EMPLOYMENT TRIBUNALS

Claimant: Miss L Telford

Respondent: Sellafield Limited

HELD AT: Manchester (with parties attending by CVP and Tribunal sitting in Manchester)

ON: 5, 6, 7, 8, 9, 12, 13, 14, 15 September 2022, with a further day in chambers on 1 November 2022

BEFORE: Employment Judge Johnson

MEMBERS: Mr K Smith
Ms K Fulton

REPRESENTATION:

Claimant: unrepresented
Respondent: Miss J Connolly (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well founded and is dismissed. This means that the claimant was fairly dismissed.

2. The complaint of disability discrimination is not well founded and is dismissed. This means that the complaint was unsuccessful.

3. The complaint brought in respect of unpaid holiday pay is dismissed upon withdrawal by the claimant on 6 September 2022

REASONS

Introduction

1. This claim arises from the claimant's employment with the respondent which terminated on 20 July 2022 when she was dismissed.

2. The claimant presented a claim form to the Tribunal on 13 December 2018 following a period of early conciliation from 15 October to 15 November 2018. She brought complaints of unfair dismissal, disability discrimination and unpaid annual leave, ('holiday pay'). The holiday pay complaint was withdrawn by the claimant on day 2 of the final hearing and as a consequence, was dismissed by the Tribunal.

3. The respondent presented a response on 6 February 2019 resisting the claim and arguing that the claimant was dismissed fairly because of her misconduct and while conceding some to the health issues may amount to a disability under section 6 of the Equality Act 2010, it disputed that the claimant was subjected to unlawful discrimination. The grounds of resistance also raised issues relating to time limits because many of the allegations of discrimination were thought to have been presented out of time.

4. The case was subject to significant case management with 5 preliminary hearings before Employment Judge ('EJ') Hodgson on 3 April and 27 June 2019, EJ Hoey on 16 and 25 October 2019 and EJ Doyle on 7 January 2020. An ongoing problem related to the particularisation of the grounds of complaint and as will be discussed in the 'Issues' section below, this was not finalised by the time the final hearing commenced.

5. However, for the purposes of the final hearing, the case was ready to begin on 5 September 2022 with bundles and witness statements being available in both hard copy and pdf formats. The hearing took place using CVP and on day 1, EJ Johnson confirmed that the parties could attend remotely for the remainder of the hearing with the Tribunal sitting (on the whole), at Alexandra House in Manchester. This was felt to be the most proportionate way of dealing with the hearing taking into account the claimant's ongoing health issues and unrepresented status, the West Cumbrian addresses of many of those giving oral evidence and the difficulties in knowing exactly when each of the respondent's witnesses would need to be called during what was a lengthy hearing.

The issues

6. This matter was a significant problem throughout these proceedings and unfortunately, a precise list of issues had not been finalised by the time the final hearing began. By this time, the claimant relied upon 6 lengthy schedules which made numerous allegations under the heading of specific forms of discrimination covered by EQA.

7. In total 86 complaints could be identified within the 6 schedules, described in following way, (and with page references for the bundle included):

   a) 8 – failure to make reasonable adjustments (p145)
   b) 43 – direct discrimination (p149)
   c) 4 – harassment (p165)
   d) 4 – indirect discrimination (p167)
   e) 15 – discrimination arising from (p169)
   f) 12 – victimisation (p175)

   The alleged discrimination or treatment referred to in the schedules was dated as having taken place from 2009 until 2018. Clearly, questions of time limits would be relevant under section 123 EQA. While broadly, we did not take issue with the forms of discrimination being alleged and whether they were precisely described in the claim from, we nonetheless found that many of the allegations lacked the basic requirements to enable to the Tribunal to consider whether each individual complaint was well founded. For example, allegations of indirect discrimination and reasonable adjustments (ss19 & 20/1), lacked a clear provision criterion or practice ('PCP'), while the allegations of victimisation (s27 EQA) failed to identify a protected act.

8. As to whether the claimant was disabled (s6 EQA), which is the gateway through which disability discrimination complaints can be brought, the respondent concedes that the claimant was disabled from March 2017 in relation to asthma, chronic pain, endometriosis and IBS. There were a series of other conditions referred to by the claimant, (including cancer, cysts and trigeminal neuralgia). However, these were not accepted as being a disability for the purposes of these proceedings by the respondent. The Tribunal did not hear submissions from the claimant nor any relevant evidence from her. However, we were satisfied that these additional conditions were not relevant to the allegations of disability discrimination which we needed to consider.

