somewhat by a speculative listing now.

24. Against that, clearly some expense could be wasted by proceeding now, albeit only if the respondent's appeal is successful.

25. That said, some preparation costs would be lost by a postponement.

26. The costs of the first day have been incurred in any event. The costs of preparation that are likely to be lost by a postponement would be at least those of a day or, perhaps, two, whereas we are likely to be able to deal with liability and further directions in 3 days.

27. The potential expense wasted by proceeding is, therefore, roughly the cost of 1 or 2 hearing days but this is only if the respondent's appeal is successful. This was a risk the claimant was willing to take.

28. The mere existence of an appeal, without more, would not generally be good grounds for a postponement. Indeed, to simply delay because of the appeal would make a mockery of the strike out decision which was, in part at least, due to numerous delays in compliance with directions.

29. It is not for me to express a view on the merits of that appeal save to say that it appears arguable on both sides and does not appear to be merely a tactical approach or means of causing further delay.

30. The complexity and importance of the issues remains whatever my determination.

31. If I were to postpone, and the respondent were successful at appeal, they would not be prejudiced. They would, however, have the advantage of already being in possession of the claimant's witness statement prior to preparing their own.

32. It is also possible that the respondent's history of non-compliance with directions would then be repeated.

33. The only disadvantage in the event of a successful appeal would be the 1 or 2 days wasted costs of proceeding in this window. Whilst not insignificant, that is a small sum in the context of the costs (and exposure) as a whole.

34. Against that, if the appeal is unsuccessful, the parties will be in the same position they are now but 2 years down the line. The current trial window would be lost.

35. This would be a significant further delay for the claimant to receive any determination of the issues in the case, and any entitlement to compensation arising therefrom.

36. In addition, the issues already go back 5 years and the background much further than that. A delay, therefore, could have a significant adverse effect on the cogency of the evidence.

37. Moreover, such a delay may be more prejudicial to the claimant because, I heard, her mental health continues to be adversely affected.

38. It is often the case that mental health only improves once an individual has achieved closure in relation to the issues in the case.

39. Overall, therefore, the disadvantages of delay significantly outweigh the limited potential prejudice of proceeding and so the respondent's application for a postponement is refused.

The respondent's participation

40. Having determined that the rule 21(2) hearing should proceed, the respondent argued for full participation. That, as mentioned, would effectively render the judgment of EJ Noons a nullity and it is not within my power to overturn it.

41. In any event, I heard that the respondent's witnesses were not available and, furthermore, their witness statements had not even been exchanged so such participation was impossible in the trial window in any event.

42. In circumstances where the respondent was unable to lead evidence, advance a positive case or address matters where the burden of proof rested with them, we discussed the extent to which they may be permitted to cross examine.

43. On reflection, however, the respondent only sought to be able to provide what they termed a "road map" to assist me in walking the claimant through the list of issues, including with reference to their amended grounds of resistance and the documents, to establish whether her claims could adequately made out. They also requested the opportunity to contribute written submissions.

44. I agreed that, given the complexity and importance of the issues, all of the claimant's claims should not simply be upheld in a default judgment without, at least, some evidence being adduced from her and a level of checking and cross referencing to the documents.

45. In those circumstances, as the claimant was going to be required to give her evidence and I was going to walk her through the list of issues to satisfy myself which of her claims were adequately made out, it seemed to me to be in the interests of justice to agree to the respondent's requests.

46. The road map would ensure that relevant matters could be put to the claimant to enable her to respond.

47. Moreover, submissions would ensure the respondent had further participation and, hopefully, reduce any risk of miscarriages of justice. For example, they indicated that they wished to make robust submissions on jurisdiction and, specifically, time limits.

48. The claimant, to her credit, did not raise any strong objections to these proposals.

49. I would add that it was only in closing, after I had heard the evidence, that the respondent suggested that, even if their appeal were successful, any future tribunal would be bound by any findings of fact I may make.

50. That is a submission that I do not accept. It will, of course, be a matter for the EAT whether they order a full rehearing, if the respondent's appeal is successful.

Rule 21 determination

51. As this is a rule 21 hearing, it is not proportionate to make extensive findings of fact but, given the request for reasons, I have gone beyond a simple default judgment.

52. I was able to agree most of the material background facts with the parties and then work through the list of issues, identifying which of the claimant's claims could be made out and why.

Background

53. The claimant commenced employment with the respondent on 1 April 2000. In the last years of her employment, she was a senior practitioner in one of their regional safeguarding units, working with children and young people at risk, under a team manager.

