EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113831/2021

Held in Stranraer 13, 14, 15 and 16 September 2022 with members' meeting on 7 October 2022

Employment Judge M Robison

Tribunal Member I Ashraf

Tribunal Member J McCaig

Miss J Craig	**Claimant** **Represented by** **Mr M Bertram -** **CAB Advisor**
Community Integrated Care	**Respondent** **Represented by** **Mr P Kerfoot -** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.

2. The respondent shall pay to the claimant the sum of **NINE THOUSAND FOUR HUNDRED AND FIFTY NINE POUNDS AND TWELVE PENCE** (£9,459.12).

3. The claims of disability discrimination are not well founded and are therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim in the Employment Tribunal claiming unfair dismissal and disability discrimination on 27 December 2021. The respondent

resists the claims and claims that the claimant was fairly dismissed for reasons of capability following a long absence on sick leave. Following receipt of medical reports the respondent conceded that the claimant was disabled at the relevant time in terms of section 6 of the Equality Act 2010 in respect of brachial plexus injury; but not anxiety.

2. On the first day of the final hearing, parties liaised to finalise the issues for determination by the Tribunal, as follows:

Disability

1. What does the claimant contend her disabilities were at the relevant time? In particular, did the claimant's anxiety amount to a disability for the purposes of the Equality Act 2010?

2. Did the claimant have a physical or mental impairment?

3. If so, does this impairment have a substantial and long-term impact on the claimant's day to day activities?

Unfair dismissal

4. What are the facts or beliefs known to or held by the employer which caused them to dismiss the claimant?

5. What was the reason, or principal reason, for dismissal? Was it capability or another reason contended for by the claimant?

6. Is that reason a potentially fair reason for dismissal in terms of section 98 of the ERA?

7. If so, did the respondent's decision to dismiss the claimant fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted for the purposes of section 98?

8. If the claimant was unfairly dismissed, should the Tribunal reduce the claimant's compensatory award to reflect the chance that the claimant

would have been dismissed in any event if a fair procedure had been followed, and if so, by how much?

9. If the claimant was unfairly dismissed, should the Tribunal reduce the claimant's compensatory award to reflect the claimant's contributory conduct, and if so, by how much?

Harassment

10. What are the allegations of conduct that the claimant relies upon?

11. Was this conduct unwanted by the claimant?

12. Was the conduct related to the claimant's disability?

13. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Failure to make reasonable adjustments

14. What is the PCP applied by the respondent that puts the claimant at a substantial disadvantage?

15. Did the respondent know, or ought it to have known, that the claimant was disabled and was likely to be placed at a substantial disadvantage as a result of their disability?

16. If the duty to make reasonable adjustments arose, what adjustments would have been reasonable in the circumstances?

Discrimination arising from disability

17. Did the claimant's disability, cause, or have the consequence of, or result in *"something"*?

18. Did the respondent treat the claimant unfavourably because of that something?

19. Was the respondent's treatment a proportionate means of achieving a legitimate aim?

3. At the final hearing, the Tribunal heard evidence first from the respondent's witnesses: Mrs T Forrest, HR Business Partner, and Mr Phil Benson, the dismissing officer. The Tribunal heard evidence from the claimant and from Mrs Kelly, a former colleague who no longer works for the respondent, and Mr John Smith, her partner.

4. The evidence in chief was primarily given by way of witness statements, with supplementary questions permitted as appropriate and with each witness being cross examined.

5. The Tribunal was referred to documents from a joint file of productions (referred to by page number).

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

7. The respondent is a national social care charity employing approximately 5,500 people. In its Each Step Division (dementia and elderly residential and nursing care) it had 15 residential care homes, 6 of which were in Scotland. The claimant worked in the Thorneycroft Care Home in Stranraer, which has 60 residents with a range of care needs including dementia.

8. The claimant first worked with the respondent in 2003, initially as a bank/relief worker. She commenced permanent employment on 8 February 2006 and worked there until she was dismissed on 26 July 2021, holding the roles of support worker, senior support worker and latterly team leader.

9. The role of support worker was to provide direct personal care to the residents. Senior support workers would supervise support workers, and administer medicines and assist support workers as appropriate.

10. In the team leader role the claimant would supervise the senior support workers and undertake an administrative role including overseeing staff rotas and

training, auditing care plans, ordering and administering medication, organising activities and liaison with families, doctors and the SSSC. Although in other care homes in the Each Step division, team leaders would also undertake the tasks of a senior support worker, that was not in practice at Thorneycroft where the team leaders would primarily undertake an office based role.

11. At Thorneycroft, at the time of the claimant's absence and dismissal, the following structure was in place: an acting manager; a team leader; an acting team leader covering the claimant's role; a team of senior support workers; a team of support workers covering day and night shifts; an administrator; a cook and catering assistants; housekeeper and maintenance worker.

Respondent's Sickness Absence Management Policy

12. The respondent relied on their sickness absence management policy version 13 dated 30 April 2020 (page 184).

13. This stated that it "gives clear guidance on how to report and certify long term and short term sickness absence and how Community Integrated Care manages sickness absences" (186). Under "roles and responsibilities" it is stated to be the responsibility of all colleagues to:

    a. Keep absences to a minimum.

    b. Inform manager as soon as possible if unable to attend work due to illness.

    c. Keep in contact with the line manager throughout.

    d. Provide certification that covers the whole period of sickness absence.

    e. Contact the line manager 24 hours before returning to work.

    f. Attend any meetings that link to the management of your sickness absence.

    g. Follow steps and stages in procedure(187).

14. The process map for managing long term sickness (stated at 10.1 to be absences of four weeks or more) sets out the following steps to be followed:

- Colleague informs line manager of long term sickness.

- Colleague and line manager to agree regular points of contact and set dates for regular absence review meetings, stated to usually be weekly telephone contact and monthly review meetings, but that could be changed by agreement depending on the medical advice in each case.

- Medical evidence in the form of a GP report or occupational health assessment required in order to manage and support colleagues through long term absence.

- If appropriate colleagues who have regular periods of long term sickness may be subject to the warning process as for short term sickness, with a right of appeal.

- Following regular absence review meetings and taking into account medical evidence a decision will be made as to whether the colleague can return to work or not.

- If this does not result in return to work, then it may result in termination of employment due to ill health, in which case:

    - a letter of invitation to a formal meeting will be sent out to discuss circumstances;

    - a formal meeting will be held to discuss colleagues ill health, prognosis, medical evidence, reasonable adjustments or suitable alternative roles and if further evidence is required;

    - a written decision/outcome will be sent after the meeting to confirm the decision;

    - colleagues dismissed will have a right of appeal.

15. Under “agreed contact during sickness absence”, it is stated that “throughout the period of sickness absence it is the responsibility of the colleague to contact

their line manager as agreed. If the colleague fails to make contact as agreed the line manager will try to make contact to find out a return to work date and a reason why contact was not made" (194).

16. Under "managing long term sickness absence", it is stated at 10.2 that "if it becomes clear that the colleague's absence is likely to become long term, the colleague will normally be asked to telephone their line manager once a week (unless otherwise agreed)" and under 10.3 that "regular absence review meetings will be held between the colleague and their line manager or other appropriate manager or member of the regional HR team. There are no set timescales for holding these regular meetings as each absence will be dealt with on a case by case basis and will depend on the medical advice received throughout the absence" (203). Para 10.6 states that "each meeting will be recorded in writing or by the completion of an absence review meeting form and must include the outcome of the meeting, the answers to any outstanding questions and the agreed date, time and place of the next visit" (204).

17. Para 14 is headed "dismissals for long term absence" and at 14.1 states that "If all of the steps have been followed in section 10 and a medical report or all reasonable evidence gathered is not able to show that the colleague will be fit and able to return to work, then the colleague will be dismissed. This is also subject to discussion relating to reasonable adjustments and alternative employment" (207).