9. There was also a complaint of unfair dismissal, which was presented in time and where the respondent argued that the dismissal was by reason of the potentially fair reason conduct.

10. Ultimately, the Tribunal decided that it was necessary to behave proportionately and apply the overriding objective to this matter. We concluded that Miss Connolly's submission was correct and it was in the interests of justice to identify the issues as essentially falling into 3 categories:

    a) Unfair dismissal.
    b) 3 complaints of disability discrimination which were potentially in time and associated with the dismissal (p57):

       i) The alleged delay and/or postponement of the claimant's disciplinary, (ss20/1 EQA).

       ii) The appointment of Mr G Norman as disciplinary hearing officer (s13 EQA).

iii) Mr G Cartmell's alleged briefing to staff following the claimant's dismissal (s13 EQA).

c) The historical and pre-disciplinary process complaints over a period from 2009 to 2018 (p71/2/3):

i) Allegations made against Mr J Raymond and Mr G Cartmell (ss13, 15 and s20/1 EQA).

ii) Allegations against Mr J Raymond not pleaded in the claim form (ss19, 26 and 27 EQA).

11. A summary of the steps which a Tribunal must take when dealing with a conduct unfair dismissal, the various forms of disability discrimination and the application of time limits under s.123 EQA are included in the Appendix (below) and will be applied to the discussion latter in the judgment

Evidence used

12. The claimant gave oral witness evidence. She also called her partner Kevin Baugham and her former colleague Ms Cottier.

13. The respondent called the following witnesses:

a) Graham Cartmell (the claimant's line manager from 2014).
b) Graham Norman (the dismissing manager).
c) Dave Stewart (the claimant's line manager from 2007-8)
d) Steve Bostock (the first appeal hearing manager
e) Ann Lohan (the second appeal hearing manager)
f) Matthew Makin (disciplinary process investigating officer)

14. Mr Stewart was not called because the claimant confirmed that she did not need to cross examine him. Jon Raymond who was the claimant's line manager from 2012 was unable to give evidence because he unfortunately was suffering from a terminal illness and it was clearly not in the interests of justice to compel is his attendance, especially as the allegations made against him took place more than 3 years before the claim form was presented to the Tribunal.

The claimant's unrepresented status and challenges arising from her health issues

15. As case involved a disability discrimination complaint, it is not surprising that the Tribunal found that the claimant had particular health issues which needed to be taken into account throughout the 10-day hearing.

16. The claimant was unrepresented and had during her disciplinary process been provided with advice and support by her trade union Prospect. However, she was without any representation throughout the hearing.

17. It was hoped that the timetable for the final hearing would be sufficient to deal with reading time, witness evidence, submissions, deliberation and the delivery of an oral judgment by day 10. However, difficulties arising from the unrepresented claimant's health and her anxieties in dealing with cross examination of the respondent's witness evidence meant it was appropriate and in accordance with the overriding objective (and relevant sections of the Equal Treatment Bench Book), to allow her additional time so that she could fully participate in the hearing.

18. While this might be the case, considering the historic nature of many of the allegations, the length of time it took for this case to reach a final hearing and the challenges in calling witnesses to attend, it was essential that (at the very least), final submissions would be heard on day 10. Even if it meant that the Tribunal needed to deliberate on a separate day in chambers, thereby delaying the delivery of a reserved judgment with reasons.

Findings of fact

The respondent

19. The respondent ('Sellafield') is a large employer with a number of sites across the UK, but primarily it is based in West Cumbria and it is its plant near Whitehaven which is of relevance to these proceedings. Given the nature of Sellafield's work, it is a heavily regulated business both in terms of health and safety legislation, but also by reason of national security. Being a large employer, it has access to sizeable Human Resources ('HR') functions, in house and/or external legal advisors and professionals with a range of expertise. It also has Occupational Health facilities available on site to support its workforce.

20. Sellafield has a range of policies and procedures relating to employees and which regulates their conduct within the workplace.