54. The claimant's professional regulatory body is the Health and Care Professionals Council (HCPC)

55. It was accepted by the respondent that at all material times the claimant was disabled within the meaning of the Equality Act 2010 by virtue of her osteoarthritis. No other potential disability was contended for.

56. Knowledge of the claimant's osteoarthritis was also conceded.

57. There was a long history of adjustments being requested and some being provided not least in relation to Dragon voice recognition software.

58. It was initially provided in 2012/2013 but there apparently remained issues with its effectiveness, such as compatibility with the hardware/laptop, whether it could be used at home, the impact of background noise etc.

59. The claimant was absent from work from April 2016 until February 2017 due to stress. During this period the respondent was "minded to dismiss" but the claimant was able to convince them that she would be able to return to work and be effective. She then took her accrued annual leave returning to work in April 2017.

60. Following engagement with Access to Work, it was agreed that the claimant needed upgraded software and equipment.

61. The claimant said that there were a few delays in the provision and uploading of the new software and then, initially, intermittent issues with the functionality but she acknowledged that, by February 2018, it was fully functioning, and she had received a couple of training sessions.

62. It was suggested that the claimant needed one more training session, but she went off sick before attending. That said, it was her evidence that the dragon software was up and running by February 2018. Indeed, she felt that this may have been part of the reason that she was subsequently suspended.

63. The claimant said that, once the software was functioning and she was able to use it, the respondent did not want to allow her sufficient time to show how this would improve her case progression and report writing. In those circumstances, there was no evidence of substantial disadvantage after February 2018.

64. In any event, earlier in the period after the claimant's return in April 2017, particularly latterly, the respondent was raising concerns with her that she was failing to progress cases appropriately. Similar concerns had, seemingly, arisen in earlier years, albeit the claimant put these down to earlier alleged failures to make reasonable adjustments that were part of the background to the issues in this case.

65. The claimant's evidence before me, in relation to 2017 /18 was that she either

    a. had progressed cases appropriately but there may have been delays writing them up due, she said, to her difficulties typing without adjustments or
    b. there were disagreements with her manager about when files should be closed or required no further action which, at the very least, affected their priority

66. The claimant said that her workload was higher than other senior practitioners, but the evidence did not bear that out. That said, it was often higher than the maximum level she said she had been promised. The claimant also said that she had additional duties as a senior practitioner.

67. She felt that her workload was excessive and that this was made worse by her disability and her difficulties writing.

68. In November 2017, the claimant had a new line manager, AM. She said AM was aware of her need for dragon software but not the history of the matter. She also said she believed AM was the driving force behind her subsequent treatment.

69. The respondent conceded that AM assaulted the claimant, on 9 January 2018, by grabbing her shoulder and shaking her.

70. On 17 January 2018, the claimant was called into a lengthy supervision meeting at which a number of the respondent's concerns about case progression were discussed. The possibility of a performance improvement plan was apparently raised.

71. On 24 January 2018, the claimant alleged that she was undermined by AM when a social worker, who had covered her leave over the Christmas / New Year period was removed from a handover meeting the claimant had asked him to attend.

72. On 25 January 2018, the claimant reported the assault.

73. On 6 April 2018, the claimant was suspended. The allegations remained in relation to alleged failures to progress her cases, but it was stated that these were potentially exposing children to harm, such that they were now being treated as potential gross misconduct.

74. The claimant was signed off sick with stress the same day and never returned to work.

75. An investigation was undertaken and the respondent took the view that the claimant failed to engage in the process, although she said she was unable to because of her mental health.

76. It was only once an Occupational Health (OH) report was sought and produced in April 2019, however, that advice was obtained suggesting that the claimant could engage in the process but only with several adjustments, such as principally participating in writing.

77. The claimant did then submit a lengthy written response. This led the respondent to commission a 2nd investigation.

78. The claimant submitted written objections to the second investigation report also.

79. The claimant was invited to a disciplinary hearing on 6 November 2019 which proceeded in her absence. The respondent sought to characterise the claimant's absence as a matter of choice, notwithstanding the occupational health report.

80. All of the allegations against the claimant were upheld individually as gross misconduct when, on the face of it, the majority appeared to be failures to progress or adequately record her work in circumstances where there was no dispute that workloads were high. That said, there was a reference to refusing to obey reasonable management instructions in relation to at least a couple of the children.

