EMPLOYMENT TRIBUNALS

Claimant: Ms R Sandhu

Respondent: Enterprise Rent-A-Car Ltd

Heard at: Watford Employment Tribunal (In public; In Person)

On: 27, 28, 30 June and 1 July 2022
And in chambers on 3 August 2022

Before: Employment Judge Quill; Mr P Miller; Mr D Sutton

Appearances

For the claimant: Mr Beyzade, counsel
For the respondent: Ms H Slarks, counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded. The Claimant was not dismissed unfairly and the claim fails and is dismissed.

2. The complaints of disability discrimination each fail and are dismissed.

3. The complaints of harassment related to disability each fail and are dismissed.

REASONS

Introduction

1. The Claimant had been employed by the Respondent for several years until she was dismissed. The Claimant disputes the reasons for the dismissal and alleges it was unfair and discriminatory. She also cites other incidents of alleged direct discrimination or harassment. The relevant protected characteristic is disability. The disabled person is not the Claimant (that is, we do not need to decide if the Claimant met the definition or not); it is her father. The Respondent accepts that the Claimant's father is a disabled person within the meaning of the Equality Act 2010, but there are disputes about which employees knew what, and from which dates.

The Claims and The Issues

2. ACAS early conciliation was between 14 and 29 August 2018. The claim was presented on 4 October 2018.

3. By judgment of EJ Smail on 21 May 2019 and sent to parties on 8 July 2019, the current respondent (Enterprise Rent-A-Car Ltd) became respondent to the claim (and the only respondent to it) and time was extended for all 3 claims: unfair dismissal; disability discrimination (by association) and harassment related to disability (also by association).

4. By the orders of EJ Smail, sent to the parties under cover of letter of 23 December 2019:

   4.1. He noted the effective date of termination was 15 May 2018 (which was, we infer, a finding he made when making the May 2019 decision).

   4.2. He decided that the Claimant's draft list of issues sent to the Tribunal and the Respondent on 11 June 2019 accurately reflected the claim that had been presented, in accordance with his decisions at the 23 May 2019 hearing, in so far as it relied on the Claimant's father's disability as the protected characteristic.

   4.3. He decided (or else confirmed a decision already made on 23 May 2019) that the claim as presented did not include complaints based on a protected characteristic being the Claimant's own (alleged) disability. He refused the Claimant's application to amend to add such complaints.

5. A challenge to this decision was considered at a hearing on 13 February 2020, and the decision with reasons is contained in the document at pages 72 to 79 of the bundle. The 23 December decision was not changed. The text of the list of issues recorded by EJ Smail in paragraph 5 of his decision and reasons document was as follows (we have changed the formatting slightly, but not the wording or numbering).

   <u>Unfair Dismissal</u>

   5.1 What was the permitted reason for the claimant's dismissal? The respondent relies on the permitted ground of capability, three years of alleged poor performance and potentially some other substantial reason for refusing to accept change within her department and a new reporting structure. The claimant asserts that the real reason for her dismissal was because of her fathers' illness.

   5.2 Secondly, if it is accepted that the permitted reason was capability, did the respondent carry out a fair capability procedure?

   The claimant complains of

   failure of the respondent to allow the claimant the chance to improve her performance after the February 2018 oral warning;

   failure by the respondent to give a warning to the claimant that she would be dismissed if her performance did not improve;

failure to address in the dismissal letter of 15 May 2018 the points raised by the claimant at the disciplinary on 8 May 2018 including relating to the time and attendance project;

issues at the appeal. It is asserted that dismissal was pre-judged because there was a settlement offer.

There was a refusal to grant a postponement to allow the claimant to get a union representative

and it is said there was no consideration of sanctions less than dismissal.

It is said there was inconsistency of treatment

and that dismissal was outside the band of reasonable responses. There was, it is suggested, a failure to follow incremental disciplinary sanctions.

Direct Disability Discrimination/Harassment

5.3 As to associative discrimination advanced both as direct discrimination and harassment, the claimant complained of the following:

5.3.1 Whether the claimant's father was at all times disabled for the purposes of the Act because he had cancer?

5.3.2 Relying on a hypothetical comparator working as a payroll supervisor with a team to manage with a parent who does not have a disability requiring assistance, were there acts of less favourable treatment by the respondent because of her father's alleged disability and the need to assist him?

5.3.3 Did on 8 February 2018 Steve Young, her immediate line manager, prevent the claimant from leaving work to go on approved time off to attend a hospital appointment with her father by overloading her with tasks to be done that day?

5.3.4 Was she subject on 18 February 2018 to disciplinary proceedings and issued with a warning?

5.3.5 In January to March 2018 did Mark Astil and Joanne Keeley hide information and did not reply to the claimant's emails?

~~5.3.6 On 12 March 2018 the claimant was feeling ill with anxiety, stress and a sore eye but Steve Young refused the claimant permission to go home; however Jo and Mark Astil were allowed to go to GP appointments during the course of a normal working day; further, both Mark and Jo were allowed to have extended lunches, Jo was allowed to leave early from work to take her dog to the vet and even had extended lunches to take her dog for a walk~~;

5.3.7 On 27 March 2018 Mark Astil extended Joanne Keeley's deadline but told Steve Young the claimant was late by 10 minutes;

5.3.8 In the last week of March 2018 Sinita Johal was rude to the claimant about her arriving late from having been to the hospital;

5.3.9 28 March 2018 Rob Taylor and Steve Young offered the claimant to leave under a settlement agreement and said "why don't you take time off with your Dad?"

5.3.10 from 28 March until dismissal the claimant was excluded from the respondent's premises and told not to speak to colleagues;

5.3.11 she was dismissed on 14 May.

6. The text very closely replicated that in the 11 June 2019 list of issues, that had been mentioned in the 23 December 2019.

7. We have crossed through item 5.3.6 because that was withdrawn at a hearing before EJ Anstis on 9 June 2021, as recorded in the summary of the hearing, and confirmed to us by both parties at the outset of our hearing.

8. So there are 8 alleged instances of less favourable treatment [5.3.3 to 5.3.5 and 5.3.7 to 5.3.11] for the direct discrimination complaints.

9. The same 8 things are also the alleged instances of unwanted conduct for the harassment complaints.

The Hearing and The Evidence

10. We had a bundle of 552 bundles, and pages 552 to 611 in a supplementary bundle.

11. At the start of the hearing, we had written statements from:

11.1. For the Claimant: the Claimant (original and supplemental); Shola Ajadi; Indira Freeman; Richard George; Peter Gorton; Candace Reifer (two documents); Harpreet Sandhu; Amritpal Sidhu.

11.2. For the Respondent: Mark Astill; Marwan Bateh; Sanita Johal; (William) Steven Young.

12. Ms Johal's statement had been served late, but we gave permission for the Respondent to rely on it, and for Ms Johal to give evidence.

13. The Respondent did not require any of the Claimant's witnesses other than the Claimant herself to be sworn in and cross-examined.

14. The Claimant would have liked to cross-examine Mr Astill. The Respondent did not call him or make any application to us for a witness summons. Even though he no longer works for the Respondent, that would not, in itself, have prevented his being called as a live witness. We read his statement, but we give it very little weight.

15. The Claimant's representative invited us to make a finding that the Respondent had failed to disclose documents which fell within the terms of the tribunal's orders. Further, he invited us to find that this had been done deliberately and that we should draw adverse inferences from the Respondent's conduct. As a result of questions put to the Respondent's other witnesses, the Respondent produced a witness

statement from Rob Taylor which discussed the disclosure exercise. We granted the Respondent's application that he could give evidence and be cross-examined.

16. We rejected the Respondent's argument that this was a dispute which had already been decided by EJ Anstis. However, we are not persuaded that the Respondent has deliberately breached the orders or that there is anything implausible about the explanation for why some appraisal records are missing, even though some earlier ones were still available. We do not draw any adverse inferences from the disclosure exercise.

The Findings of Fact

17. The Respondent is a car rental company operating throughout the United Kingdom in various aspects of car rental including corporate rental, insurance rental and specialist vehicle rental.

18. The Claimant began employment with the Respondent in June 1999. She started as an Accounting Assistant. When she joined the Respondent, there was an Accountant and four or five assistants in the Billing Department. Her duties included paying invoices, receipting monies received, (payable and receivables) and dealing with collections (outsourcing). She was also placed in charge of consolidating and reporting on the fleet costs and these were downloaded by way of a system called ERPM and sent to the Managers/Directors for consideration who then relied upon them for various conference calls and financial reviews with other managers throughout the UK and Ireland. She also consolidated financial highlights for UK and Ireland for the UK Corporation Office then known as UK99.

19. Over time, she was given more responsibilities including reconciling accounts. The Claimant did a range of financial/administrative duties including bank transfers and moving money from group companies.

20. About two years after joining, she became Payroll Accounting Assistant. This role included processing payroll from start to finish (including P11d, P60, payroll entries etc) as well as any related payroll accounting. She liaised HR, and ran weekly/monthly reports. She still performed some of her previous duties. Her appraisals were good and she received pay rises.

21. In around 2009, her department's duties increased. At this time corporate had some 1000-1200 employees on the payroll compared to around 100 when the Claimant began. The Claimant carried out helpdesk functions for all groups of companies for the payroll in UK, Ireland and St. Louis USA for HCCP (home country compensation plan).

22. The Claimant was a hard worker and met her deadlines in this period. In around 2010, she was promoted to the role of Payroll Supervisor. The Claimant argues that this meant that she was a lot busier because, according to her, she was expected to do all of her original duties and supervise another employee as well. We accept that it was Mr Young's genuine belief that the supervisor was not required to undertake

every task personally, but rather was required to manage the team, including allocating tasks to team members, so that the work was completed.