The claimant

21. The claimant, (Miss Telford), was employed by Sellafield at the time of her dismissal as a Senior Control Systems Engineer. It was understood by the Tribunal to be an IT based role. Before that, she was an IT Trainee from 1996 until 1998 and at the date of her dismissal, she had worked for Sellafield for more than 20 years.

The earlier pre-2018 disciplinary process allegations

22. Miss Telford had several managers during her career and in relation to the period during which the issues in this case where alleged to have taken place, her managers were understood to be as follows:

    a) Mr Stewart (Technical Specialist/Temporary Team Leader) 2007 to 2008

Although he was available at the hearing to be called as a witness by Sellafield, Miss Telford confirmed that she had no questions for him during the hearing. He was not called and while she did not formally accept his statement, his evidence was clearly not challenged by Miss Telford and no relevant documents were referred to during her evidence. Although allegations relating to his conduct were included as part of the numerous issues in the bundle (on pp101, 132 and 133/4), no evidence was heard supporting these allegations.

b) Mr J Raymond (2008 to 2014)

Mr Raymond had recently left Sellafield's employment and it was understood that he had terminal cancer. There was limited evidence heard concerning his involvement in relation to the relevant issues identified by Miss Telford. We only heard limited evidence from Mr Cartmell who was aware of issues existing between Mr Raymond and Miss Telford. Mr Raymond's written evidence although of limited value as he was not called, was not challenged by Miss Telford.

c) Mr G Cartmel (2014 until dismissal)

Mr Cartmell gave evidence to the Tribunal and we found his evidence to be credible and reliable.

For the avoidance of doubt, it was not proportionate to deal with every single allegation at length in these findings of fact. There were some matters which were very old, predating 2010, not fully particularised and no evidence was heard from the claimant supporting the allegations that she was making. We were also acutely aware that the witnesses' memories were fading when compared with more recent events and Miss Telford did not provide detailed evidence to enable them to be considered by the Tribunal.

Mr Raymond

23. In relation to Mr Raymond, the allegations made by Miss Telford against him were vague, nor were they dealt with in detail in her evidence, (or indeed in her questioning of the Sellafield witnesses whom she had ample opportunity to cross examine).

24. It seems that in terms of the allegations made against Mr Raymond, a number of issues arose during 2013 and 2014, which culminated in a stage 1 grievance being brought and the two individuals being separated into different work areas. It is understood from the documents in the hearing bundle, that Miss Telford made threats of raising her issues with ACAS, but we noted that this did not ultimately result in Tribunal proceedings. We also acknowledged that Miss Telford was also represented by her trade union at this time, and she was clearly aware of her potential right to bring a Tribunal claim in 2014 and had she felt the need to take further action concerning her alleged treatment at work during these years, she should have presented a claim at that time and not on 31 December 2018.

Mr Cartmell

25. In relation to Mr Cartmell, there were (on the whole) a series of vague and insufficiently particularised allegations relating to the following thematic areas:

a) *Paygrade issues*

Miss Telford's belief that she should have progressed from Paygrade 7 to 8 (issues 3.6 and 3.7), during 2013 to 2014. Based upon Mr Cartmell's credible evidence, he explained that he informed Miss Telford to apply for a position out of her current department for a higher graded post, but she failed to make such and application.

b) *Denial of Secondment*

Miss Telford alleged that she had been denied a secondment (issue 1.6). Mr Cartmell gave credible evidence that he told her to complete a form to apply for this secondment but heard nothing more from her. His evidence was not resisted to any real degree.

c) *Booking 'work time' issue*

There was an allegation made concerning the booking of work time (issue 2.5). Miss Telford said that she had been concerned that Mr Cartmell made an adjustment to time recording codes for the working time which she lost because she would leave by reason of her disability. This was supported by Mr Cartmell's evidence and an email within the hearing bundle. On the face of it, this was a practical management step to resolve a difficult situation and represented a flexible solution by not applying Sellafield's time code categorisations rigidly. This appeared to represent a positive step by Mr Cartmell rather than a detriment.

d) *Use of credit time rather than special leave for personal issue*

There was a slightly confusing allegation regarding Miss Telford seeking time off work because her grandfather was unwell. Mr Cartmell told her to use credit time rather than special leave. The Tribunal accepted Mr Cartmell's evidence that this was a thoughtful and flexible step suggested by him given that he was aware of her health issues and the impact it had upon her need for absences. The use of accrued credit time appeared to be an appropriate and non-discriminatory way of managing this absence.