81. The claimant was dismissed summarily by letter dated 19 November 2019 and it was stated that the respondent had an obligation to report the findings to the HCPC.

82. The respondent's pleadings confirmed such a report, albeit the claimant had heard nothing further. Before me, however, the respondent asserted that no such report had been made.

83. The claimant was given the right to appeal and did so, attending the appeal hearing by telephone. The appeal was rejected by letter dated 17 February 2020.

The issues and their determination

84. As already mentioned, it was not in dispute that the claimant was a disabled person at all material times by virtue of her osteoarthritis. Knowledge was also not in dispute.

85. I was reminded that other conditions, including relating to the claimant's finger or her mental health were not pleaded disabilities.

86. The first item in the list of issues was in relation to an alleged failure to make reasonable adjustments and, specifically, an allegation that the claimant was put at a substantial disadvantage by virtue of the respondent's failure to provide an auxiliary aid, that being Dragon software or an administrator to carry out her typing.

87. In relation to the latter, the claimant suggested that she would need around 15 hours per week just to keep up with the priority work. It seemed to me that could easily cost around £10,000 per annum and so it was unlikely to be reasonable.

88. However, that would become academic if, as claimed, the Dragon software could remove the disadvantage. The claimant said the software would reduce her writing time by 60%

89. It was not in material dispute that typing was slower and more painful for the claimant and so she would be at a disadvantage compared to non-disabled comparators.

90. It was clear that at various times Dragon software was provided but there were delays in relation to the necessary upgrades in 2017 and it was the claimant's evidence that she did not consistently have fully functioning software on which she was trained until around February 2018.

91. Prior to that point the claimant's case was made out but there was no substantial disadvantage thereafter. She was, in any event, off sick from April 2018.

92. On that evidence, therefore, the allegation would be out of time unless it formed part of a continuing course of conduct.

93. On the claimant's case it did so in 2 key respects. Firstly, the claimant said that the absence of the Dragon software caused or contributed to her failures to progress certain case files and it was those alleged failures that led to the disciplinary proceedings against her which led to her dismissal.

94. In addition, it was the claimant's case, or at least her belief, that her need for adjustments and her difficulties coping with workloads in their absence were the real principal reasons for her dismissal.

95. As a result, there was evidence that the failure to make this adjustment sooner did amount to the start of a continuing course of conduct such that the complaints were not presented out of time.

96. In any event, on the claimant's evidence, the reasons for her delay were her ill-health and poor advice from her union which would make it just and equitable to have extended time. The respondent was unable to call evidence and so there could be little prejudice in relation to the delay, save in relation to having this part of the claim brought at all, but in circumstances where they have been aware from the outset that it was a central element of the claimant's response to the allegations against her.

97. The next claim for an alleged failure to make reasonable adjustments was, effectively, the same claim put a different way.

98. It was not in dispute that the respondent applied a provision criteria or practice of requiring typed, written work.

99. It was also clear that there was a requirement for senior practitioners to carry a full caseload, potentially even beyond the recommended maximum.

100. The claimant's difficulties with typing up reports etc would put her at a substantial disadvantage in those circumstances.

101. The claimant's case was that the fully functional Dragon software with training would have removed the disadvantage and so I do not need to consider any other proposed adjustments.

102. That said, an additional part of the alleged disadvantage was that the claimant's performance (and, potentially, conduct) was assessed in relation to a period when she said the reasonable adjustments were not in place.

103. In those circumstances, to avoid the disadvantage, the claimant said that a further necessary adjustment was that she should not have been assessed until the fully functional software was in place and I accept that this also appeared to be reasonable.

104. Again, there was a clear link between the adjustments and subsequent events such that no time limit jurisdiction points arose.

105. The claimant's claim of indirect disability discrimination is dismissed on withdrawal.

106. In relation to the claimant's claims under s15 Equality Act 2010 it was clear that, on her case, the meeting on 17 January 2018, at which performance concerns were discussed, arose, at least in part, because of delays in producing her written work. Those delays arose, at least in part, because she did not have fully operational dragon software to ameliorate the adverse effect of her disability on her typing ability.

107. In those circumstances she has given evidence as to facts from which I could conclude that unfavourable treatment had taken place because of something arising in consequence of her disability.

108. The respondent cannot show that their actions were not tainted with discrimination nor could a positive case on justification be advanced, so this claim must also succeed.