23. The Claimant's line manager when she was first appointed to be Payroll Supervisor was Ceri Miles. Ms Miles manager was Steve Young, Financial Controller (at that time, and later Senior Financial Controller). The Claimant began to report directly to Mr Young during a period when Ms Miles was on maternity leave. That arrangement continued upon Ms Miles' return.

24. As Payroll Supervisor, the Claimant scored had several reviews and in her witness statement (paragraph 13) refers to those in the bundle on pages 201-210 (January 2014) and 211-217 (July 2014) as examples.

25. The Respondent used the following rating system

(5) Outstanding	Employee consistently and significantly surpasses job requirements. Role model for others.
(4) Exceeds Requirements	Employee consistently surpasses job requirements. Often creates better ways to perform.
(3) Meets Requirements	Employee consistently performs meeting job requirements.
(2) Requires Improvement	Employee often fails to meet job requirements. Improvement needed.
(1) Unsatisfactory	Employee is unable to perform job requirements. Immediate improvement required

26. These are in order from most satisfactory at the top, to least satisfactory at the bottom. For ease of exposition, we will refer to them as "5" to "1" respectively, for identification purposes.

27. The Respondent used a standard pro forma in which a large number of questions are asked and a cross (or some other mark) is placed in one of these 5 boxes.

28. We do not need to itemise every question on the form. The headings were as follows, and there were in the order of half a dozen or so questions under each heading: Personal Characteristics; Initiative and Application; Dependability; Problem Analysis and Decision Making; Diversity Skills; Communication Skills; Quantity Of Work; Quality Of Work; Leadership.

29. Under each of the sections, there were the reviewer's comments (or the space for them to be entered, at least). At the end there was the heading "overall performance", with just a single question beneath it: "Overall Performance This

Review Period". This was followed by the reviewer's overall comments and a section of "goals to be accomplished" during the next review period, with (in many cases) specific "expected completion dates".

30. Before we say more about the reviews mentioned in paragraph 13 of her witness statement (which the Claimant has cited as examples of her having been well thought of and receiving good reviews), it is important to acknowledge that it is not the Claimant's case that these were necessarily the best examples that she could have produced had all of her past reviews were available. However, they were not. As mentioned above, we have accepted that the Respondent has carried out a reasonably thorough search, and disclosed all that could be found, and we have rejected any suggestion that it deliberately withheld more favourable items, and disclosed only those which supported its own position.

31. However, just because – having heard both side's witnesses – we reject the argument that better reviews were deliberately withheld, that does not mean that we are bound to conclude that none of the missing reviews were any better than these. It is perfectly possible that they were. However, the Claimant has not proven that the other items were better than these, and the Respondent has not proved (or attempted to argue) the missing items were worse than these.

32. The process was that Mr Young provided the Claimant with an electronic version of the document so that she could add her comments. Then they were each supposed to put ink signatures on the completed document, and then it was supposed to be scanned and uploaded to the Respondent's HR records system. Criticism is made by the Claimant's side during this hearing that the disclosure is incomplete in that, for example, emails sent to the Claimant with the electronic version could have helped show both (a) what the original unamended document said and (b) when the document was sent to the Claimant for comments. However, even without such items, it is clear to us that the Claimant had received each of the appraisal forms in the bundle, with Mr Young's comments and scores, and had had the opportunity to comment on each such item.

33. The Claimant's comments in her witness statement about the two 2014 reviews are as follows: "I scored well in my reviews and in a number of appraisals I met and exceeded expectations." This reflects a similar argument put to Mr Young during cross-examination and in the Claimant's submissions.

33.1. In fact, in both 2014 reviews, the overall score was "meets requirements".

33.2. Both sets of overall comments contained praise for the Claimant, especially her work ethic. The first also said:

> There are a few areas we do need to work on though as we have a number of overdue projects, you are chased by third parties for responses from time to time and this does not reflect well on you nor does it reflect the care you take in your role These being the outstanding tasks that I really have to chase up too much Your inbox is also way too long and does not lend itself towards getting back to people or a healthy environment I would like to see you get more organized which will help your overall

> personal brand and help prevent errors Yes employees are getting paid on time, but you have to chase too much to ensure this happens and there are errors as a result which could be prevented by creating better process / timely reviews
>
> The last pieces to improve are communication, listening & your decision making process I touched on this above and I would like to see you put a plan in place to improve email communication and verbal communication As the office grows and our operations become more complex, I need good strong communication directed with the appropriate content to the appropriate audience This will result in clearer communication and less resends of emails as well as reflecting better on the you as a whole.
>
> In terms of decision making. I believe you need to be a little more organized to allow for a better process but also to have a slightly more methodical process to the decision making to allow for more consistent and fuller timely results. A lot of your decisions require or impact other departments so having a methodical approach will engage these people earlier and help establish the issues / goals and timelines. This will also help the end communication of the plan / decision It will also build relationships, personal brand as well as ensuring all angles are covered and we hit the "gold" on the target 8 out of 10 times and the others hit the red

33.3. The second said that there had been significant progress in these areas.

33.4. In the first one, the Claimant did have two 5s (outstanding) and around fourteen 4s (exceeds). She also had about eleven 2s (requires improvement). The remainder were in the middle category, 3, (meets). She had no 1s (unsatisfactory).

33.5. In the second one, the Claimant had two 5s, twenty 4s, two 2s, with the remainder 3s.

34. In other words, the various marks to the individual questions were consistent with the comments in the “Overall” section that there had been improvement over the second revie period, compared to the first. However, the two reviews cited by the Claimant in paragraph 13 of her witness statement do not persuade us to conclude that that the Claimant had had unceasingly positive appraisal outcomes prior to the “requires improvement items” discussed below.

35. In around January 2016, the Respondent appointed a Payroll Manager, who was subordinate to Mr Young. It was suggested to the Claimant that she would report into the Payroll Manager. The Claimant objected to this, stating that she had had bad experiences when reporting to Ms Miles. She said she preferred to continue to report directly to Mr Young. This Payroll Manager left after a few weeks, and the Claimant continued reporting to Mr Young.

36. In around July 2016, a new Payroll Manager commenced in post. This was Mark Astill. The Claimant told Mr Young that she did not want to report to Mr Astill. Mr Young told her that, temporarily, she would continue reporting directly to him, but the longer term plan was that she would report to the Payroll Manager.

37. In July 2016, Mr Young carried out one of the regular performance reviews. The same pro forma described above was used. The overall rating was “requires

improvement". It was Mr Young's genuine opinion that this was the correct outcome, and the comments which he wrote in the report were his genuine opinions. It was not unreasonable for him to give the overall "requires improvement" rating based on the evidence he had about the Claimant's performance, as stated in the comments and as reflected by the individual scores. She was given approximately: no 5s; twelve 4s; twenty-nine 3s; fifteen 4s; no 1s.

38. It was Mr Young's evidence, and we accept, that the overall rating was not simply a totting up of the individual marks and, furthermore, that an "exceeds" in one area did not necessarily cancel out a "requires improvement" in another. It was Mr Young's evidence, and we accept, that some of the questions on the pro forma were more relevant than others to the overall assessment of an employee in a particular role, and in a role as supervisor of other staff.

39. It is our finding that the report as a whole, and the comments sections in particular, set out clearly what Mr Young's concerns were and what the Claimant was being told required improvement. For example, he wrote:

> I believe there are still areas to improve on here We need to be more - hit deadlines - listen to advice - hold people accountable
>
> You are very employee focused and really want the best for your employees
>
> The first half of the year we were understaffed and it was understandable that some things fell however, However, the leadership piece is lacking. The areas are not new and we nave been discussing these with limited success. In our discussions you understand why things need doing a certain way or why I am addressing a certain email or deadline. Yet, you will continue to do it or not do it. This appears that you are not listening or believe you have a better plan The issues are bigger now as the company is far bigger and must operate like a professional large business. The department must understand that if they miss deadlines that it has multiple consequences elsewhere.
>
> The structure of the team is there but they need to understand their responsibilities and understand that THEY must achieve them. This will only be achieved through your leadership. organizational skills and you getting up to date
>
> In FY17, you need to listen more to instruction and get a lot more organized so less follow up is required. You must focus on EDMs and accountability within the team FY17 needs a lot more structure to allow for more accurate financials, better review process and a more professionally run department where they do not need to be constantly chased or followed up to get replies or resolution. FY17 needs you to support the business in the swim lane requested and you need to develop a communication plan to ensure the correct audience is on the professional email
>
> Ranjit - I have a lot of time for you but you have a lot of work to do to enable you to fully support the team in the size of the business we work in.
>
> Overall, a lot of hard work has been completed in FY16 but too much follow up and not enough structure in place.

> Well done on the clean FSR and FYE I have faith in you and I love your attitude towards your work but we need to make changes to how we do things in FY17. Thank you

40. There are positive comments made about the Claimant's performance and attitude, both in the extract just quoted and elsewhere in the report. However, we do not accept that the Claimant was misled into thinking that her performance was acceptable. She was expressly told that she needed to improve, and she understood that that was the information which Mr Young was communicating.

41. She responded in the document by writing that she would address the areas highlighted. She made some comments about staffing levels on the team, and particular issues with particular individuals, which, in context, were an acknowledgment that the team had not met all of its expectations. She wrote, "Now that I have a strong team, I am confident they will be on track". She signed the document, with her comments included, around November 2016.