e) *Asthma attack and change of room*

Miss Telford also raised an issue concerning the way in which an asthma attack was managed which she believed arose in 2017 from a colleague who sprayed a deodorant spray in the open plan office where she worked and. It is understood that she sat next to Mr Cartmell at this time, and she raised the matter with him, although as he was out of the office a great deal as a manager, we accept his evidence that he was not present when the alleged incident took place. Mr Cartmell told her that he would speak

with the employee concerned but following further investigation it became clear that Miss Telford had obtained evidence from OH which described her asthma being triggered by multiple causes including any strong smells and changes in temperature. Miss Telford said that she did not want Mr Cartmell to discuss the matter with the employee concerned but felt that Sellafield should simply ban the use of aerosol sprays in the workplace. Given the multiple triggers identified and the potential impact of such a rule being imposed by management, the measure adopted of providing Miss Telford access to a separate room was a reasonable one to take. This would restrict her exposure to strange smells and vapours and in addition, she had the opportunity to control the temperature in the room to a level that suited her.

Miss Telford asserted in her case, that she did express concerns regarding the distance of this room from the nearest toilet and the impact this would have by reason of her IBS. However, Mr Cartmell said that he did not recall Miss Telford raising any issues regarding difficulties arising from this change of work location and its impact upon her IBS, either from OH or her.

On balance, we preferred Mr Cartmell's evidence as in this difficult situation, he made arrangements based purely upon Miss Telford's asthma. This was understandable given that an asthma attack could result in Miss Telford being hospitalised. Mr Cartmell behaved in a reasonable way in offering this adjustment and did not behave in a discriminatory way by reason of her disabilities as he was unaware of the need to balance the impact of two separate conditions and even if he had, the amelioration of the issues arising from asthma were clearly of paramount importance.

26. We noted that all of these allegations (and others which it is not necessary to discuss in detail), took place more than 3 months before the early conciliation reference was made on 15 October 2018 and before the claim form was presented. They were not related to the disciplinary process, being individual and isolated matters. As such, these are complaints which cannot be considered to have been presented in time and this matter will be discussed further below.

<u>Disciplinary incident and Operation Alduin</u>

27. On 12 April 2018, Miss Telford was invited to a meeting with managers regarding a security matter and the Tribunal was referred to a note of this meeting, (p716). Miss Telford was informed that a black mesh bag had been found in the car park and she confirmed it was hers. Included within this bag were USB sticks which included data relating to the Thorp Primary Domain Controller (PDC). Miss Telford raised her disability as issue, citing forgetfulness, but acknowledged that she vaguely remembered that a few weeks prior to the meeting, she was parking her car at a disabled bay, when various items spilled out of a bag onto the tarmac. On balance, the Tribunal accepted that Miss Telford dropped the black mesh bag in the car park, that

contents fell onto the ground and she omitted to pick up the items found, including the USB sticks.

28. What was significant was the Sellafield PDC was an operating system which had been downloaded onto her personal USB stick and that this was in an unencrypted format. This USB stick was used at home on her own computer and at work. This created a danger in terms of corruption of the Sellafield IT systems with the potential introduction of 'Malware' viruses and other damaging third-party software.

29. It was not initially clear to management why the PDC was contained on the personal and unencrypted USB stick. However, Miss Telford explained that she needed to start work each day late because of the symptoms arising from her disability. She needed to take medication each day and so as not to cause drowsiness, time had to be allowed for it to take effect. As a result of her late starts, Miss Telford would usually be the only person left working in her office after 4pm/4:30pm. She argued that she would sometimes be unable to access official encrypted USB drives because line management would have locked them away by 4.30pm for security reasons. As a consequence, Miss Telford said that she improvised and instead used unencrypted USB sticks in her possession. However, while this may be the case, she never explained why she did not raise this matter with line management and ask for encrypted USB sticks to be made available before they finished work for the day.