109. Similarly, the claimant alleged she had been threatened with a performance improvement plan and a report to the HCPC at the same meeting. Whilst I note this was disputed on the facts by the respondent, in the absence of evidence to the contrary, I had no reason not to accept the claimant's evidence. Indeed, the former seemed likely in the context presented.

110. The claimant gave evidence that she was subject to further unfavourable treatment in a meeting in February 2018 which I accept and uphold as part of the course of conduct for similar reasons.

111. It was a central element of the claimant's case that the subsequent disciplinary proceedings and her dismissal amounted to further unfavourable treatment arising in consequence of her disability.

Specifically, she said that this was because she could not complete all her work tasks in time due to her typing being slower and fully functional Dragon software not being available at the relevant time.

112. It is clear that at least some of the allegations did, as claimed, relate to alleged failures in relation to report writing or updating the system and, indeed, delays in these areas may have impacted the claimant's other duties, child visits etc.

113. There was some evidence that the claimant had been instructed to produce certain children in need plans that she did not consider to be necessary. This was characterised by the respondent as a refusal to obey a lawful instruction.

114. However, whilst the claimant acknowledged that she had been instructed to produce these plans and had not done so, she said that this was because, in the specific circumstances, they were not essential and so she had placed them as a low priority, rather than refusing.

115. She also said that she had been proved right and the files were subsequently closed.

116. As a result, it was not implausible that all of the allegations against the claimant were in some way related to difficulties writing reports arising from her disability.

117. Having established those facts, the burden of proof would shift to the respondent to show that their actions were in no way whatsoever tainted with discrimination and, being unable to call any evidence, they were unable to do so.

118. Reporting the claimant, as a result of the above, to the HCPC, was also capable of amounting to unfavourable treatment although I accept the respondent's submission before me that, in fact, contrary to their pleaded case, no such report was made.

119. Nonetheless, telling the claimant that such a report had been, or was going to be, sent, were still capable of amounting to unfavourable treatment and, as above, was the culmination of a chain of events that arose from her disability.

120. Moreover, the respondent would have been obliged to report the claimant for gross misconduct and/or serious safeguarding concerns. The fact that they did not do so may well support the claimant's position that she was not only not guilty of gross misconduct, but the respondent did not genuinely believe that she was.

121. The allegations of unfavourable treatment starting with the allegations of performance failings on the part of the claimant all the way through to her dismissal were clearly related and part of a course of

conduct, notwithstanding the different individuals involved as they all stemmed from the same information produced by the claimant's managers.

122. In relation to the victimisation complaints, the numerous alleged protected acts were not in dispute, having been conceded by the respondent.

123. However, the claimant's evidence before me was that the driving force behind the allegations against her was AM.

124. Whilst AM was aware of the claimant's need for software, shortly after her arrival as an agency manager in November 2017, the claimant acknowledged that she had no reason to believe that AM was aware of any of the history of her requests for reasonable adjustments.

125. In those circumstances, the case was not made out that the allegations the claimant made about the meeting on 17 January 2018 were because of previous protected acts.

126. As identified previously, the matters discussed at that supervision meeting arose from failings to progress certain case files. Failings that were, in part, acknowledged by the claimant, albeit she attributed them to ongoing difficulties with the dragon software.

127. The evidence showed, however, that the respondent appeared to escalate matters after the 17 January 2018 meeting in which the claimant had raised concerns about her reasonable adjustments not being in place.

128. Specifically, it appeared that the respondent was initially treating the claimant's alleged failings as performance matters but, subsequently, this was escalated to treating them as gross misconduct.

129. In the absence of evidence from the respondent, therefore, the claimant has established facts from which I could conclude that there was a causative link between her raising concerns (in January and March 2018) that her reasonable adjustments had not been fully implemented and the subsequent alleged detriments right through to her dismissal and purported HCPC report.

130. The claimant withdrew her complaints of harassment.

131. I next considered the claimant's health and safety detriment complaints.

132. I was surprised that the respondent, as a local authority, had not, in their pleaded case, suggested that the claimant should have raised her concerns with a health and safety representative or committee. Rather, they had conceded that the claimant had raised a valid health and safety concern in relation to the assault by AM.

133. In any event, the claimant gave evidence that she was unaware of any such representative or committee and, indeed, that she had raised the matter with her union and they also had not pointed her in such a direction.

134. In raising the issue of assault, the claimant was, as the respondent accepted, bringing to her employer's attention by reasonable means circumstances connected with her work which she reasonably believed were harmful to health and safety.