18. Section 16 relates to appeals, which are stated in most cases to be a review following an appeal hearing with a written outcome (209).

19. In this case, there was no formal agreement between the claimant and her line manager regarding the frequency or mode of contact during her sick leave.

Background to claimant's absence

20. In or around July 2018, while in the role of senior support worker, the claimant had an operation for the removal of a lipoma. The claimant returned to work after a short period of sickness absence but she experienced pain in her right arm and shoulder and did not have full mobility in her arm.

21. On 1 May 2019 the claimant was promoted to team leader. She was issued with and signed a contract of employment setting out terms and conditions of her employment for the role of team leader from 21 June 2019.

22. That contract included the following at paragraph 2.7: “you are required to carry out the duties as set out in your job description which may be amended from time to time by Community Integrated Care. Any significant amendment will be discussed with you personally and/or in consultation”; and at 2.8 “You may also be required to carry out such reasonable additional or other duties as necessary to meet the needs of Community Integrated Care and the people we support from time to time”.

23. The claimant was issued with a team leader job description (183a). It stated that it was prepared in February 2013 by a previous regional manager (183f). It transpired that this was out of date and not one then generally in use by the respondent.

24. The job description for the role of team leader which the claimant was issued included responsibility for “delivery of and personal care to all service users in an allocated area/unit” and the following job purpose “to ensure the clinical and personal care provided to all service users meets their individual personal needs and ensure all service users are treated with dignity and respect at all times” with duties including “to supervise and undertake non nursing duties as required in order to meet tenants individual needs where appropriate”

25. In also stated in summary “This Job Description is an outline of the key tasks and responsibilities of the post and the post holder may be required to undertake additional duties as appropriate to the pay band. The post may change over time to reflect the developing needs of the Charity and its services, as well as the personal development needs of the post holder” (183f).

Proposed amendment of duties

26. During 2019, the Care Inspectorate made an unannounced visit to Thorneycroft Care Home. A report was subsequently completed on or after 17 October 2019 (214). This report assessed the care home as adequate in two

respects (scoring 3 out of a possible 6) namely supporting people's wellbeing and leadership. For staffing, setting and care and support planning it was assessed as "good" (scoring 4). This was well below the standard which the respondent expected. A service improvement plan was put in place quickly which set out all actions to address concerns.

27. On 9 January 2020, the claimant underwent exploratory surgery to attempt to repair nerve damage caused during the 2018 surgery (148).

28. On 2 March 2020, the claimant returned to work from sick leave (150).

29. The acting manager, Tracy Ross, who was covering for the care home manager Joseph Morley who was at that time on sick leave, completed a return to return to work form. That form states, under "are you fully recovered", "I am now fit for work but I need to be careful and know my limitations". Under the section, "action plan", it is stated "Jeanine will inform manager if she is in any pain or discomfort and we can look at reducing shift times. Jeanine has declined a phased return at this time" (151).

30. On 11 March 2020, after working for nine days, the claimant was again on sick leave for "exploration of accessory nerve" (152, 153).

31. On 3 April 2020, the claimant returned to work. No return to work form was completed. On her return, the claimant undertook "lighter duties" which involved primarily paperwork associated with the role of team leader.

32. In light of the Care Inspectorate report, and the subsequent service improvement plan, the claimant was asked by the acting manager Ms Ross to undertake a shift "on the floor" doing the duties of a senior support worker because of concerns around the budget. Because the claimant had expressed certain concerns about the budget, Ms Ross advised her to send an e-mail to Ms Tracy Johnston, a regional manager.

33. On 30 May 2020, the claimant e-mailed Ms Johnston, copying in Ms Ross, Mr Kevin Moir, regional manager for Scotland and Mr Morley, who had returned that day from sick leave (226). She expressed concern about being advised that she was to "give up one of my team leader days to work as a senior support

worker on the floor as we are severely over budget". She stated that she did not consider that this was a reasonable request because she was not managing to get all the team leader duties done in her hours. She also advised that because she had only recently returned to work from a major operation and had been left with a brachial plexus injury she could not lift her right arm. While Ms Ross had told her that she would not be expected to lift or do personal care, she said that would not work because she would have to help out if they were short and she did not want her injury to get any worse. She stated they were over budget because the other team leader was working far more than her expected hours, and that the budget problem could be solved if they worked their rota'd hours.

34. On 2 June 2020, following a consultation with her surgeon, a medical report was provided which stated that the claimant had said she was being pressured to return to direct patient contact and heavy lifting roles at work and that "I think this is untenable for her now and almost certainly untenable for the rest of her career based on the likely range of outcomes of recovery of trapezius" (110). At that time the claimant also saw her physiotherapist, who reported that "regarding her work, Jean should not be undertaking a physically demanding job at present as this is likely to contribute to her pain and will affect her recovery from her surgery. It is likely to flare up her neuropathic pain and will not promote a good grounding for her rehabilitation. She plans to discuss this with….her management team at work".

35. On 5 June 2020, the claimant had a meeting with Ms Ross and Mr Morley (at which minutes were taken but not forwarded to the claimant 227) regarding her team leader role at which time Ms Ross confirmed that there was a request that team leaders work one duty day per week as a senior support worker. The claimant advised, as set out in the e-mail of 30 May, she was not prepared to do this, and that if she was she would resign, since her surgeon had only permitted her to return to work because she had told him that her job entailed paperwork only within an office environment. Mr Morley requested permission to contact the claimant's surgeon. Ms Ross took issue with the contents of the e-mail of 30 May and stated that they were incorrect.

36. On 5 June 2020, the claimant gave permission for the respondent to access medical information regarding her brachial plexus injury (229).

37. On 8 June 2020, the claimant was requested to administer medication to assist with Covid regulations and policies, but she advised that she was unable to due to pain in her arm/shoulder (230).

38. On 29 July 2020, the claimant attended her GP who recorded “problems at work, is being sent to occupational health by work. Feels is being targeted for her job being wound up. Feels as a team leader is being asked to do more physical work than job spec outlines. This is causing her current physical issues to become more of an issue. Not sleeping, anxious in day. Agrees to try duloxetine in addition to current rx” (146).

39. On 3 August 2020, the claimant advised HR that she was not prepared to sign an occupational referral form as requested because the job description on the form was for senior support worker and not team leader. She advised that since she had returned following her operation she had carried out all of her team leader duties and that she did not in that role require to carry out the duties listed (236). HR suggested a meeting to discuss her concerns but the claimant advised, having taken advice from her union, that she did not require to attend the meeting and expressed concern about an “ulterior motive” and asking to be referred to occupational health as soon as possible (233).

Claimant’s absence on sick leave

40. On 11 August 2020, the claimant attended her GP who recorded “better sleep, work situation worsening. Asking to be signed off as real struggle”. He issued a fit note which diagnosed shoulder pain and stress (156).

41. By letter dated 19 August 2020 Kevin Moir, regional manager, wrote to the claimant expressing concern that the claimant was unable to fulfil her job role as team leader since returning from her operation and in particular was unable to complete any other duties and tasks other than paperwork. He said that it was his understanding that she was unable to carry out tasks including “medication administration, assisting residents with personal care, respond to

emergency situations and assisting with residents mobility (hoisting and transfers)". He stated that "it is my understanding that in your role as team leader, you are required to do all the duties of a senior support worker. The key difference being that you are supernumerary and have protected time to concentrate on tasks including: care plans, reviews for PWS, colleague supervisions and staff meetings. One of the requirements of a team leader would be to cover senior support worker shifts, it is totally expected that you would be able to carry out all of the duties in line with the senior support worker job description. May I add that this applies to all team leaders within the Each Step division" (239). He noted that this had been disputed by her, that she had said that she had given out medication since her return and responded to many emergency buzzers. He invited the claimant to raise a formal grievance and attached the grievance policy. He advised that if she did not respond then he would proceed with the occupational health referral. A further OH referral form was sent to the claimant.