30. What was clear to the Tribunal, was that Miss Telford had failed to acknowledge during the investigation process, any awareness of the risks on her part involving data security. The memory sticks contained not only the Sellafield PDC, but also personal photographs and work relating to Miss Telford's weekend job with the computer game retailer, Game. This suggested that not only was sensitive work systems/data downloaded onto the unencrypted personal USB sticks, but occupied the same hardware with personal data too. The Tribunal was taken to an email in the bundle which Sellafield sent to employees as a reminder of the safe ways of storing data using encrypted memory sticks, but we accepted on balance, that she was aware of these devices prior to the disciplinary investigation, especially when taking into account her specialism in IT work, (p.770).

31. Miss Telford was suspended at this point while an investigation took place. the investigation was entitled *'Operation Alduin'* and the report was produced on 2 May 2018, p728. Its author Simon McNichol (and who did not give evidence during the hearing), described the risk management exercise in relation to the Sellafield data breach and what action was appropriate in relation to her actions. Recommendations were made (p732), including a referral of her case to HR for further investigation, an identification of the relevant risks in terms vulnerability to Sellafield's network and wider concerns regarding nuclear safety.

32. The Tribunal noted that the recommendations made in the Alduin report did not decide upon whether or not disciplinary action should be taken against Miss Telford. However, it was recorded that 261 hours of time were spent by Sellafield IT engineers and security experts as a consequence of the incident. This was evidence of the seriousness and rigour of the investigation and also demands placed on Sellafield resources.

HR Investigation

33. Following the completion of the Alduin report, Miss Telford was invited to an investigation meeting with Matthew Makin on 22 May 2018. She was accompanied by her trade union representative, (p757). The purpose of the interview was confirmed to Miss Telford. Within the interview record, she made amendments by hand to the typed document, (p.759). While we understood that these changes were made at the disciplinary hearing, we find that she agreed that the annotated version reflected what was discussed during the investigation meeting.

34. Mr Makin then conducted interviews with other witnesses, including Graham Cartmell (24 May 2018). He also emailed Dr Bickerton the OH physician concerning Miss Telford's suggestion that the medication which she was taking at the time of the incident could have impaired her judgment. In an email dated 21 June 2018, Dr Bickerton said that it was *'theoretically* possible that they could impair her judgment but was unable to give a higher likelihood than that, (p772).

35. The investigation report was completed and then produced on 25 June 2018. It is not necessary to consider the report in detail, except to note that Mr Makin found that Miss Telford had left the USB devices outside the B594 building on the Sellafield site, (p780) and that there was a case to answer, (p781).

Disciplinary hearing

36. Mr Makin recommended that the case proceed to a disciplinary hearing. In his letter dated 10 July 2018, he invited Miss Telford to a disciplinary hearing on 19 July 2018. The allegation to be considered was described as being [details – serious infringement]. He enclosed his investigation report and the letter warned that as the disciplinary hearing was considering a matter which could amount to gross misconduct, she was at risk of dismissal. She was advised that she could be supported a trade union representative if she wished.

37. The disciplinary hearing took place as planned on 19 July 2018 before the hearing officer, Graham Norman. Miss Telford attended with her trade union representative and a note of the hearing was included within the bundle. Miss Telford had confirmed that she had received all of the paperwork sent by Mr Makin and said that she anticipated her union representative would have

taken issue with the documents and sufficient time being available to prepare for the disciplinary hearing, (p.790). The disciplinary hearing began at 1pm and continued until 4:10pm, with adjournments for breaks. Miss Telford and her representative were able to contribute and make submissions as appropriate.

38. Mr Norman's decision was that the allegation of gross misconduct was proven and summary dismissal was the sanction imposed. Reasons were recorded in the note (p798) and his letter of 20 July 2018 confirmed the decision and notified Miss Telford of a right of appeal, (pp800 to 801).

39. This was a long hearing, and the Tribunal finds Mr Norman gave credible evidence that a full investigation into the issues took place, with a consideration of all relevant matters before a decision was made. He concluded that it was not reasonable for Miss Telford to place company information on an unencrypted USB stick and information was which was described as being classified 'official sensitive' in the Alduin report.

40. Mr Norman noted that the incident caused a loss of operations for a duration of up to 6 months. No convincing evidence was providing during the hearing of other identifiable and comparable Sellafield employees losing company data on an unencrypted USB stick. At its highest, Miss Telford made vague references to similar incidents which were not treated as seriously as her case, but while she might not have wanted to get other colleagues into trouble, when attending a disciplinary hearing, she would be expected to name those colleagues or at least provide some means of identifying them. The Tribunal did not hear evidence that she was willing or able to do so during the disciplinary process. Accordingly, Mr Norman was left to decide the matter on its own merits.