135. If there had been a health and safety representative or committee, given that neither the respondent nor the claimant union were seemingly aware of them it would not have been reasonably practicable for the claimant to have raised the matter by those means.

136. That said, it was established that the claimant first raised her concern by email to KJ on 25 January 2018.

137. In those circumstances, the alleged detriments that preceded 25 January 2018 cannot have been on the ground that the claimant raised the issue.

138. The subsequent detriments could have been so caused and not just by virtue of the timing. As previously mentioned there appeared to be an escalation thereafter, albeit unknown to the claimant until her suspension with issues that were previously being addressed as ones of capability were to be treated as potential gross misconduct and, ultimately, were upheld as such.

139. In the absence of any evidence explaining that change in direction, the claimant's claims for detriment, after 25 January 2018, are, therefore made out. There is no reason why both the previous protective acts and the health and safety concern could not both contribute to causation.

140. Whilst academic, my conclusions are the same regarding the whistleblowing detriment claims.

141. I would acknowledge that the initial alleged disclosure did not specifically raise any wider public interest concerns. However, the respondent had conceded that it was a protected disclosure and the claimant's evidence was that, whilst personal in nature, she did reasonably believe, when making it, that there was a wider public interest in addressing an assault by a senior social worker.

142. That latter point was reiterated by the claimant in her response to the disciplinary investigation the following year.

143. The other elements required to make a disclosure protected were made out.

144. It was, perhaps, surprising that the respondent did not appear to have taken any action in relation to the assault despite conceding that it had taken place. Whilst very different to the allegations against the claimant it did potentially indicate differential treatment.

145. In relation to the claimant's claim of unfair dismissal, the respondent had said that the potentially fair reason was conduct. The burden is on them to show the potentially fair reason and they have failed to do so.

146. As a result, the claimant was unfairly dismissed. There may have been other failures, procedural or otherwise, but that is academic.

147. In any event, the claimant disputed that any of the allegations against her could have amounted to gross misconduct.

148. She did, however, accept that there had been some issues with her case progression, or at least the appropriate recording of the same, albeit she put that down to not having her reasonable adjustments properly in place at the relevant time.

149. The claimant also acknowledged that she had not progressed 3 children in need plans that she had been instructed to do even though she felt they were unnecessary.

150. The respondent had sought to characterise this as a refusal to obey a lawful instruction. The claimant denied this saying that she had carried out an initial review and met the relevant agencies and determined that the cases were low risk or required no further action. As a result, she had not refused but had determined that they were low priority and had been focusing on what she considered to be more pressing matters.

151. On the claimant's case, therefore, the issues could only reasonably be characterised as ones of capability and, indeed, ones that were impacted by the absence of fully functional Dragon software at the relevant time.

152. It also appeared that, had the respondent genuinely believed the claimant to have been guilty of gross misconduct putting children at risk they would have been obliged to report the issues to the HCPC and they had not done so.

153. It was the claimant's evidence before me that she believed the principal reason for her dismissal was her need for adjustments, the fact she continued to raise her need for these and the challenges she'd had with workloads and case progression as a result.

154. That seemed to me to be both plausible and in accordance with the main thrust of her claims of discrimination and victimisation.

155. In those circumstances, the case was not made out that the principal reason for her dismissal was the raising of health and safety concerns and/or the making of one or more protected disclosures even though they appeared to have played a part, consciously or otherwise, in the escalation of matters.

156. The claimant's claims of automatic unfair dismissal under sections 100 and 103A Employment Rights Act 1996, therefore, fail.

157. The respondent could not establish that the claimant had committed gross misconduct amounting to a fundamental breach of the contract of employment. As a result, the respondent was not entitled to summarily dismiss the claimant and her claim for wrongful dismissal succeeds.

158. The list of issues for this hearing included consideration of Polkey and contributory fault.

159. It would be for the respondent to show the latter and, having been struck out and adducing no evidence they were unable to do so. In any event, the evidence I did see and hear suggested the issues were better characterised as performance concerns.

160. As the dismissal was substantively unfair, any issues in relation to what might have happened had any procedural failings been rectified, did not arise.

161. That is not to preclude, at this stage, consideration of other ways in which the claimant's employment may have come to an end subsequently, whether through choice, ill-health, a capability procedure or otherwise.

162. I have, therefore, given directions for the respondent to set out their position in relation to the arguments they would seek to make at a remedy hearing so that further directions may be given for such a hearing and a determination made in relation to their future participation .

Employment Judge Broughton

Date: 30 September 2022