42. In around March 2017, an individual named George Porter left the Respondent and completed an Exit questionnaire. In it, he said he was going to do similar work elsewhere for more money. He was asked to tick one box from a choice of twenty to say which was the main reason he left. He ticked two boxes: "dissatisfied with management"; "dissatisfied with pay". He also answered a large number of further tick box questions. Few of those ticks indicated dissatisfaction, but it was recorded that he believed he could have had more "EDMs" (employee development meetings) and that he believed that his most recent one was not timely. In a document not signed by Mr Porter, the notes of the exit interview record that "Ranjit" (ie the Claimant) was his main reason for leaving, and that Mr Porter was critical of her relationships with the team and Mr Astill, and that his EDMs were always late and "of no value". The document records that he accepted that he had not raised this at the time of the EDMs. Mr Young was present at the exit interview, and believes the notes accurately record what Mr Porter said, and we accept his evidence on that point. (In fact, Mr Porter's comments about the Claimant's work ethic are at odds with Mr Young's. Mr Young had known her longer and knew more about her work. Mr Young had a high opinion of the Claimant's positive attitude to her work.)

43. The Claimant's Annual Performance Review was in May 2017. The scoring system used the same labels as the other performance review pro forma, but there were fewer questions.

44. The overall score on the annual review was "requires improvement". The Claimant and Mr Young both signed the completed document in June, and the Claimant had "no comments". This shorter pro forma recorded Mr Young's individual scores as being approximately: two 1s; five 2s; one 3 and no 5s or 4s. He included very detailed typed comments, which included some areas of praise and some areas of criticism, including in relation to the previous year's goals.

45. Amongst other things, under the heading "email management" he wrote:

> Ranjit, your email situation is unacceptable. Your replies are often delayed and often don't actual answer the question(s) asked. On top of this spelling & grammar is poor. In

an electronic world, this is a big problem that must be resolved. We have discussed this area a number of times but little progress has been made

46. Under the heading “customer service”, he wrote:

> The big issue in this area is failure to meet your deadlines or promises. It’s the one thing I hear more than anything outside of failing to reply to emails. You are either failing to respond, deliver a project, return a call or asking for extensions.

47. Under the heading “employee development”, he wrote:

> Retention in the team has been poor over the past year and since the last review you have lost George. George highlighted that your management style was a reason why he left. George highlighted that you don’t fully train employees up so that they end up having to come to you to resolve the issue & that you seem to retain the power of knowledge. George highlighted that EDMs were often cancelled or rushed which left him feeling undervalued. George also highlighted the disorganised nature and the atmosphere this created which is not good for employees. We have discussed the “bottle neck” you create in the team as well as the lack of organisation and effective training which creates this environment with limited success

48. Under efficiency and organisational skills he wrote

> Ranjit, your team lacks a structured and effective operational plan and start following company policy / best practices. The department looks like its disorganised when replies and promises are not met while too many deadlines arc met with a last minute rush or last minute extensions. The team need an operational plan, a payroll memo and more direction. This is reflective in the CT process, Bupa process, late updates to Jim, not following XM process on mgt fees. S Drive and email situation

49. The opinions stated in the comments (both the short extracts mentioned above, and the document as a whole) were Mr Young’s genuine opinions. We are satisfied that they gave the Claimant clear and specific information about Mr Young’s opinions, including about what Mr Young believed were George Porter’s comments. Whether the Claimant agreed with Mr Young or not, we are satisfied that she knew that he was telling her that improvement was still required.

50. The Claimant had a performance review in September 2017. The outcome was “requires improvement”. She had two 1s; five 2s; one C and nothing else. Compared to the annual review, her mark for “think and decide” had gone from 3 to 2, and for “build relationships” had gone from 2 to 3. All the others were the same on each.

51. Mr Young wrote lengthy and detailed comments. In our judgment, it was clear to the Claimant from the comments that improvement was required. Many of the comments were fairly similar to those from the annual review. Amongst many other things, he wrote (emphasis added):

> Ranjit, there are some clear areas that require immediate improvement and I am happy to help you put a plan in place, **I have not seen enough change since the last review or the review before that which is disappointing.** You need to be honest with yourself, you keep telling me you meet your deadlines etc then after you arc challenged, you agree

> we don't. You have to accept that you need to improve and be open to the fact mistakes / errors / missed deadlines happen before you can truly start to address it. When in conversations, you really need to start listening rather than being eager to over speak or just reply to part of the feedback you heard.

52. The Claimant added her own comments and both she and Mr Young signed in November 2017. The Claimant made some comments about things she thought had gone well and said that she was happy that 2 new staff members on the team seemed to be settling in well. She said "*I do not entirely agree this review However, will take the necessary to improve and ensure no late entries are processed during statement and payroll*".

53. In the May document, Mr Young had listed 6 areas which the Claimant needed to improve and gave details. In the September document, he said that the same 6 areas still required improvement, and again listed them and gave details. These were:

    a. email management;
    b. customer service;
    c. employee development;
    d. leadership;
    e. efficiency/organisational skills;
    f. accepting responsibility.

54. We accept that the Claimant genuinely believes that these criticisms were not justified and/or that insufficient allowance was made for problems that were beyond her control. It is her genuine opinion that too much focus was placed on any negatives, and not enough on any positives.

55. It is our finding that Mr Young genuinely believed the comments which he wrote in these documents. He gave examples of the things which caused him concern in the documents themselves, and in his evidence to the tribunal. He had reasonable grounds upon which to form these beliefs, albeit (as he knew at the time) the Claimant did not necessarily agree with him.

56. In relation to the working relationship between the Claimant and Mr Astill, it was clear to Mr Young that this was not a good one. Each accused the other of behaving rudely and each accused the other of making mistakes and/or overlooking tasks. Mr Young did accept that there was at least one example of Mr Astill being in the wrong, and this was in connection with slowness in approving a leave request which the Claimant had submitted. Mr Young dealt with this by approving the request and speaking to Mr Astill about it.

57. In around November or December 2017, the Claimant found out that her father was ill. She passed that on to Mr Young by no later than December. In January 2018, she found out that the diagnosis was Stage IV cancer, and she informed Mr Young fairly soon after finding out. She asked Mr Young not to tell anyone else, and he did not do so. Apart from Mr Young, the Claimant told only two employees, being her own two team mates, and asked them not to tell anybody.

58. In particular, the Claimant did not tell Mark Astill, Joanne Keely or Sanita Johal and nor did Mr Young. We have not been persuaded that anybody informed any of those three, in the period soon after the diagnosis. The Claimant asked her team members to keep the matter confidential, and – based on the evidence presented – it seems they did so. The Claimant's recollection is that it was after her father broke his femur that she made other people aware that her father had cancer. Her father broke his femur on 22 March 2018.

59. Ms Johal gave evidence on oath that she personally was not aware that the Claimant's father had cancer until after the end of the Claimant's employment. We accept that this is true.

60. In his written statement, Mr Astill states that he did not know the Claimant's father was unwell until after she had left the business. We have given his written statement in the tribunal proceedings little weight, but it has not been proved on the balance of probabilities that he knew the Claimant's father had cancer (or any other disability). The Claimant did not tell him herself and has not provided evidence to satisfy us that that anyone else did. We reject the suggestion that we should infer, from the fact that the Respondent did not call him as a witness, that he did know about the disability.

61. We had no statement from Ms Keely. However, as with Mr Astill, the Claimant did not tell Ms Keely herself about her father's disability and has not provided evidence to satisfy us that anyone else did.

62. From around November or December 2017 onwards, the Claimant provided support to her father including, for example, attending hospital appointments with him.

63. On or around 29 January 2018, the Claimant was handed a letter inviting her to a formal hearing on 6 February. The letter stated that Mr Young was calling the meeting to discuss, amongst other things, "Three consecutive performance reviews rated as Requires Improvement" and a "Clear definition of what the requirements are to improve".

64. As is consistent with the Respondent's standard practice, the meeting was called "Formal Disciplinary Hearing". However, it was clear from the letter that the discussion was to be about performance (including alleged failure to respond to emails and other queries promptly) rather than misconduct. The letter included the Disciplinary and Dismissal Procedure extract from the Employee Handbook. It said nothing about reporting lines, or about any requirement for the Claimant to report to Mr Astill.

65. The meeting took place on Tuesday 6 February 2018. Rob Taylor from HR accompanied Mr Young, and the Claimant was accompanied by a work colleague. We are satisfied that the handwritten notes (starting 370 in the bundle) are reasonably accurate, while not being verbatim. The invitation letter had mentioned three consecutive performance reviews, but had only included copies of two. At the outset of the meeting, Mr Young said that it was the most recent two that he wished

to discuss as they were from the last 6 to 7 months (being the May 2017 annual review, and the September 2017 item as mentioned above).

66. Amongst other things discussed, the Claimant raised the issue of there having been a delay in Mr Astill approving a leave request (which she likened to the way in which she alleged Mr Davies had treated her) and stated that she was working long hours, and was finding it difficult to leave on time. Mr Young stated that the delay in approving the leave request had been unacceptable. The leave request was not connected to her father's disability, and had been for a trip abroad.

67. Mr Young showed the Claimant examples of email trails which he regarded as problematic (either because he considered the content of the Claimant's replies to be unsatisfactory or because he considered the time to respond being unsatisfactory) and discussed the best practice and templates he wished her to follow. He said that the Claimant was to provide a plan for her team (something which had previously been requested from her). The Claimant said she could do it by "Friday", which was Friday 9 February 2018. Mr Young said that producing the plan was one of the things which would help the Claimant to leave on time; he also said he was willing to guarantee that her leave requests would be approved within 48 hours.