42. On 25 August 2020, Mrs Forrest contacted the claimant seeking to set up a video call to discuss her concerns along with Phil Benson, a senior manager with operational responsibility for 15 Each Step care homes, who was appointed to oversee the claimant's sickness absence (245).

43. An occupational health meeting was arranged for 9 September 2020 (253), but did not take place.

44. A report dated 21 September 2020 prepared by the claimant's consultant Professor Hart (114) states that, "If return to work is being considered I think it would be most appropriate if this were on the basis of significantly altered duties, where she could have the arm fully supported such as desk work. It may be that she needs reduced hours also due to the build up of pain with repetitive function". He noted that she would remain affected by considerable functional impairment for at least twelve to eighteen months.

45. Mr Benson contacted the claimant by text on 17 September with a view to setting up a meeting (369) which was due to take place on 21 September. However on that date the claimant advised that she was rushed by ambulance

to Dumfries Infirmary (371). In a response text, Mr Benson said "let me know when you are better and able to talk to us but don't worry for now, just get yourself better" (374). The claimant sent an update by text on 23 September (375) and another on 25 September advising she had had an emergency operation to have her gallbladder removed and on 28 September advising that she had a sick line up to 20 October (158 and 380).

46. By text dated 4 November, Mr Benson stated "Hello Jeanine – I'm just checking how you are doing", and a meeting was arranged to take place on 11 November.

47. On 11 November 2020, that meeting took place (on Teams and WhatsApp) with Mr Benson and Mrs Forrest. Minutes were taken but these were not forwarded to the claimant (258a). At that meeting the claimant's job role was discussed.

48. By e-mail dated 12 November 2020 (261), Mr Benson advised that "our main priority is to support you in your recovery from your recent operations and look for all the ways in which we can support you to return to work at Thorneycroft. As agreed, after your consultation on the 23rd November with your surgeon we will talk through our occupational health support and how we can work together to support your returning to work".

49. On 30 November 2020, Mr Benson texted the claimant asking how her appointment went.

50. On 1 December 2020, the claimant e-mailed (262) Mr Benson to confirm that after her appointment with her surgeon there has been no change in her recovery from 6 months ago and she was to have a further check up in 6 months time. She also referred to the fact that the physiotherapist she saw said the stress she was experiencing with work issues would not be helping with her pain. She advised that she was still signed off and the GP had confirmed that he was issuing another sick line (160 and 161).

51. By text dated 29 December 2020 (394), Mr Benson asked the claimant if she had received the occupational health referral form, to which she responded

that she had not and "pointed out that [she] was being treated differently by being sent so early in my sickness to occupational health" (395). She also advised that "after my last appointment with Professor Hart I realised I won't be fit for work for another 5 or 6 months, that's the end of my recovery period. Only then will we know how much movement I will be left with in my right arm" (398).

52. Mr Benson relied on the same date, if "that's what comes from your appointment with our occupational therapist then we can address the best way forward at that point. What we must do though is ensure that we go through this process to give you the best support...and advice" (399).

53. On 31 December 2020, Mr Benson e-mailed another OH referral form for the claimant's signature; Mr Benson granted the claimants request for an extension to 8 January (402). The claimant then advised by text that she was not prepared to sign it because the duties listed were not those of a team leader, including food handling(403). Mr Benson responded that he was "confident that we have filled the form in correctly and this is what we would be looking to review with the occupational health team" and that they were "part of the expected duties of a team leader" (405).

54. By letter dated 1 February 2021, Mr Benson advised that following concerns the claimant had expressed about texting during December, he would communicate via telephone call, post and e-mail in future. He asked the claimant to review and sign the amended occupational health form which now detailed a list of duties which he would like to understand her fitness to undertake. He also asked for any recent documentation from her surgeon to better understand her fitness to return to work and any potential reasonable adjustments. Mr Benson however attached to the occupational health reform in error a letter to a colleague who was also on long term sickness absence.

55. By e-mail dated 1 February 2021 the claimant advised that she had been sent the wrong letter and asked not to be sent any further texts or emails, but asked for correspondence to be by post (276).

56. By e-mail dated 1 February 2021 Mr Benson apologised for sending the wrong letter and for e-mailing, requesting return of the consent form. The claimant replied saying she could not sign a form that is incorrect (275).

57. By letter dated 11 February 2021 Mr Benson advised the claimant that he had taken on board her comments regarding the description of duties and amended it by removing the job description from the referral (280).

58. By e-mail dated 15 February 2021, the claimant advised that she had no further documents from her surgeon and said that once again the form sent was not correct. She stated that she gave permission to access her medical records and had no problem attending occupational health and suggested another appointment could be made(284).

59. On 15 February 2021 Mr Benson asked her to point out the parts of the form she felt were incorrect so that he could liaise with the HR team to see if it could be addressed and advising they needed a signed form before she could be referred to OH (283).

60. Having taken advice from HR, he advised by e-mail dated 22 February that he had been unable to change any of the fields relating to job details (282).

Occupational health referral

61. By e-mail dated 24 February 2021, the claimant advised Mr Benson that having taken advice from her union, she had signed the form with a caveat: "in the letter dated 18 February 2021 signed by Phil Benson it stated I could do my job. I have now signed the consent form to send me to occupational health despite my job description as team leader being incorrect which I have pointed out several times before. However as stated before I am happy to attend occupational health".

62. On 8 March 2021, the claimant undertook a consultation with occupational health. The report dated 9 March 2021 stated, under "occupational aspects" that "Ms Craig did return to work last year, but since July, her pain experience is worse, although she reports some slight improvement in range of movement in arm and shoulder. In October, Ms Craig was also admitted for urgent gall

bladder surgery, but fortunately she has recovered from this well. Ms Craig remains unfit for work at this time, mainly due to pain and restriction of function of the right arm. As you are aware Ms Craig has reported that she feels stressed by the capability and sickness absence management procedures. Ms Craig's general practitioner has certified her as unfit for work for three months up to 5 April 2021. Judging by progress to date, it is highly likely that her General Practitioner will extend this fit note for a further three months. The prognosis beyond this point, will depend on Professor Hart's assessment of her recovery at eighteen months". Under "additional questions raised in this management referral" it is stated, "It is highly unlikely that Ms Craig will be able to return to work within the next three months. The prognosis thereafter remains unclear but, it will largely depend on the specialist assessment of her neurological recovery. If Ms Craig's recovery restores near full function in the right shoulder and arm, she should be able to administer first aid and respond to emergency situations, but the prognosis and end point of recovery are unclear" (303).

63. By e-mail dated 23 March 2021, Mr Benson invited the claimant to meet him on 29 March 2021 to discuss the findings in the occupational health report (303) and asking for any relevant documentation from her GP or Professor Hart (302).

64. By text dated 24 March 2021, the claimant sent a photograph to prove that she was in hospital (408) and an email advising she was undergoing tests (304).

65. On 25 March 2021, Mr Benson responded by text that there was no need to prove anything and to get well soon (409). The claimant advised that she would contact him as soon as she was out of hospital (410) to which Mr Benson replied "don't worry about me for now Jeanine, just focus on getting well and getting home and then we can catch up and take care of the next steps. But you need to focus on you for the minute while your [sic] in hospital" (411).

66. On 1 April 2021 the claimant sent a text to Mr Benson advising that she was still in Dumfries and Galloway Infirmary undergoing tests and suggested

waiting until after her next appointment with her surgeon on 5 May which was the last appointment relating to her recovery period of 18 months (414).

67. By e-mail dated 9 April 2021 (305) Mr Benson sent another invite meeting asking to meet on 16 April 2021 (306). Mr Benson had been led to believe from a colleague at Thorneycroft that the claimant was out of hospital.

68. On 9 April 2021, the claimant responded by e-mail to advise that she was still in hospital and waiting to be transferred for further tests, stating “Due to you hounding me for a meeting whilst I am ill in hospital and treating me different, I am now putting this in the hands of my union” (308).