68. The Claimant did not bring up her father's cancer, or time off to support her father, or the need for her to arrange her working hours around the time spent supporting her father, during the meeting. The meeting ran for about 75 minutes (1035 to 1150). We are satisfied that the Claimant had the opportunity to bring up points that she wanted to discuss; there were times when she was asked to focus on the issues at hand, but these were when she was talking about her interactions with Mr Astill (or others), not when she was seeking to bring up issues connected with her father.

69. Mr Astill's outcome letter dated 8 February 2018 informed the Claimant that the outcome was "Verbal Warning" as defined in the Respondent's procedures. The letter set out his genuine opinions as to why the outcome was justified. On the second page, there were 8 bullet points describing "the steps I need you to take and the improvements I need to see from you". In the letter, he repeated the need for the plan to be produced. He did not specify in the letter that the Claimant had agreed to do this by Friday 9 February.

70. The letter informed the Claimant of her right to appeal. It said that it would remain active until 6 August 2018, and would be removed from her file then unless she "continued to fail to perform as expected during the next six months". We do not interpret this as saying that there will be no further action against the Claimant for 6 months, and that a review would take place at the end of a 6 month period (and not before). The letter as a whole, including this sentence, was conveying that the Respondent was seeking a prompt improvement in performance, which she was then required to sustain.

71. On 14 February 2018, the 6 February meeting reconvened, and the Claimant was given a copy of the letter and an oral explanation of the contents. The Claimant mentioned that she was working on the plan which had been discussed on 6 February 2018. She did not appeal against the Verbal Warning.

72. Pages 108 to 200 of the bundle contain extracts from the Respondent's handbook and policies. Formal disciplinary action and the procedure are introduced on page 130. On page 131, comments include:

> Depending on the severity of the alleged disciplinary offence in any individual case, we reserve the right to skip one or more stages of the procedure set out above.
>
> The following non-exhaustive list details the types of behaviour that may subject an employee to disciplinary action, up to and including dismissal,
>
> - Failure to perform satisfactory work
> - Insubordination
> - Refusal to follow proper instructions
>
> In relation to misconduct the company recognises three types – minor misconduct, serious misconduct and gross misconduct. Examples of each and the potential sanctions are set out below.
>
> Formal Oral Warning
>
> A formal oral warning will usually be given for minor offences relating to job performance, punctuality, absenteeism, or any minor breach of the company's regulations. The employee will be advised that the warning constitutes the first formal stage of the disciplinary procedure, of his or her right of appeal and that a brief note of the oral warning will be placed in his or her personnel file for a specified period (usually 6 months), subject to satisfactory conduct and performance. The nature of the offence and the likely consequence of further offences or a failure to improve will be explained to the employee.

73. Daryl Scales, VP Finance Europe, was Mr Young's line manager at the time. On 6 February 2018, he sent an email to Mr Young and Mr Taylor stating that HR electronic records incorrectly showed Payroll Supervisors as reporting to Mr Young, and asked for that to be corrected to show them reporting to the Payroll Manager, which is what he thought was correct according to the organisational structure. We infer from Mr Young's reply that Mr Scales was already aware that the Claimant has going through a formal process at the time. In their respective replies, Mr Taylor and Mr Young each asserted that the reporting arrangement for the Claimant to temporarily continue reporting to Mr Young had been correctly approved in the past. It was suggested that this was a temporary arrangement and that, from 1 April, she would be reporting to Mr Astill. We have not seen any contemporaneous written documents which specify that this specific date was given to the Claimant, or when.

74. The Claimant alleges that in the period January to March 2018, there were emails from her which did not receive replies from Mr Astill and Ms Keely. She also alleges that they hid information from her. We have not been satisfied on the evidence that there was any information that was deliberately hidden from the claimant by either of them. Furthermore, we have not been satisfied that there was any relevant information that she needed to have that they failed to give her. There are various email trails in the bundle, many being exchanges including the Claimant, Mr Astill, Ms Keely and others. We think it fairly likely that there will be some emails that might have been sent by the claimant to which there was no specific response from either Mr Astill or Ms Keely or both. However, we have not been shown any particular

relevant emails that did require response for which no response was received. We have not been shown any particular adverse consequences that the claimant has suffered as a result of any alleged failure on their part to reply to any email

75. In relation to 8 February 2018, our finding is that the claimant was not prevented from leaving work by Mr Young. He did not think that he given her work to do that would have prevented her leaving on time. He had told her expressly two days earlier that he wanted her to avoid working late. We are satisfied that had the Claimant raised with him that she needed to go to the hospital to be present at her father's appointment, and would not be able to do that if she had to perform particular tasks on 8 February, then Mr Young would have been willing to assist her with making arrangements for someone else to do the work, or else willing to tell her that the work could be done the following day instead. We are satisfied that the Claimant did not tell him that that he had asked her to do work which could not – in her opinion – be completed in time for her to leave in time to make the appointment.

76. It is alleged that in March, Ms Johal made some sort of sarcastic comment to the Claimant, along the lines of "good afternoon" when the Claimant arrived later than the usual start time. The Claimant had been to a hospital appointment with her father. We accept that Ms Johal was telling the truth to the tribunal in 2022 when she said that she had no recollection of making such a remark in 2018. However, we accept that the remark was made. Mr Young recalls speaking to Ms Johal and telling her that her comment had been inappropriate. However, Ms Johal was not aware that the Claimant had been to the hospital or that the Claimant's father had cancer. It is alleged by the Claimant that Ms Johal had asked the Claimant's team about the Claimant's whereabouts and/or her reasons for coming in late; assuming that's true (and the Claimant was not a witness to it, but is relaying what her team told her) then that does not support the Claimant's inference that someone had told Ms Johal about her father's illness.

77. In the morning of 27 March 2018, the claimant was supplying some medication to her father. For that reason, she was not able to be physically present to hand over a particular binder to Mr Astill containing month end information. It was due by 11am, and he received it about 11.10am. The Claimant had made clear to the respondent that she was able to provide the binder on 26 March, because it was ready. However, it was not taken from her that day. On 27 March, Mr Astill informed Mr Young that the claimant had been late supplying the information. We have not been provided with evidence that Mr Astill knew that the claimant was providing medication to her father on that morning, and that that was her reason for not physically putting in him possession of the item until after 11am. As we have said above, we are not satisfied that Mr Astill was aware that the claimant's father had cancer. Other than Mr Astill supplying information to Mr Young about the alleged lateness, there were no specific adverse consequences for the claimant.

78. It is the claimant's account that Joanne Keely (another payroll supervisor) was given an extension of a deadline until the following day in March. The Respondent does not deny that she was given an extension. In his written statement, Mr Keely asserted that he was unaware of which deadline the Claimant was referring to. We

have not been satisfied that the deadline which Ms Keely was required to meet was for the provision of the same type of information that the claimant had been required to supply on 27 March. Even though we have given Mr Astill's statement little weight, he makes a point that some deadlines can be less easily shifted than others, and that is obviously true. On the Claimant's own account, the Claimant did not ask for an extension and have that request refused, but rather the suggestion is that it was unreasonable of Mr Astill (and motivated by her father's disability) to fail to co-operate with her on 26 March (in advance of the deadline) to receive the information from her then, and unreasonable of him to report the matter to Mr Young when she had already made him aware the previous day that the information was ready. It has not been suggested that, in March 2018, Ms Keely was the subject of a Verbal Warning, or any other type of performance management exercise being overseen by Mr Young.

79. It was Mr Young's perception that there were problems with the Claimant's performance after the meetings of 6 February and 14 February, and after the warning letter dated 8 February, but handed to her on 14 February.

80. As discussed above, one of the action points was for the Claimant to produce a detailed plan for her team's work, and, on Tuesday 6 February 2018, she had said she would be able to do this by Friday 9 February. On Friday 16 February, Mr Young chased this by email at 14:22. At 17:05, the Claimant replied from her work email account to say that she had been having technical problems with her personal email account, and would email him the item as soon as she was able to resolve that. He replied a few minutes later saying "OK. You were going to share this 7 days ago." The Claimant's reply was "I was waiting for the outcome for the plan piece. I had this last Friday on my screen via my hotmail account." Later the same evening, at 20:20, he said that the team's list of responsibilities was a week overdue, and the detailed plan for the team's work was also late. On Tuesday 20 February, the Claimant emailed to say that she had been waiting for the outcome letter; she added she had not yet had time to complete as she had been busy with other work issues over the weekend. At 20:42 on Thursday 22 February 2018, the Claimant sent a document "plan and responsibilities" to Mr Young stating that she was sorry it was late and saying that she had created it from scratch, having been unable to access the items she said was stored in her personal email account.

81. The plan is a one page item (page 520) and the list of responsibilities is a list of 13 brief items (page 521). It was Mr Young's opinion that these did not constitute the detailed operational plan that he had been expecting to receive, and it was his opinion that he had made clear to the Claimant what he had been seeking.

82. On 28 March 2018, a discussion took place. The Respondent asserts that it is covered by without prejudice privilege and that they do not waive that privilege.

83. The matter is discussed in both sides' witness statements, and was dealt with in cross-examination. It is also an item in the list of issues as alleged discrimination and harassment. The Respondent does not assert that the contents of the

Claimant's ET1, or the list of issues, or the Respondent's response, or the witness statements contain evidence which we should deem inadmissible.

84. What Mr Young says in his statement is:

> 68. By March 2018, I was beginning to feel that it was likely to be impossible to resolve both Ranjit's refusal to change her reporting line and her performance issues. I had not taken a settled decision that she would need to be dismissed, but I considered that it was worth exploring whether she would agree to leave.
>
> 69. On 28 March 2018, Rob Taylor and I held a without prejudice conversation with Ranjit. I do not waive privilege in respect of the contents of that discussion. Ranjit was experiencing some personal issues at the time and, as a long serving employee, we decided to present her with an alternative option in the circumstances. Ranjit was not forced to accept this settlement agreement nor was she told that she would be dismissed if she did not accept it. Ranjit was offered this discretionary period of paid time off to think through the issues that been raised with her in connection with the verbal warning and to reflect on this alternative option and to take some out with her family. Ranjit returned to work on 3 May 2018.

85. The Claimant's written account is:

> 66. On 28 March 2018 I was called by Robert Taylor (HR Manager) and asked to attend a meeting with him. I thought that the meeting was going to deal with a missing checklist that I was looking for and which had been removed from the payroll drive. When I came to the meeting room, I saw both Steve Young and Robert Taylor sitting at a table. Robert Taylor had a folder in his hand and then said that he had a Settlement Agreement for me. He said that as I had dealt with a number of them, I knew how it worked and that if I did not accept the terms that they would become very brutal with me. I said that the only thing that I had done was to tell you about my dad, Robert Taylor said that if I did not accept the terms they would put me on endless disciplinaries and that I would not be able to handle it. Steve Young then mentioned that my GP had recommended that I should take sick leave (as I was suffering from stress/depression) and that my father was ill. I believed that this treatment was discrimination directly linked with my father's illness. It was also harassment, I was literally being hounded out of my job solely because of my father's illness.
>
> 67. I asked Robert Taylor and Steve Young when they had decided this, and they said "last week" which was when my father had broken his femur and I had to take a couple of days off as he needed an operation. This seemed to be another act of associative disability discrimination as I had to take time off to support my father.
>
> 68. Steve Young suggested that I should go to my team and say that I would be away from the office for a while and that all enquiries should be directed to him. Steve waited for me and walked me to the car park and asked for the keys to the payroll cabinets, my drawers, the payroll office and asked me for any other keys I had. I felt humiliated by their actions and was sure that this less favourable treatment was linked to my father's illness as there was no rational explanation for this. I was not given a fair time to address my so called failings/poor performance despite having worked for nearly 20 years for the Company.

86. As we have mentioned above, we have seen no contemporaneous documents from the January to March period indicating that the Claimant had been told she would report to Mr Astill from 1 April 2018 or that she had refused to do so. The Respondent

is stating that it does not waive privilege over the discussions of 28 March 2018, and in any event, has not provided evidence that reporting lines were discussed in that conversation (which is without prejudice in any event, according to the Respondent).

87. Following this conversation, the Claimant left work (with the Respondent's permission) and that she never resumed her duties prior to termination. Our findings are as follows:

87.1. The Claimant was made an offer which would terminate her employment on agreed terms and would be subject to her signing a settlement agreement.

87.2. The claimant was told and that there would potentially be disciplinary action against her if she declined the offer of a mutually agreed termination.

87.3. The Claimant was told that she might find such disciplinary a difficult experience (but we do not find the word "brutal" was used).

87.4. She was told that she could take time off to be with her family while she thought about the offer.

87.5. She was told she could take time off to take legal advice and that, in any event, the Respondent would allow her time to take legal advice prior to requiring an answer from her

87.6. Her keys were taken from her.

87.7. She was told that any enquiries for her sent to the team should be referred to Mr Young

87.8. She was told to tell her colleagues that she was going to be absent, but not to tell them the reasons.

87.9. She was also told not to discuss the proposed settlement agreement with her colleagues.

87.10. The respondent did not tell the claimant that she was unable to speak to any of her colleagues or to contact any of her colleagues, regardless of subject. The restriction on what she could discuss was solely about the reasons for her absence and the fact of, and details of, the settlement agreement proposal. We are satisfied that the Claimant is not deliberately relying to us on this point; she either misunderstood what she was told at the time, or else has subsequently misremembered. In any event, we are satisfied that the respondent took reasonable steps to make clear to her that the restriction only related to discussing the proposed termination agreement.

88. We have not been provided with details of exactly what without prejudice discussions followed or when. However, it is common ground that (a) agreement was not reached and (b) there came a point when both sides understood that there was not going to be an agreement.

89. The parties have not provided documents which demonstrate that there was either any agreement that the Claimant would return to work from a particular date, or that she was instructed to do so. She had been continued to be paid as normal, and her absence had been treated as simply a period in which she was not required to perform duties. She was not using up any form of leave entitlement. Mr Young's suggestion is that the absence had ended and the Claimant was back at work with effect from 3 May 2018. That is not the Claimant's understanding of the situation, and we prefer her evidence, as her recollection is more likely to be correct as she was the person directly affected (ie she was either performing her duties or she was not).

90. On Thursday 3 May 2018, the Claimant was at a family gathering. Her uncle had just passed away. She received a phone call from Mr Taylor of HR, and she told him where she was and why. He told her that he was calling about inviting her to a formal disciplinary meeting. The Claimant accepts that she received the letter confirming the invitation that day (pages 421 and 422 of the bundle). The letter informed her that purpose of the hearing was to consider the question of whether or not disciplinary action ought to be taken in accordance with the Respondent's disciplinary procedure, and that such action could include: verbal warning, written warning, final written warning or dismissal.

91. The letter had headings "insubordination" and "capability".

91.1. Under the first were listed allegations of refusing to report to the two Payroll Managers since 2016, breakdown of trust between the Claimant and Mr Young (including requests to report to Mr Young's managers rather than to him), breakdown of relationships between the Claimant and her team's internal clients, unwillingness to work with new management structure, and alleged responsibility for high staff turnover, including Mr Porter's departure.

91.2. Under the second were lists allegations of poor email management and communication, reluctance to engage with training, failure to heed management instructions and guidance, and poor development and support for the employees on her team.

92. The letter enclosed the relevant extracts from the staff handbook (the same as had been supplied before the February meeting) and a copy of the warning letter. In relation to the latter, the letter (which was signed by Mr Young) said:

> Since that outcome, I appreciate that you have had to take time out of the business for matters outside of your control, however the areas where you could have made [an] immediate impact or change have been the most disappointing

93. The letter informed her that she could be accompanied. The time and date was 9am on Tuesday 8 May 2018. Since the Monday was a bank holiday, that meant that the Claimant had just one and a bit working days to seek to arrange a companion. The email attaching the letter was sent at 11:43. It mentioned a change of time from 9.30am to 9.00am, from which we infer the phone conversation was earlier than 11.43am. As mentioned, the Claimant had explained to Mr Taylor that she was at a

family gathering following a bereavement, and therefore we are satisfied that Mr Taylor was aware that she would be able to start making arrangements straight away on the Thursday.

94. At 16:57, the Claimant confirmed receipt of the letter, and said she would, as requested, inform Mr Taylor who would accompany her.

95. On the bank holiday Monday, the Claimant emailed Mr Taylor seeking a postponement. She mentioned two things: she was checking the information she had about reasons for the named employees leaving; she had contacted a union on the Friday and was waiting to hear back as to whether she was a member or not.

96. At 1.32pm, Mr Taylor replied. He said it sounded like she had the information she needed re the departed employees, and would not postpone for that reason. He also said that she should know (from knowing whether she paid subscriptions or not) whether she was a union member. He suggested that she had not used a union representative at the previous hearing and asked for the name of whichever work colleague would be accompanying her.

97. At 2.20pm, the Claimant expressed willingness in principle to attend the following day, in light of Mr Taylor's refusal to postpone. She asked for express confirmation that she could contact a work colleague about this. He replied at 4.16pm, saying that (a) she could do so and (b) that, according to him, he had already told her on 19 April that she could "communicate as normal with colleagues" about anything other than the "without prejudice process and the proposed agreement".

98. At 5.10pm, the Claimant replied to say that she had not yet spoken to a colleague, taking into account that she had contacted the union on the Friday, and that it was now a public holiday. She said her main reason for seeking postponement had been to arrange for either union rep or work colleague to accompany her. She ended: "Based on the below I am assuming the hearing will take tomorrow." To which Mr Taylor replied: "Are you happy for the hearing to go ahead tomorrow?", with the Claimant's answer - 14 minutes later, at 6.03pm – being "That's fine". Six minutes after that, she wrote: "FYI - I am not going to have time to update my colleague in the morning. Therefore, I will be attending on my own"

99. The meeting went ahead. We find the handwritten notes starting on page 423 are reasonably accurate. The meeting lasted from 9am to 1045am.

100. At the outset of the meeting, after the introduction, she repeated that she had not had the chance to update a colleague and so was not going to be accompanied. She was asked if she was happy to proceed, and she said she was. The meeting was conducted by Mr Young, accompanied by Mr Taylor.

101. The claimant and did not specifically say that her performance generally over the last few weeks since the oral warning (or prior to that) had been affected by her father's ill-health or the time she had devoted to caring for him and supporting him. She did say that there had been an interaction between her and Mr Astill on the day of her

father's fall; she said this was the context of her having said, about Mr Astill: I don't respect. Mark and I don't like Mark to him.

102. In relation to her delays in supplying the plan to Mr Young, and the updates to that plan that he had asked for following receipt, she said that this occurred during what had been a tough time because of personal issues; we accept that may have been an indirect reference to her father's illness, but she did not expressly say so.

103. In the meeting, the claimant suggested that her performance had been reasonable. Her explanation for at least some of the issues that Mr Young was highlighting were that these were problems created by Mr Astill.

104. She accepted during the meeting that she had been unwilling to have Mr Astill as her line manager. She reiterated that her reason for that was a fear caused by poor experience from having the way should be managed by Ms Miles previously.