69. On 9 April 2021, Mr Benson e-mailed “Apologies I had mistakenly thought you were home which is why I sent a reconvened appointment letter to attend a support meeting. These are normal under the sickness and absence process and are required as part of our policy and procedure. If you could let me know when you are discharged so I can schedule the meeting that would be appreciated until then I’ll pause the process until your back home. Again, my apologies” (307).

70. The claimant’s union was subsequently in touch with Mr Benson, but the e-mails did not reach him because the wrong e-mail address was used (312).

71. On 4 May Mr Benson contacted the claimant by e-mail to say “I’m just checking in to see how you are and if you are out of hospital yet. I haven’t heard back since you went in when you were unwell and I’m conscious about the time since then so I just wanted to touch base to see how you were” (315).

72. On 5 May 2021 the claimant replied by e-mail “Have you not heard from my union rep to not contact me till I’m well enough to contact you. Yes I am out of hospital and now waiting to go into Edinburgh hospital. My mum passed away and was only buried less than a week ago and I’m grieving. Can you please wait till I know more about my condition as I’ve no information for you and I’m too ill to discuss anything just now” (315).

73. By e-mail dated 21 May 2021, Mr Benson advised the claimant he was following up on his previous e-mail and “checking in to see if you have any

questions or need any information regarding the recent announcement" (which related to a proposed TUPE transfer) (316).

74. The claimant responded by e-mail on 21 May 2021 to advise that she had said she would be in contact when she knew more about her condition. She advised that her dad had passed away and was recently buried and she was grieving and still poorly and signed off. She said she was "being badgered and being treated unfairly and different from others off sick".

75. By letter dated 10 June 2021, the claimant was again invited to attend an absence management meeting on 30 June 2021 (318).

76. On 30 June 2021, the claimant e-mailed advising that she was not well enough to attend any meetings and understood that her union rep had advised him of that (321). Because he had used the wrong e-mail address, Mr Benson had not received the e-mail advising that or requesting that she be referred back to occupational health for a new and accurate assessment before a further meeting took place (325).

77. By e-mail dated 5 July 2021, Mr Benson invited the claimant to a further rearranged meeting on 8 July 2021. The claimant's union rep responded, advising that the claimant had consultant appointments on 12 and 19 July and asking that the meeting be delayed until after these assessments (331).

78. On 12 July 2021, Mr Benson agreed to postpone the meeting, rescheduling for 21 July 2021, and stating, "I must advise that if you fail to attend, I will make a decision concerning your future employment…without the benefit of any information from you as this is the third occasion we have tried to meet to discuss this. It is important that you make every effort to attend the meeting so that you are given the opportunity to discuss your absence and alternatives that may be available to facilitate a return to work. I understand from the email from your union rep that this absence process is causing additional stress and therefore it is in your best interest to meet with us to resolve it. I must inform you that a possible outcome of this meeting is the termination of your employment on the grounds of ill health".

79. On 19 July 2020 the claimant attended a consultation with a Professor Stone in Edinburgh.

Sickness absence meeting and dismissal

80. On 21 July 2021, the claimant met with Mr Benson and with an HR officer who took minutes (343 – 352). The claimant was accompanied by her union representative.

81. The claimant was advised of her dismissal by letter dated 26 July 2021 (354 – 356). In that letter Mr Benson stated that:

"despite an individual having a specific role or set of responsibilities in their day to day work, anyone working in our care homes is expected to be able to meet some basic needs regarding the welfare of the people supported if they were the only ones available to carry out these tasks at the time needed…With regards to your role considering your experience, training, skills and competencies these would include: supporting a person with personal care including continence or hygiene support; supporting a person to make or consume food or drink; supporting a person to take medication; facilitating emergency support up to and including CPR or assisting someone after a fall; supporting people to evacuate during an emergency such as a fire or flood.

Whilst I agree that prior to your period of absence the manager had authorised you to work in an "office based" capacity completing largely administrative duties this is not consistent with other team leader roles within the division, or comparable roles in other care homes where people share similar responsibilities. For the avoidance of doubt, these roles that I compared your duties with includes other team leaders, clinical leads, unit leads and assistance managers.

Specifically I have confirmed with the management team at Thorneycroft that both team leaders who are covering the current work part time as team leader, supernumerary and part of their time working on the household administering medication, leading a shift and providing all elements of care needed for people on the households they are responsible for.

During our meeting I asked if you agreed with the occupational health assessment form completed on 9th March and you confirmed that you did, and I asked if you were any better since the occupational health assessment and you were unable to confirm you were better. I attempted to ask specifically if you were able to carry out certain responsibilities, you stated that you were unable to answer any of my questions because you don't know where you are in your recovery.

I asked if at your consultation on the 12th July, which you stated was relating to your ongoing absence, you had a discussion with your consultant regarding your condition….when I asked what those discussions were about you said you didn't know and wouldn't know until you received the written report.

I don't accept this, you clearly stated that at the consultation you talked through things with the physio and the consultant but when I asked what those discussions were you stated you couldn't tell me until you received the report. I believe that a consultation with two physios and a professor would leave you with enough information to convey to me what the plan going forward for your treatment is and how this might impact your ability to return to work.

You did however state that they did assure you that when they get to the bottom of things, there is no reason you couldn't return to work if you were fit to. But you said that they haven't yet got to the bottom of things and this gives me the clear understanding that you are still unable to return to work as your medical consultants still haven't resolved your ongoing medical concerns.

I attempted to discuss with you any potential offers of support however you stated that the support you needed was to be "given peace and time to get strong again". I explained that this isn't possible because we need to work together in order to facilitate a return to work as soon as possible.

I therefore confirm that, having considered all known facts, and in line with the sickness absence management policy, your employment with Community Integrated Care will terminate on grounds of incapacity due to ill health.

I have reached this decision because we are unable to continue to sustain your ongoing absence from work due to the impact it is having on the operation of the care home and in addition you offered no insight as to a potential time you would be able to return to work even if your duties would be limited to the ones you were carrying out prior to 11th August 2020. You also offered us no insight into when you would know or provide any indication of when you would be in a position to answer any of my questions in relation to the specific duties we would require a team leader to be able to complete under normal working conditions".

82. The claimant was advised of her right to appeal.

83. Professor Stone provided the claimant with a report dated 27 July 2021 which stated that the claimant had now developed a more widespread chronic pain syndrome which he said could be called fibromyalgia and PPPD (124).

84. By letter dated 29 July 2021, the claimant submitted an appeal on the basis that Mr Benson did not wait for reports from the consultant or send the claimant for an up to date occupational health report (358).

85. On 2 August 2021, Mr Wright acknowledged receipt (359) and wrote by letter dated 14 September 2021 inviting her to an appeal meeting on 22 September (361).

86. By text dated 18 September 2021, the claimant advised that she could not attend because she was on holiday until 24 September and asking to reschedule (362). Mr Wright responded by text on 23 September advising her request was with HR and that he was on holiday until 4 October (367).

87. By text dated 24 and 26 October and 1 December the claimant asked Mr Wright for news of her appeal (364). She received no reply. No appeal took place.

88. The claimant was certified unfit for work by her doctor from 11 August 2020 until the termination of her employment for the following reasons:

- because of shoulder pain and stress (to 25 August 2020) (156);
- because of cervical spine pain and stress (to 29 September 2020) (157);

- because of shoulder pain and gallbladder surgery (to 20 October 2020) (158);
- because of laparoscopic cholecystectomy for one month (159);
- because of shoulder pain until 5 December 2020 (160);
- because of ongoing shoulder pain until 18 January 2021 (161);
- because of stress and chronic neck and arm pain until 5 April 2021 (162) and again for six weeks (163);
- because of anxiety states and chronic neck and arm pain until 15 June 2021 (164);
- because of anxiety states for three months (165).

89. The claimant's gross weekly pay as at the date of her dismissal was £394.13. She was 53 years old. She has not worked since her dismissal. She has been signed off work since and is in receipt of universal credit, employment support allowance, and personal independence payments.

Relevant law

Unfair dismissal

90. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(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. Capability is one of the potentially fair reasons for dismissal.

91. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

92. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd v Jones* 1982 IRLR 439). The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

93. In capability dismissals for long term absence, the Tribunal must consider whether the employer can be expected to wait longer for the employee to return by reference to all the circumstances of the case, including the nature of the illness, the likely length of the continuing absence, and the need for the employer to have the work performed. In addition the Tribunal must also consider whether a fair procedure has been followed, which requires consultation with the employee and obtaining medical reports to ascertain the employee's medical condition and likely prognosis as well as the consideration of other options open to the employer (*BS v Dundee CC* 2014 IRLR 131).

94. Section 118 ERA states that where a Tribunal finds that dismissal is unfair it will make a basic award and a compensatory award. The basic award depends on the claimant's wage (subject to limits), their age and length of service (s.119). The basic award can only be reduced in certain limited circumstances set out in s.122. The compensatory award is the amount the Tribunal considers is just and equitable in all the circumstances having regard to the loss sustained by the claimant which is attributable to action taken by the employer.

Disability

95. Section 6 of the Equality Act 2010 (EqA) states that a person had a disability if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities.

96. Section 15 EqA states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

97. Section 20 EqA sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. The relevant requirement is set out at section 20(3) which states that "the first requirement is a requirement, where a PCP [of the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage". A failure to comply with the duty amounts to discrimination under section 21(2).

98. The duty arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (*Smith v Churchill Stairlifts plc* 2006 ICR 524 CA). An adjustment from which the disabled person does not benefit is unlikely to be a reasonable one *(Romec Ltd v Rudham* EAT/0069/07). The question is whether the adjustment would be effective in removing or reducing the disadvantage the claimant is experiencing as a result of their disability, not whether it would advantage the claimant generally. To assess the effectiveness of a proposed adjustment, it is best practice to consult the disabled employee, who is most likely to know whether the adjustment would

make a difference. Alternatively, or additionally, expert opinion, such as medical or occupational health advice, could be obtained on the probable effect of any proposed adjustment.

99. Section 26 EqA states that a person harasses another if they engaged in unwanted conduct related to a relevant protected characteristic, which includes disability, and the conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile degrading or offensive environment.

100. In deciding whether the conduct has that effect, the Tribunal must take into account the complainers perception, whether it is reasonable for the conduct to have that effect and all the circumstances of the case.

Tribunal's discussion and decision

Tribunal's observations on the witnesses and the evidence

101. Considering first the respondent's witnesses, although the Tribunal accepted the evidence of Mrs Forrest as credible, we did not find it to be reliable in certain important respects. This was because as HR business partner she had limited dealings with the claimant and limited understanding of how Thorneycroft operated. In particular, although her evidence was that the role of team leader and senior support worker were essentially the same, we did not accept that had been the position at Thorneycroft.

102. We found Mr Benson to be an impressive witness who was experienced, professional and honest. His evidence was entirely consistent with the documentary evidence lodged. We noted that Mr Benson is a qualified nurse specialist and took account of that in regard to evidence relating to the claimant's medical records in particular. We were of the view that he struck the right balance between support for staff and the business needs of the organisation. We noted that he is no longer working for the respondent, and took on board Mr Kerfoot's submission that this meant that he was more independent than he might otherwise have been.

103. Turning to the claimant's witnesses, although we took on board the very difficult circumstances in which the claimant found herself, with her health difficulties,

bereavements and relationship difficulties, we did not find the claimant to be a credible or reliable witness. We found that she was much too defensive in her answers to questions, that she was evasive and seemed to find it difficult to answer questions with a straight and direct answer. She gave the impression of assuming that the questions were designed to trip her up which appeared to result in an over-emphasis on answers what she thought to be the correct answers to support her claim rather than accurate answers, which resulted in some of her answers being illogical and internally inconsistent. We found her to be contrary, and even obtuse on occasions, for example her evidence that she considered she was fit for work in August 2021 is unsupported by the medical evidence.

104. In the main Mrs Kelly's evidence appeared to emphasise what would support the claimant's case, but we did note that she confirmed the position with regard to the requirement for all staff to be able to deal with emergency situations, and suggested that roles were more fluid than the claimant asserted.

105. Again we found that Mr Smith did not answer questions directly. Again we appreciated that he and the claimant had been through difficult circumstances, but he appeared to answer questions in a way which underlined or supported the claimant's case rather than giving straight or accurate answers. This meant that we also found his answers to be evasive and contrary in places. He had a tendency to offer his opinion about events, rather than give evidence about the facts.

106. While in general we preferred the evidence of the respondent's witnesses, particularly Mr Benson, we were aware that Mr Benson had not worked at Thorneycroft so while he was able to give evidence about how the care home should be run, we accepted the evidence of the claimant about practices which took place in Thorneycroft which were not necessarily in line with company policy. We have taken this into account in our deliberations.

Tribunal's deliberations and conclusion

Unfair dismissal

107. The claimant claims unfair dismissal. The first question for the Tribunal to consider was the reason for dismissal, and in particular whether it was capability or another reason contended for by the claimant.

108. The claimant did not concede in this case that capability was the genuine reason for dismissal. She essentially argued that the respondent had an ulterior motive for dismissing her. She referred in particular to concerns following the request for her to work a senior support worker shift and the e-mail which she sent including her concerns around the budget. She suggested that from that point on it was apparent to her that they were "out to get her", that she "did not trust" them, that they "wanted rid of her", and that with the sale of the business on the horizon they "wanted rid of long serving members of staff".

109. There was however no evidence which we heard which would allow us to make any primary findings in fact to support such an argument, or indeed from which we could infer such a motive. We noted that this request to work the senior support worker shift came after the care inspectorate report when the respondent was seeking to implement changes in the care home, and when an acting manager was in place. We understood it to be in line with how other care homes in the group operated.

110. We considered it to be clear that this dismissal was for reasons of capability, not least because the claimant had been absent for 11 months prior to her dismissal; given evidence that there were no concerns about her performance; and of the difficulties which care homes have in recruiting staff. We did not accept any suggestion of an ulterior motive.

111. This is a potentially fair reason for dismissal; so the next question for us, by reference to section 98(4) ERA, is whether dismissal is fair or unfair in the circumstances. The question for the Tribunal is not whether we would have dismissed the claimant, but whether dismissal falls within the range of reasonable responses open to the respondent.

112. By reference to *East Lindsey v Daubney* 1977 IRLR 181, *Lyncock v Cereal Packaging* 1988 IRLR 511 and *BS v Dundee City Council* 2014 IRLR 131, Mr

Kerfoot argued that in order for an ill-health dismissal to be fair, an employer must consult the employee and establish the true medical position before deciding to dismiss, taking account of the following factors at the point of dismissal: the nature of the illness; the prospects of return; the likelihood of reoccurrence; the need for the employer to have someone doing the work; the effect of the absence on the rest of the workforce; the extent the employee is made aware of the impact and length of service; how long the employer is expected to keep the employee's job open and whether to allow more time, whether temporary cover is available, whether sick pay is exhausted; what admin costs there are in keeping the employee on the books and the size of the employer.

113. Mr Kerfoot, relying in particular on two key paragraphs of *O'Brien v Bolton St Catherine's Academy* 2017 ECWA Civ 145 at [36] and [45], submitted that the employer was entitled to finality and not required to give way to a claimant's argument for more time. This is particularly where the employee has not been as co-operative as the employer is entitled to expect in providing an up to date prognosis, and taking account of the severity of the impact on the employer of the absence of the employee.