105. The meeting ended without the claimant being given an outcome, but being told that the standard process was the outcome to be delivered within five working days. She asked for it to be sent by email to her Hotmail account, rather than by post to her home address.

106. The outcome letter (pages 436 to 440) was dated 15 May 2018 and had the effect (as decided at an earlier hearing) of terminating her employment with effect from 15 May 2018.

107. We accept that the letter contains Mr Young's genuine opinions and beliefs.

108. The second paragraph stated:

> The hearing was held to consider the points outlined in the invitation letter dated 3rd May concerning insubordination and your capability to perform the role. Whilst the points which were considered are set out in the letter, as explicitly discussed in the hearing, the primary reasons were your refusal to report into the Level III Payroll Manager position dating back to January 2016 and covering two separate Payroll Managers and the breakdown in trust and relations between us and also your payroll business partners.

109. The fourth included the passage:

> The hearing was held to consider the points outlined in the invitation letter dated 3 rd May concerning insubordination and your capability to perform the role. Whilst the points which were considered are set out in the letter, as explicitly discussed in the hearing, the primary reasons were your refusal to report into the Level III Payroll Manager position dating back to January 2016 and covering two separate Payroll Managers and the breakdown in trust and relations between us and also your payroll business partners.

110. In terms of reporting to Mr Astill, the letter mentioned that the latest date for this had been set as April, and that, in the 8 May hearing, the Claimant had said that she could not do this straight away, as she could first need to attend an external course to help her come to terms with this. The letter noted that she had started but been able to complete this external course on two previous occasions, and that she was unable to recall the name of the course. The letter implied that Mr Young was not

persuaded that the Claimant was either (a) providing a specific date for completion of the course, or (b) stating that she was sure she would be able to report to Mr Astill once she had completed it. The letter also said that Mr Young's reasons opinions for thinking that the Claimant was not yet prepared to report to Mr Astill included his opinions about how she had acted since the Verbal Warning; he said that she had been negative since the meeting (to the Training Manager) and had not completed the records he had instructed her to keep. He acknowledged that she had not been in the business for the full period since 14 February onwards "through personal issues", which we take to me an acknowledgement that he was aware that the Claimant had been providing support to her father, even though the Claimant had not expressly mentioned that in the meeting. He did not expressly mention that she had been absent since 28 March 2018 at the Respondent's suggestion that she take time to consider a severance agreement.

111. The letter as a whole makes clear that – while performance issues are being taken into account – the main issue, according to Mr Young was the Claimant's refusal to accept what he said were the reporting structures established in 2016, namely that she should report to Payroll Manager, not to him, Mr Young, directly.

112. She was given 12 weeks' pay in lieu of notice.

113. The letter said that she could appeal, and she did so.

114. The appeal was heard by Mr Marwan Bateh. At the time of the hearing, he is the Respondent's Vice President of Finance for Europe. At the time, he I was Assistant Vice President of UK and Ireland.

115. Mr Taylor asked him to hear the appeal against dismissal and Mr Bateh agreed. Mr Young reported directly to Mr Bateh. Mr Bateh was more senior than the dismissing officer, and his appointment was consistent with the requirements of the Respondent's procedures.

116. The Claimant's appeal hearing was originally scheduled for 7 June 2018. It was rescheduled to 27 July 2018 and then to 17 August 2018, on the Claimant's request each time.

117. During the appeal hearing, Mr Bateh asked the Claimant a number of questions which he considered relevant, and gave her the opportunity to expand on what she said in her grounds of appeal. He instructed Mr Taylor to conduct some further enquiries to assist him.

118. His appeal outcome letter dated 24 August 2018, at page 494 of the bundle, contains his genuine opinions. He approached the matter with an open mind, and considered whether reinstatement (overturning the dismissal decision) was appropriate. In particular, having considered the evidence, he formed the opinions:

> … during our meeting you showed no indication that you would accept reporting to a Payroll Manager without further issues and continuing poor performance. I am unconvinced that based on what I have seen you could work in a harmonious manner

within the existing structure. I believe that this would only cause further unrest and turmoil for you, the team and the wider business.

It is my opinion that many of the performance issues you raised at the appeal were not only caused as a direct result of your unwillingness to accept the reporting line, but also arise from your continued poor demonstration of communication, leadership and time management. These have been a regular area of focus in your three performance reviews in November 2016, June 2017 and November 2017 as well as the previous disciplinary hearings on 6th February 2018 and 8th May 2018.

119. He rejected her argument that the dismissal was because of (or connected to) her father's diagnosis. He said that his enquiries satisfied him that the employer had been extremely flexible in relation to her working time. He rejected her argument that her offer to consider attending mediation meetings with Mark Astill meant that it was wrong for the employer to decide that she was refusing to report to him, or unable/unwilling to work harmoniously with him.

120. He rejected the appeal and Mr Young's dismissal decision stood.

The Law

121. Section 98 of ERA 1996 says (in part)

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to dorelates to the conduct of the employee,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

122. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for the factual reason which it relies upon. The Court of Appeal discussed the meaning of the word "reason" in this context in Abernethy v Mott, Hay and Anderson [1974] I.C.R. 323

> *A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law. In particular in these days, when the word "redundancy" has a specific statutory meaning, it is very easy for an employer to think that the facts which have led him to dismiss constitute a redundancy situation whereas in law they do not; and in my opinion the industrial tribunal was entitled to take the view that that was what happened here: the employers honestly thought that the facts constituted redundancy, but in law they did not.*

123. It is the actual thought processes of the person (or persons) taking the decision to dismiss that have to be analysed, and the tribunal must make findings of fact about what set of facts/beliefs caused that person (or those persons) to decide to dismiss the Claimant. This is the analysis required by section 98(1)(a), and it is separate and distinct from what is required by section 98(1)(b).

124. If the Respondent can prove that it did actually dismiss for the factual reasons which it has claimed, then it is not necessarily fatal to its defence if it put the wrong label on that set of reasons in, for example, a dismissal letter. (Although, of course, when considering the overall fairness of the dismissal, the tribunal will consider whether or not the Respondent gave sufficient information to the employee, and with sufficient clarity, at the relevant times, and will also consider whether the procedure which was adopted was appropriate to the circumstances. If the mislabelling causes the employee to be misled or causes the employer to overlook procedural steps which it had been obliged to follow, then that will be highly relevant when considering fairness.)

125. If the respondent fails to persuade the tribunal that it had a genuine belief that the facts were as it has claimed, and that it genuinely dismissed for that factual reason, then the dismissal will be unfair.

126. It must also persuade the tribunal that the actual factual reason for the dismissal was such that the principal reason for the dismissal fell into EITHER the category "capability" or else, "some other substantial reason".

127. The second part of section 98(1)(b) refers to "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". We will use the shorthand SOSR, while not ignoring the full text.

128. The use of the word "other" is significant. A dismissal reason does not fall within the category SOSR if, in fact, it actually falls within one of the specific definitions in section 98(2). That being said, there is nothing wrong with a respondent relying on SOSR as an alternative label, in addition to one or more of the specific reasons set out in section 98(2).

129. The importance of the need for the tribunal to clearly and precisely identify the factual reason for the dismissal before seeking to categorise it within Section 98 is exemplified by the discussion at paragraphs 47-56 of Ezsias v North Glamorgan NHS Trust [2011] I.R.L.R. 550 in the EAT. For example:

129.1. If the reason that the employee is dismissed is that the employee is considered blameworthy because their conduct has (in the employer's opinion) brought about a certain state of affairs, then that reason should probably be categorised as "conduct". The dismissal reason is what the employee did.

129.2. On the other hand, if the employee is dismissed because a certain state of affairs exists such that employer decides that dismissal is the solution, then that should probably be categorised as SOSR, regardless of whether the employee is blameless or blameworthy for the state of affair existing.

129.3. The difference between these dismissal reasons may be subtle. However, there is a finding of fact for the tribunal to make. As with any other finding of fact, the tribunal is not necessarily obliged to take the dismisser's word for it. As per the guidance in Ezsias, tribunals must be on the "lookout" to see whether an employer is asserting a factual reason falling within "some other substantial reason" as a pretext to conceal the real factual reason for the employee's dismissal.

130. Provided the Respondent does persuade the tribunal that the Claimant was dismissed for capability or SOSR, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

131. In considering this general reasonableness, we must take into account the respondent's size and administrative resources and I will decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal.

132. In considering the question of reasonableness, I must analyse whether the respondent had a reasonable basis to believe in the factual basis for its dismissal reason.

133. We must consider whether or not the respondent carried out a reasonable process prior to making its decisions.

134. In terms of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular Claimant fell within the band of reasonable responses in all the circumstances.

135. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23).

136. It is not the role of this tribunal – when deciding the unfair dismissal claim - to decide whether we think the Claimant should or should not have been dismissed. In other

words, it is not our role to substitute our own decisions for the decisions made by the Respondent.

137. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process: that will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case.

138. If there is unfairness at the first stage, then that can potentially impact the overall fairness of the employer's decision to dismiss, even if the second stage is carried out to a high standard of fairness. See Taylor v OCS Group [2006] IRLR 614.

ACAS

139. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992).