114. In this case, Mr Kerfoot argued that the respondent had, by reference to their sickness absence policy; consulted as appropriate; sought to obtain medical evidence through repeated contact, where the claimant was not as cooperative as she could have been; established the true medical position and met the claimant as appropriate on 11 November 2020 and 21 July 2021. By that time, the respondent had the occupational health report and had confirmed with the claimant that the contents were accurate. Through consultation the respondent established that there was an increase in symptoms and no suggestion that there was any improvement or that prognosis would be brought forward. The situation was no different on 21 July 2021 from what the respondent knew already from the occupational health report so that it was appropriate to consider a dismissal at that point. He submitted that, considering the relevant factors for the respondent to take into account: the medical evidence was that it was likely to reoccur or at least continue; there

was no prospect of the claimant returning to work; she had a chronic condition; there was a need for the respondent to have a role of team leader; the absence of a key member of staff had a significant effect and was not sustainable in the long term. There being no reasonable prospect of return after 11 months, he argued that it was not reasonable to keep the job open for the claimant when there was still no accurate prognosis.

115. We accept the respondent's submissions that dismissal in these circumstances fell within the range of reasonable responses for the following reasons.

116. We considered first whether the employer could be expected to wait longer for the employee to return, by reference to the relevant factors.

117. In this case, the claimant had been absent for 11 months as at the date of dismissal. She was absent inter alia due to physical pain caused by the restricted movement in her arm. There was apparently no indication when her condition might improve, and no clear indication of how long she might continue to be absent from work.

118. On the question of the need for the work to be performed, the claimant was a team leader and the respondent was covering her role with an acting team leader. The role of team leader was an essential one, it being a relatively small operation but with only two team leaders. It was not reasonable to expect an employer of this size to keep the position open indefinitely.

119. We went on to consider the question of procedural fairness. For a dismissal based on long term absence for capability to be fair, an employer must carry out a fair procedure. We took the view that in this case the respondent's procedures leading up to dismissal were fair, with one exception.

120. An employer will be expected to ascertain the employee's medical condition and likely prognosis, as well as consulting the employee and taking their views into account. The respondent's absence management procedure was designed to ensure this, and we noted that the procedure adopted by Mr Benson was in line with that policy.

121. In this case, the employer had seen a number of medical reports from the claimant's consultants and had obtained an occupational health report. There was no indication from these when the claimant might be due to return to work. The claimant's union rep took issue with reliance on the occupational health report which had been supplied over three months prior and also requested a delay in the absence management meeting to allow the claimant to attend a further consultation with her consultant. The respondent did defer the meeting until after that consultation, and this was after considerable delays and rescheduling due to various understandable reasons. The claimant then took issue with the fact that the respondent did not wait until after the written report was obtained, but a) the consultation was discussed with the claimant; b) the claimant confirmed that there was no improvement; c) the claimant said that she had had no indication of when she would be able to return to work; and in any event d) the medical report which was subsequently supplied confirmed the position which had been discussed.

122. We took the view that up to the point of dismissal, the respondent had followed a fair procedure. There was however a dispute between the parties as to whether an appeal had taken place, which would be in line with the respondent's procedure, with the ACAS code of practice and expectations around what a fair procedure would entail.

123. The respondent invited the Tribunal to find that the appeal did take place without the attendance of the claimant (for whatever reason). However, if the Tribunal were to find that no appeal had taken place, Mr Kerfoot argued that even if there had been an appeal, that would not have changed the outcome because it would have made no difference.

124. We had no direct evidence that an appeal had taken place. Mrs Forrest and Mr Benson recalled being told that Mr Wright had undertaken an appeal and had advised the claimant of the outcome. We did not hear evidence from Mr Wright who could have confirmed the position. Further, unusually, there was no paperwork at all lodged to confirm that an appeal had taken place in the claimant's absence or that there was an outcome, far less that it was communicated to her. More importantly we did have text messages which the

claimant sent to Mr Wright and it is apparent that there was no response from Mr Wright.

125. We therefore concluded that no appeal had in fact taken place.

126. In that respect, not least because that this is a key component of the ACAS code of practice, but perhaps more importantly the respondent's own sickness absence procedure, we find that the correct procedure was not followed.

127. Although Mr Kerfoot argued that had the proper procedure been followed that would make no difference to the outcome, if there is a failure to adopt a fair procedure the dismissal will not be rendered fair simply because the unfairness did not affect the end result. This of course is the import of the House of Lords decision in *Polkey v AE Dayton Services Ltd* 1987 IRLR 503 in which Lord Bridges stated that "If an employer has failed to take the appropriate procedural steps…the one question the [Employment Tribunal] is not permitted to ask in applying the test of reasonableness …. Is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been followed". Only in exceptional circumstances would a dismissal where there had been a failure to follow a correct procedure be fair, specifically where it would be "utterly useless" or "futile".

128. We could not say that this was one of those exceptional cases, given not least that the respondent's policy, rightly, required an appeal. We therefore find notwithstanding, given the failure to conduct an appeal, in contravention of the employer's own procedures, that dismissal in this case was unfair.

129. The "no difference argument" is of course only relevant when it comes to the question of compensation, and specifically the compensatory award, and what amount the Tribunal considers just and equitable to award in all the circumstances.

130. The question then is whether the Tribunal should reduce the claimant's compensatory award to reflect the chance that the claimant would have been dismissed in any event if a fair procedure had been followed, and if so, by how much?

131. We concluded in this case that the compensatory award should be reduced and we gave careful consideration to what reduction would be just and equitable in this case.

132. We did note that the report from the consultant was dated 27 July 2021, which came just one day after the dismissal. While the claimant might have taken the view that she could have relied on that at the appeal, we noted that the respondent had delayed the absence management meeting until after the claimant had seen her consultant. We also noted that the claimant accepted during the meeting on 21 July that her symptoms had not improved and that there was no indication from her consultants when she might be fit to return to work. The written report did not alter that position. The claimant herself gave no indication at the time when she might be fit to return to work.

133. The question then is whether the claimant would have been dismissed in any event at that time. Mr Benson's evidence was that when he considered the medical evidence if he had seen it at the time he would still have dismissed; he said that it would have reinforced his decision; since it confirmed that the claimant was unfit and potentially still is unfit to return to work.

134. Given the evidence the respondent relied on to support their decision to dismiss, we conclude that, even if an appeal had taken place, dismissal would certainly have been upheld. Consequently, there could not be said to be any injustice to the claimant who would have been dismissed on the same date, and thus any compensatory award otherwise payable is reduced to nil.

135. We have however found that dismissal is procedurally unfair in this case. This is not the type of case where it is possible to reduce the basic award under s122 ERA. Consequently, in finding that the claimant has been unfairly dismissed because of the failure of the respondent to carry out a proper procedure, we find that she is entitled to the basic award. We did not understand there to be any dispute regarding the calculation of the basic award in the schedule of loss which was lodged. Accordingly we find the claimant entitled to the sum of £9,459.12.

Disability status

136. The respondent concedes, in respect of brachial plexus injury and nerve damage, that this is a disability for the purposes of the Equality Act 2010. The respondent disputes however that the claimant had a mental impairment amounting to anxiety at the relevant time.

137. Mr Kerfoot argued, relying on the case of *J v DLA Piper* UKEAT/0263/09 and *Herry v Dudley Metropolitan Council* UKEAT/0069/19, that the Tribunal should analyse the effect of the condition rather than focus on the medical diagnosis; and distinguish between clinical depression and medicalisation of a work issue/problem which is not likely to amount to a mental impairment. He argued that Tribunals should be aware that an individual's reluctance to compromise in relation to issues at work, as was the case here, may be a reflection of their character rather than an impairment. He submitted that the evidence was that the claimant's anxiety was a reaction to the sickness absence process and this largely went away after the dismissal. The anxiety was not only a medicalisation of work problems but also the adverse impact of bereavement, relationship split, and poor health which all contributed. He submitted that the claimant had not been able to show that any anxiety she was suffering as an impairment.