Equality Act 2010 ("EQA")

Burden of Proof

140. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action. Section 136 of EA 2010 states (in part):

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

141. Section 136 requires a two stage approach:

141.1. At the first stage, the tribunal considers whether there are proven facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

141.2. If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

142. Where we do not find, on the balance of probabilities (taking into account the evidence from both sides and drawing inferences where appropriate), that a

particular alleged incident did happen then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

Direct Discrimination

43. Direct discrimination is defined in s.13 of EQA.

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

44. It has two elements; firstly whether the Respondent has treated the Claimant less favourably than it has treated others ("the less favourable treatment question") and secondly whether the Respondent has done so because of the protected characteristic ("the reason why question"). So for the less favourable treatment question the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about the characteristics of a hypothetical comparator. That being said, the two questions are intertwined and sometimes an approach can be taken that the Tribunal deals with "the reason why question" first. If the Tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of it will necessarily follow that the person whose circumstances are not materially different would have been treated the same. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

45. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not. We must analyse both the conscious and sub-conscious mental processes and motivations for actions and decisions and s.136 applies. In other words, if there are proven facts from which the Tribunal could infer that there had been unlawful discrimination then the burden of proof shifts to the respondent and the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of a protected characteristic.

46. In approaching the evidence in a case and considering the burden of proof provisions the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] ICR 931 and Madarassy v Nomura [2007] ICR 867. The burden of proof does not shift simply because the claimant proves a difference in sex or race and a difference in treatment. That only indicates the possibility of discrimination, and that is not sufficient. Something more is needed. In In Deman v Commission for Equality and Human Rights 2010 EWCA Civ 1279, the Court of Appeal suggested that "something more" does not need to be a great deal more. For example - depending on the facts of the case - a non-response from a respondent, or an evasive or untruthful answer from a respondent or an important witness, could be the "something more" that is required. Against other factual circumstances, it may simply be the context of the act itself. In SRA v Mitchell, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation of the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services.

47. As per Essex County Council v Jarrett EAT 0045/15, when there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. It should not take a broad-brush approach in respect of all the allegations.

48. When a comparator is used the actual or hypothetical comparator's circumstances must be the same as the claimant's other than the protected characteristic in question.

143. The language of section 13(1) refers to "because of a protected characteristic". It does not say, "because of the Claimant's protected characteristic". Thus the claim can potentially succeed if the Claimant was treated less favourably because of her father's disability.

Harassment

144. Harassment is defined in s.26 EQA.

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

145. For brevity we will refer to the list in section 26(1)(b) as "the prohibited effect", while not ignoring that either purpose or effect is sufficient (it does not have to be both).

146. Disability is one of the relevant protected characteristics for the purposes of s.26, as mentioned in section 26(5).

147. To succeed the claimant needs to establish on the balance of probabilities that he has been subjected to unwanted conduct and that it had the prohibited effect. However, it is not sufficient to succeed for the claimant to prove that the conduct was unwanted and that it had the prohibited effect; the unwanted conduct also has to relate to disability. However, because of s.136 the claimant does not need to prove on the balance of probabilities that the conduct was related to disability in order to shift the burden of proof. We would need to be persuaded that there are proven facts from which we might infer that the conduct should be so related.

148. The wording of section 26 does not require that the unwanted conduct relate to the Claimant's disability. In this case, the allegation is that the unwanted conduct related to her father's disability.

149. As is clear from the wording of section 26(1)(a) EQA and from the EHRC Employment Code, the definition of harassment does not require that the Claimant has the protected characteristic in question. At paragraph 7.10 of the code, a number of examples are given.

150. It is important that when considering whether the prohibited effect has occurred - and when applying s.26(4) in particular - we have regard to appeal court guidance including HM Land Registry v Grant 2011 ICR 1390; [2011] EWCA Civ 769. We must not cheapen the effects of the words in section 26(1)(b), and the mere fact alone that a claimant was, to some extent, upset by what was said or done is not necessarily enough to meet the definition.

151. When dealing with a series of alleged incidents of harassment (and the same principle applies to discrimination as well), it is important not to carve up the allegations and *only* consider them one by one. Considering the allegations one by one on their own merits is an important part of the analysis but it is important to also stand back and have regard to the entirety of the conduct which is found to have occurred (see Qureshi v Victoria University of Manchester EAT/484/95). This is particularly important when considering whether it would be reasonable to regard the conduct as having the prohibited effect and whether to draw inferences that the conduct was related to the protected characteristic.

Analysis and Conclusions

152. We will deal first with the Equality Act allegations (other than the dismissal) by reference to the list of issues. The Respondent accepts that the Claimant's father had a disability at all relevant times (from January 2018 onwards).

153. We accepted that Mr Young was told by the claimant that her father was ill in around December 2017 and that he found out the condition was cancer in around January 2018. We accepted that Mr Young did not tell any other people.

5.3.3 Did on 8 February 2018 Steve Young, her immediate line manager, prevent the claimant from leaving work to go on approved time off to attend a hospital appointment with her father by overloading her with tasks to be done that day?

154. As per the findings of fact, Mr Young did not deliberately give the Claimant tasks to do with the intention of preventing her leaving to go to a hospital appointment. Nor was he aware that the Claimant would not be able to go to the hospital appointment that day. The Claimant did not tell him.

155. There are no facts from which we could conclude that he would have allocated any different tasks to her that day if her father did not have cancer. There are no facts from which we could conclude that her workload allocation that day was related to her father's cancer. On the contrary, our finding was that he would have provided

assistance or suggestions to her had she asked. He had said just a couple of days earlier that he wanted her to be delegating her work sufficiently to team members so as to be able to leave on time.

156. These allegations of direct discrimination and harassment fail.

5.3.4 Was she subject on 18 February 2018 to disciplinary proceedings and issued with a warning?

157. It is true that the 29 January letter was sent after he was aware of the Claimant's father's diagnosis, and after she had started providing support to her father. However, the letter was not sent for a sham reason. It referred back to performance reviews which had been conducted prior to his knowledge of the Claimant's father's disability, each of which gave the Claimant and outcome of "2 – requires improvement" and each of which contained his genuine opinions about the Claimant's performance. Those documents contained a lot of detailed information both about his reasons for thinking the Claimant's performance was not satisfactory, and what she needed to do to improve. The urgency of her doing so was clear from both the express words and the overall tone. In January, he was not trumping up a false charge against the Claimant; he was genuinely continuing with a course of action which he had embarked upon previously. He had hoped the feedback would have been sufficient for the Claimant to make steps to improve; however, in January, he decided that she was not improving.

158. As per the findings of fact, there was a meeting on 6 February, which was reconvened on 14 February, and the Claimant was handed the outcome letter (dated 8 February) in that reconvened meeting. So it is factually accurate that she was subject to disciplinary proceedings and given a warning, though the date is 14, rather than 18, February 2018.

159. There are no facts from which we might conclude that he would have reached a different decision than to send his 29 January letter if the Claimant's father was not disabled.

160. As mentioned in the findings of fact, in the 6 February meeting there was no discussion specifically about the claimant's father situation, or about time off for dealing with her father situation, or about the respondent allegedly not making sufficient allowances for the effects on her work that the time off for that reason had. Rather the claimant, when asked about alleged poor performance raised other matters, including matters from a long time previously, and including suggesting that Mr Astill was potentially to blame for delays and confusion.

161. In our judgment, the issuing of the warning was consistent with the Respondent's policies.

162. As per the findings of fact, the letter dated 8 February (bundle page 387) represented Mr Young's genuine opinions. He genuinely believed that the claimant had been performing poorly and that a verbal warning was the appropriate outcome.

163. There are no facts from which we could conclude that Mr Young would have made a different decision about whether to issue a warning if her father did not have cancer.

164. We accept that it was unwanted conduct that the Respondent issued the warning. There are no facts from which we could conclude that the decision was related to her father's cancer.

165. The allegations of direct discrimination and harassment fail.

5.3.5 In January to March 2018 did Mark Astil and Joanne Keeley hide information and did not reply to the claimant's emails?

166. On the facts, we reject the assertion that any information was hidden from the Claimant. Further, while it was possible that some emails might not have received responses, we were not satisfied that there was a particular email which required a response, and which did not receive one.

167. On the facts, neither Mr Astill nor Ms Keely were aware that the Claimant's father had cancer.

168. There are no facts from which we could conclude that any failures by Mr Astill nor Ms Keely to provide any information, or respond to any email, was related to the fact that the Claimant's father had cancer.

169. These allegations of direct discrimination and harassment fail.

5.3.7 On 27 March 2018 Mark Astil extended Joanne Keeley's deadline but told Steve Young the claimant was late by 10 minutes;

170. One possibility is that there was simply confusion or misunderstanding between Mr Astill and the Claimant about the availability of the information in the binder. One possibility is that Mr Astill disliked the Claimant and seized on a chance to report her. One possibility is that, knowing the Claimant had had a warning for poor performance, Mr Astill saw it as his duty to report any perceived failings to Mr Young.

171. In any event, he did not know about the Claimant's father's cancer, and that did not motivate him to make the report to Mr Young.

172. His report to Mr Young was unwanted conduct. In a "but for" sense, there was some connection between the Claimant's father's disability, in that, but for her attending to her father, she would have been in work prior to 11am and able to hand the item to Mr Astill, and but for her failure to do so, he would not have made the report to Mr Young. However, even assuming, for the sake of discussion, that this was sufficient to justify a decision that the unwanted conduct was "related to" the Claimant's father's disability, we do not think that it would be reasonable for the conduct to be treated as having the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The matter was reported to Mr Young, but there was no action taken by him. Had she wished to, or had it been necessary for her to do so, the Claimant could have explained the circumstances to Mr Young. It would be cheapening the meaning of the words in

section 26 to treat the factually accurate report of Mr Astill to Mr Young as amounting to harassment.

173. In terms of the allegation that the Claimant was treated less favourably when compared to Ms Keely, we are not persuaded that Ms Keely was a valid actual comparator, as – on the facts – the situations appear different. Asking for, and being granted, an extension, is not the same as being reported for missing a deadline when no extension has been (requested or) given.