138. He argued further that there was little evidence to support the conclusion that the impact of the impairment was substantial or long term. He submitted that the impact must be long term at the time of the alleged acts of discrimination, and the claimant must show that it was likely to last 12 months or more. The evidence was that while her anxiety had an impact on her mood, she responded to letters, kept in contact, attended medical appointments and corresponded with her union. The respondent submits that there was no impact beyond that of her accepted disability.

139. Mr Kerfoot relied on the medical notes and on Mr Benson's evidence that these suggest that anxiety was more of a secondary symptom. Mr Benson said that in relation to the anxiety and stress that no medication was prescribed for that but the medication was in relation to the primary disability.

140. While the claimant's medical records make reference to anxiety and stress, we accepted, from the medical records and the evidence of Mr Benson (who is a qualified nurse), that there was no formal diagnosis of anxiety by the doctor but that the stress and anxiety she suffered was a reaction to her circumstances. This of course was not only the stress of the absence management process, but also of all her health concerns, bereavements and relationship split. Although the claimant may have understood that she was being prescribed medication for anxiety, we simply did not accept the claimant's evidence that she found the way that she was treated through the sickness absence process to be more stressful that her various medical conditions, her bereavement and her relationship split. We concluded that this did not meet the definition of a mental impairment.

141. Even if we were to have accepted that any stress or anxiety suffered by the claimant could be said to amount to an impairment, and even if it could be said that the effect on day to day activities was more than minor, the evidence was that it was not long term, in the sense of extending 12 months or more. The claimant's evidence was that her mental health, in respect of latterly diagnosed conditions, had improved since after the dismissal. We noted from her medical records that she had first been diagnosed with "anxiety state" by her GP on 19 December 2020, and from her own evidence that her anxiety had largely subsided after she had been dismissed (and no longer subject to the absence management process).

142. We therefore accepted the respondent's submissions in this matter. We find that the claimant has not established that she had a disability in respect of anxiety at the relevant time.

143. In any event, during submissions we asked parties what difference they thought it might make to the claimant's claim if the claimant were able to establish that anxiety was a disability. Mr Kerfoot submitted that it would only be relevant if there was any alleged discrimination which related solely to anxiety and he did not believe that to be argued by the claimant. Following discussion, we understood Mr Bertram to accept that there were no allegations

of discrimination which related solely to anxiety, but that all allegations were at least partly also concerned with the physical impairment relied upon.

144. We therefore proceeded on the basis that the disability relied on was the physical impairment, brachial plexus injury, to the claimant's arm and shoulder, which was conceded by the respondent to amount to a disability for the purposes of the Equality Act 2010.

Harassment

145. The claimant complains that the way that she was treated throughout the absence management process amounted to unlawful harassment related to disability.

146. With regard to the conduct relied upon, Mr Kerfoot submitted that the contact which the claimant received was as friendly as could be in those circumstances; there were many supportive texts; the respondent communicated by post when requested; and initially at least the degree of contact from the claimant was equal to the contact from the respondent, particularly at the beginning. When Mr Kerfoot asked the claimant, in respect of a significant amount of the contact, whether she found these to be unwanted or unreasonable, she said that she did not and he pointed out that whatever her view no grievance was ever lodged.

147. In evidence, it seems that there came a stage, when the claimant was in hospital for tests around May 2020, when the claimant came to view the contact as unwanted and too frequent. Indeed, she stressed in evidence that it was the frequency of the contact and the timing of it (including on her birthday, at Christmas, at Hogmanay) that she found to be distressing and therefore that it created an intimidating and hostile environment for her.

148. To that extent, we accepted that the contact was unwanted and the claimant found that intimidating, hostile, degrading, humiliating or offensive.

149. The question then is whether the conduct had the purpose of creating such an environment. Mr Kerfoot argued that it cannot have had that purpose because it was clear from Mr Benson's evidence and the sickness absence policy that

this was in line with the process he had to follow; so there could be nothing intimidating or hostile about it. He argued that, even if the Tribunal concluded that there was frequent contact, this was no more than was expected from the policy which allowed weekly telephone calls and monthly reviews. In this case, the process was paused, meetings were postponed for bereavements, and the policy was adapted to take account of her circumstances.

150. We readily accepted that the communications between Mr Benson and the claimant did not have the purpose of creating a hostile environment, and that Mr Benson was simply following the sickness absence procedure and indeed making adjustments to that in reaction to the claimant's circumstances.

151. Mr Kerfoot appeared to argue that even considered subjectively, the conduct could not have been said to have the effect which the claimant said that it did. He relied on the fact that there was no threat of progressing without the claimant's input or of determining the capability question without medical evidence. He pointed out that there were only two communications where the mention of consequences is set out but that is no more that the application of the sickness policy. In any event, these communications did not come early in the process but after the claimant's failure to sign three occupational health consents, when there was no mention of progressing without medical evidence, and it was only on the fourth letter this was suggested.

152. We did not accept that submission. It was clear from her evidence that the claimant did take the view that even if it was not the respondent's purpose of creating such an environment, that it did have that effect on her.

153. The question whether such conduct amounts to unlawful harassment is both a subjective and an objective question. While we take account of the claimant's position, we also consider whether it was reasonable the conduct to have had that effect, considering all the circumstances of the case.

154. While we accept that the claimant was distressed to have been contacted as frequently as she was, certainly latterly, we do not accept that the contact was unreasonable and we accept the respondent's submission that it was no more than the sickness absence process permitted. We noted that Mr Benson had

sent the claimant a letter intended for another at one point, but that was an error, and that likewise when he contacted her when she was still in hospital we accepted that he had been given the wrong information. We noted that Mr Benson's responses to the claimant were appropriate and in our view not unsupportive, and that he had paused the procedure in response to the claimant's health and bereavements which she suffered. We considered the claimant's complaints about contacting her on her birthday and at Christmas/New Year time to be unduly sensitive.

155. When reviewing Mr Benson's written communications, we had no hesitation in concluding that these could in no way be viewed as hostile or intimidating and we agreed with Mr Kerfoot that these were as friendly as could be expected in the circumstances. Indeed we were of the view that Mr Benson exhibited both patience and understanding with the claimant and her very unfortunate circumstances.

156. The claimant's concerns appeared to be influenced to the way things had been done in the past at Thorneycroft. She had the impression that staff members were not invited to occupational health meetings until they had recovered; and that they might be absent for a year or 18 months before being required to attend occupational health interviews. This rather contradicts her argument that she was always happy to attend occupational health interviews and ready to sign the occupational health consent if only her job duties were accurately listed. However, we accept that even if that was the past practice at Thorneycroft, it is entirely reasonable (and here in line with the sickness absence policy) to obtain reports from occupational health in order to support a member of staff in their return to work or with reasonable adjustments to allow that.

157. Ultimately, we had no hesitation in concluding that the claimant had not established that any reaction to the conduct of the respondent was reasonable such that it could be said to amount to unlawful harassment

Failure to make reasonable adjustments

158. The claimant argues there has been a failure to make reasonable adjustments contrary to section 21 EqA.

159. In this case, the claimant relies on the first requirement under section 20(3), that is “a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have to take to avoid the disadvantage”.

160. The Tribunal understood that there were two separate bases on which the claimant sought to argue that there had been a failure to make reasonable adjustments, namely in regard to the application of the adjustment to the sickness absence policy and the attempt to change the job specification to ensure that she failed the capability process.

Changes to the claimant’s job duties

161. With regard to the latter, we understood that the claimant argued that a change in her terms and conditions of employment was proposed which placed her at a disadvantage. This was reflected in the duties listed in the occupational health referral (which she said were of a senior support worker, not a team leader) which disadvantaged her because it was known that she would be unable to do those duties. We understood her to argue that the attempt to change the job duties was a breach of the failure to make reasonable adjustments. We considered that this was more appropriately articulated as unfavourable treatment, discussed below, and could not be said to be the application of a PCP, since it was a one off applied to the claimant.

162. In any event, the respondent’s position was that the request for her to work one senior support worker shift each week did not involve a change to her job duties. Their position was that the contract was flexible and that the structure was more fluid than the claimant understood; that no duties were imposed that were not reasonable for a team leader; the duties were those which were relevant for any role in the care home.

163. We did have some difficulty in understanding the claimant's argument, because it appeared to reveal a central contradiction. She argued that she was being asked to change her job duties because she claimed that the team leader job at Thorneycroft was office based, with no physical element. Yet she was signed off work, her consultant advising she could only do a desk based job, and he suggested that adjustments would be needed to permit her to return.

164. While the claimant sought to convince us that team leaders at Thorneycroft carried out no *"on the floor"* roles we did not accept that. She eventually conceded in cross examination that she was undertaking lighter duties when she returned to work after her operation. Although we accepted that in a care home with 60 residents with only two team leaders a good deal of the team leader's role would be office based, we did not accept that the team leader did no physical work at all. While there was an expectation that team leaders would assist residents wherever possible, the claimant suggested that if a resident asked for help they would call upon a support worker or a senior support worker to undertake the task. So while we were prepared to accept that at Thorneycroft at least, the team leader did not in fact undertake any personal care of residents, we did not accept that there was no physical aspect to the job at all. We understood from the evidence that the role included tasks such as the administration of medication from a heavy trolley, and that there was an expectation that team leaders would respond as appropriate to assist residents with any pressing needs. At the very least as confirmed by Mrs Kelly team leaders would require to be able to respond to emergency situations dealing with CPD, first aid and fire evacuations.

165. We therefore accepted that a policy criterion or practice was applied to the claimant that in her role as team leader she would require to undertake physical duties. We accepted that this would result in substantial disadvantage to the claimant, to trigger the reasonable adjustments duty.

166. In so far as the claimant sought adjustments which would allow her to return to work, which we understood from her consultant's report meant a purely desk based role, we considered whether there were any reasonable adjustments

which could alleviate the disadvantage suffered by the claimant in not being able to return to work.

167. The respondent argued that if what was proposed as reasonable adjustments was to remove all physically demanding tasks from her role this would be to create an alternative administrative role. Such an adjustment was not reasonable because it was neither safe nor efficient, nor financially feasible, it was argued. While the claimant had been given lighter duties on her return from her second operation, this was a short term adjustment and was not sustainable because it was a new role outside the structure and would necessitate another employee in the role of team leader which was financially unviable.

168. We concluded that to change the role of team leader to be purely desk based was not, in all the circumstances, a reasonable adjustment. We took account of factors set out at para 6.28 of the EHRC's Code of Practice, including any practical steps which would be effective in preventing the substantial disadvantage, which would be to remove any physical duties from the role. We also considered that, taking account of the size of the respondent and the cost to them of creating what would essentially be an additional desk based role, such an adjustment would not be reasonable, particularly when there would still be a requirement for a team leader. The Code also references as a relevant factor any increased risk to the health and safety. Where the claimant could not administer first aid, CPR or deal with any physical demands in the event of fire, we considered that it would not be reasonable for the respondent to adjust the role of the claimant to remove all of these elements.

Sickness absence policy

169. We also accepted that the sickness absence policy was a PCP which was applied to the claimant, resulting in substantial disadvantage, who as a disabled person, would be more likely to have longer absences.

170. Mr Kerfoot argued that appropriate adjustments had been made to the sickness absence policy, for example by postponing meetings and by pausing the policy.

171. As we understood it, the claimant argued that there should have been further adjustments to the sickness absence process to take account of her individual circumstances, which would have meant Mr Benson desisting from contacting her. We noted however that Mr Benson had deferred contact, postponed meetings and paused the process to take account of the claimant's circumstances, which we considered to be reasonable adjustments, but we accepted that it would not be reasonable to defer contact indefinitely.

172. In so far as the claimant argued that her dismissal should have been further delayed as a reasonable adjustment, we did not agree, for the reasons set out above in regard to the fairness of the dismissal. The factors we require to take into account are similar to those which we took into account when assessing the fairness of the dismissal in the circumstances, although the question is objective and not what is in the range of reasonable responses. We again looked at the factors set out at para 6.28 of the EHRC's Code of Practice, which are stated to include: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruptions caused; the extent of the employer's financial or other resources; the type and size of the employer.

173. We concluded, as discussed above, that to extend the sickness absence process further, with no prognosis, was not reasonable. This was because that would have had particular financial implications for this relatively small operation, operating in difficult financial circumstances but providing crucial services to vulnerable people, which would otherwise be required to hold open her job and engage a temporary replacement.

174. We concluded therefore that there was no breach of the reasonable adjustments duty.

Discrimination arising from disability

175. The claimant in this case argued that she had been unfavourably treated for a reason relating to her disability contrary to section 15 EqA. That states that a disabled person will be discriminated against by their employer if their

employer treats them *"unfavourably because of something in consequence of"* their disability, where the employer cannot show objective justification, that is the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim.

5 176. We understood there to be two bases for the claimant's claims under this head as well. We understood her to argue that she had been unfavourably treated by the attempt to change her job description to include physical tasks which she was unable to do because of her disability; as well as in the way that the sickness absence procedure was applied to her.

10 177. We have already set out above that we did not accept that there was any attempt by the respondent to change the claimant's job duties. However, we understood that the respondent accepted, given a low bar and a subjective assessment, that the treatment in being required to undertake physical duties as well as sickness absence not being extended further was unfavourable
15 treatment which arose in consequence of her disabilities.

178. However, the respondent argues that the treatment is objectively justifiable: the legitimate aim from the evidence of Mr Benson was to provide a quality of care appropriate for residents and operate to ensure that the organisation was financially viable. The evidence was that the care home had financial issues
20 and was over reliant on local authority funding which meant that margins were tight. Mr Benson referred to the fiduciary duty on management to keep the home running because of the impact on vulnerable people when closing would mean moving to another care home. The respondent argued that the decision to dismiss in this case was a proportionate means of achieving that aim, where
25 the claimant would be unable to undertake all of her roles and in particular would be unable to assist with emergency procedures.

179. We accepted the respondent's submissions that any unfavourable treatment of the claimant arising in consequence of her disability was, in the circumstances of this case, objectively justifiable for the following reasons.

30 180. There was a need for the claimant, at the very least, to be able to respond in emergency situations. We have accepted that it would not be possible to make

adjustments which could accommodate this requirement. We noted that the claimant suggested that others could undertake those aspects of the role which she could not, but we accepted that in emergency situations the claimant herself may require to respond immediately to circumstances.

181. Crucially there was not in any event, any evidence suggesting that the claimant could be fit to work even on adjusted duties. The medical evidence suggested that she could only do desk work and we have accepted above that there were no roles which were purely desk based and which did not involve any physical duties at all. To have engaged the claimant on purely desk duties would have involved the creation of an additional role and in any event the claimant could not respond appropriately to emergencies which had health and safety implications.

182. The claimant was in any event still deemed to be unfit for work by July 2021 and there was apparently no indication when it might be that she would be able to return to work. Although as we understood, there was no ongoing sick pay, we accept that there was a cost to the respondent to keep the claimant's job open and to engage another team leader on a temporary basis. We accept that there was a financial imperative for the respondent to ensure the most efficient running of the care home and ultimately to remain financially viable to ensure the continued operation of the home given what that meant for the vulnerable residents.

183. We therefore conclude that the claimant has not satisfied us that she was unfavourably treated for reasons related to her disability to satisfied they relevant provisions and therefore that claim must also be dismissed.

Conclusion

184. We find that the claimant's dismissal was procedurally unfair and that she is entitled to the basic award only, amounting to £9,459.12, in terms of the Employment Rights Act 1996.

185. We find that the claimant's claims under the Equality Act 2010 are not well-founded and therefore are dismissed.

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Employment Judge:	**M Robison**
Date of Judgment:	**14 October 2022**
Entered in register:	**18 October 2022**
and copied to parties	

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