174. These allegations of direct discrimination and harassment fail.

5.3.8 In the last week of March 2018 Sinita Johal was rude to the claimant about her arriving late from having been to the hospital;

175. As discussed in the findings of fact, we are satisfied the remark was made (regardless of whether Ms Johal intended to be rude or funny). However, Ms Johal was not aware of the Claimant's father's situation or of the reasons for the timing of the Claimant's arrival at work.

176. The Claimant's father's cancer did not motivate Ms Johal to make the remark.

177. The remark was unwanted conduct. In a "but for" sense, there was some connection between the Claimant's father's disability, in that, but for her attending to her father, she would have been at work earlier, and there would have been no reason for Ms Johal to comment.

178. However, even assuming, for the sake of discussion, that this was sufficient to justify a decision that the unwanted conduct was "related to" the Claimant's father's disability, we do not think that it would be reasonable for the conduct to be treated as having the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It would be cheapening the meaning of the words in section 26 to treat a one off remark of "good afternoon" in these circumstances as amounting to harassment; whether it might have been different had Ms Johal been aware of the true facts is a matter we do not need to address, because she was not aware of the true facts.

179. These allegations of direct discrimination and harassment fail.

5.3.9 28 March 2018 Rob Taylor and Steve Young offered the claimant to leave under a settlement agreement and said "why don't you take time off with your Dad?"

5.3.10 from 28 March until dismissal the claimant was excluded from the respondent's premises and told not to speak to colleagues;

180. The part about being told not to speak to colleague is not factually accurate.

181. It is accurate that the Respondent encouraged the Claimant to go home, and took her keys from her, and told her that, for work-related queries, people would be told she was not available, and Mr Young would deal with the matter. In that sense, she was excluded from the premises.

182. In principle, this situation was supposed to come to an end once the Claimant made clear that she rejected the termination offer. In practice, the Respondent invited her to a formal meeting, and she was dismissed.

183. There are no facts from which we could conclude the Claimant has been treated less favourably than an actual or hypothetical comparator. We were not provided with details of anyone that we think could be treated as an actual comparator. We were not provided with details of the Respondent's usual practice in relation to offering severance packages. However, for similar reasons to those discussed when addressing the issuing of the Verbal Warning, it is clear that the Respondent's concerns about the Claimant's performance were longlasting, and pre-dated the Claimant's father's disability. Once a decision is made to offer someone a severance package, it is not inherently suspicious that they would be asked to be away from the workplace pending a decision.

184. We accept that this was unwanted conduct. We accept that the Claimant was told that she could go home to be with her family, but that comment is not a fact from which we could infer that the actions themselves were related to her father's disability. There are no facts from which we could conclude the offer itself, or the fact that she was told to leave work, and remain away, pending a decision was related to her father's disability.

185. These allegations of direct discrimination and harassment fail.

Dismissal

186. We will now deal with the dismissal. There is a complaint of unfair dismissal, as well as alleged contraventions of the Equality Act 2010.

187. The respondent did not tell the claimant that she was unable to speak to any of her colleagues or to contact any of her colleagues. Thus, had she wished to, she could have attempted, on Friday 4 May 2018, to arrange for a work colleague to accompany her to the meeting.

188. The claimant made the respondent aware and that her uncle had just died and she told them that on 3 May. She also asked for a postponement.

189. The claimant accepts that she was not in a union. Mr Taylor's refusal of the part of the postponement request which related to the Claimant saying that she wanted to check whether she was a union member or not was not unreasonable. He believed that the Claimant should know one way or the other, and he also believed that, had she been a union member, she would have been able to ascertain that previously.

190. A fair reading of the email exchange is that by implication, he was not agreeing to give her more time to arrange for a companion or to brief a companion. He asked her if she was willing to go ahead and she said that given the contents of his earlier correspondence she would not have time to update a colleague and therefore she would attend by herself. He was aware that she had wanted a companion (or, at least, said she wanted one on this occasion). He was aware that she had brought

someone to the 6 February meeting. It was clear to any reasonable person that the Claimant – having already asked for a postponement expressly, and having had the request refused – was suggesting that her only reason for not bringing someone as a companion was the lack of time.

191. On any view, one clear working day is fairly short notice for the type of meeting which might lead to dismissal. However, this is not inconsistent with the Respondent's written policy which say that "proper notice" of a disciplinary meeting is 48 hours.

192. We were not shown evidence of the Claimant having been formally warned prior to the 3 May letter, that the Respondent was contemplating dismissing her if she did not agree to report to the Payroll Manager (Mr Astill, at the time). As discussed in the findings of fact, Mr Young informed Mr Scales that she had been told she had to do it by 1 April 2018, but she was away from work from 28 March 2018 onwards.

193. The lack of evidence of this particular matter having been raised formally earlier is significant taking account of (a) the prominence of this issue in the dismissal reasons and (b) the short amount of time to prepare for the hearing. That being said, this was not one of the grounds on which the Claimant sought a postponement, and she did have the full opportunity to put her points across to Mr Young (and again to Mr Bateh). Her argument was not that the Respondent's position was a surprise to her, but rather that there were good reasons that she should not have to report to (a) any Payroll Manager at all and/or (b) Mr Astill.

194. The dismissal reasons are as stated in the dismissal letter. Lack of ability to report to Mr Astill is discussed in the middle paragraphs on 437, as well as the summary. Notwithstanding the fact on the first page of the dismissal letter (and in the invitation letter) refer to "insubordination", we are satisfied that, as stated, Mr Young regarded this situation about reporting structure as falling into the "some other substantial reason" category, rather than "misconduct".

195. Based on the wording of the letter, the principal reason for the dismissal was the lack of willingness to change and work with a Payroll Manager or adapt to new processes. There was a close connection between the latter, and the performance process which had been on-going. Some of the evidence for the latter was the failure (in the Respondent's opinion) for the Claimant to adopt changes which she had been clearly instructed to adopt in her performance reviews, and the 6 February meeting.

196. However, Mr Young's opinion was that, regardless of the specific reasons that the Claimant was not adopting changes to her working practices, or accepting the 2016 structure which required her to report to the Payroll Manager, the state of affairs which existed was such that the Respondent could no longer accept the situation that the Claimant carried on not doing these things. That was his dismissal reason, and we accept that it is potentially a fair reason: ie it is potentially a substantial reason of a kind such as to justify the dismissal of a Payroll Supervisor.

197. The appeal outcome letter represents Mr Bateh's honest opinion. The appeal process was fair in terms of allowing the claimant the opportunity to have a hearing before the appeal decision maker

198. We do not accept that Mr Bateh had a closed mind going into the process. He was willing to listen to what the claimant had to say and his focus was on and what had been given as the reasons for the dismissal by Mr Young and deciding whether the claimant was able to satisfy him that that he should overturn that decision. He did not itemise and address all of the points in the appeal letter and individually. However, he did address the challenge to the dismissal as a whole, and the points that insufficient consideration had been given to her father's situation (or, the alternative, that the father's situation was the true motivation for the dismissal).

199. Mr Bateh's reason for rejecting the appeal was that he agreed with Mr Young. On the appeal, the categorisation of the dismissal reason did not change from SOSR to anything else.

200. Our opinion is that it was not reasonable to refuse to postpone the hearing of 8 May 2018, taking into account the claimant's bereavement and taking into account the short notice, and taking into account the lack of a specific reason put forward by the Respondent as to why a hearing a few days later was not workable.

201. The actual dismissal decision itself was not outside the band of the reasonable responses. The decision is not whether the employment tribunal panel would have dismissed at this stage, or whether we think all employers would have done so but whether we consider that no reasonable employer would have dismissed. Our view is that some reasonable employers would have dismissed for these reasons in these circumstances, including that the Claimant was making clear that she would not be willing to start reporting to Mr Astill in the immediate future if she came back to work.

202. In terms of the performance issues, the claimant had been given various opportunities to improve after the performance plans.

203. On the evidence, Mr Young (and later Mr Bateh) did not have a fixed opinion that the Claimant had to be dismissed regardless of what she said in the respective meetings. The fact that she was given a severance offer, for example, does not persuade us of that. Questions were asked, and the Claimant had the opportunity to speak, and her comments were addressed in the respective outcome letters.

204. Taking into account the fact that the claimant did not push the postponement point further and she did say that she was willing to go ahead and taking into account the fact that there was a thorough and fair appeal process, we do not consider that the defect in procedure (pressing ahead on 8 May without offering the Claimant a few more days to brief a companion) was such as to render the dismissal as a whole unfair.

205. The unfair dismissal complaint therefore fails.

206. There are no facts from which we could conclude that the dismissal was because of her father's disability, or related to it. As discussed already, the information given to the Claimant about perceived performance issues long pre-dated the disability. We have taken into account that the Respondent seems to have changed tack to some extent, and rather than continuing down the pure performance management path, it

changed to a process in which the issue that Payroll Supervisors were supposed to report to the Payroll Manager became the main focus of attention. That being said, as discussed above, this was not a brand new factor. The requirement for her to do this had been discussed with the Claimant previously (albeit not, as far as we know, in the bald terms "we will dismiss you otherwise").

207. The complaints that the dismissal was an act of discrimination or harassment fail.

Next Steps

208. Since all the complaints have failed, there is no need for a remedy hearing. The hearing provisionally listed for **19 and 20 January 2023 is cancelled** and will not take place.

Employment Judge Quill

Date: 29 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

4 October 2022

FOR EMPLOYMENT TRIBUNALS