41. There was an issue before the Tribunal that Sellafield refused to allow a request for a delay to the disciplinary hearing raised by Miss Telford. However, this was not a credible allegation because there was no evidence that Miss Telford requested a delay to the disciplinary hearing. She did send an email at 18:50 on 17 July 2018 to Dominic Bradley (whom we understand to be a HR officer), questioning whether she could attend because of having to 'rush to hospital at 3:30pm that day, (p787). In this email, she noted that she had identified a lump and as she had previously had cancer was anxious to have it diagnosed. She said that this would take 2 weeks. She also mentioned that her Grandfather was in hospital and worried about stress and anxiety of hearing.

42. Mr Bradley replied on 18 July 2018 and provided her with employee assistance helpline information and confirmed to her that the disciplinary hearing can be moved if necessary. However, Miss Telford replied later that day at 15:42. She did not ask for a postponement and instead she simply confirmed to Mr Bradley that her witness Ms Cottier was available to attend disciplinary hearing the next day. She made no mention of her health or

anxiety issues and did not request a postponement. In the absence of any evidence to contrary, Miss Telford clearly felt that she no longer felt a need to request a postponement. Miss Telford gave evidence in cross examination claiming that she did call Mr Bradley requesting a postponement, but we do not find this evidence to be credible, given that neither she nor her trade union representative raised this matter as an issue in the hearing note in the bundle. We are not able to find that a request was made for a postponement as alleged and there was accordingly no request for management to refuse. However, even if a request had been made, Mr Bradley's email gave a clear indication that it would have been allowed.

43. A further issue was raised by Miss Telford concerning Mr Norman's suitability for the role of disciplinary manager. The Tribunal accepted that her was capable for the role and was at the correct management level to hear a case of this nature. He was responsible for Control Systems and so was familiar with the area where Miss Telford worked and understood the technical side of the allegations. The real issue related to an application made by Miss Telford for a Single Occupancy Vehicle Application ('SOVA') which we understood would allow her to use her car to attend work without sharing. She had previously held a SOVA licence, and it expired in March 2018. She left it until the date before it expired before making the application. Mr Norman was the manager who would have to approve the renewal application gave credible and reliable evidence that this day was his final day in work before he commenced a period of annual leave. The Tribunal accepted that the process for renewing a SOVA had been changed so that a renewal required a manager to review the application before giving approval and at this time, Mr Cartmell was not aware of how the system had changed. Not surprisingly, he was very busy before he began his leave and said that this was a matter which he would leave until his return.

44. The Tribunal was unable to find that this behaviour by Mr Norman was unreasonable and it in no way indicated his unsuitability to hear Miss Telford's disciplinary hearing. This matter simply arose because Miss Telford was insufficiently organised to renew her SOVA in good time before it expired and given that she found it to be so important, it is surprising that she failed to make the application earlier. Mr Norman's decision was a practical one and something that many people would do when about to commence a period of annual leave. It was clearly unrelated to Miss Telford's disability and it simply arose from the inevitable risk a person runs when leaving the renewal of documents with an expiry date to the last moment. She did not give convincing evidence that she was prevented from seeking approval from an alternative manager and this allegation simply appears to be a case of an employee searching for any reason to support their perceived unfairness of a decision made against them.

45. A further allegation related to Mr Cartmell's alleged briefing to staff in his team following Miss Telford's dismissal. Miss Telford said that she contacted a work colleague about retrieving her personal possessions following her

termination. She took exception to Mr Cartmell's instruction to staff that Miss Telford should be referred to HR who could deal with this request. There was no evidence heard which suggested any unfavourable comments were made about Miss Telford by Mr Cartmell. She ultimately asked to have her friend Ms Cottier nominated to collect her possessions for her, (p798). The Tribunal was unable to find that she was in any way treated inappropriately by Mr Cartmell and his instruction to involve HR in this matter was not surprising and a reasonable decision to take, following the termination of an employee byu reasons of their conduct.

The appeals

46. Miss Telford was offered a right of appeal in her dismissal letter, (p800/1). She formally gave notice of an appeal in her letter dated 31 July 2018, (p815). It was a short letter which effectively said her dismissal was an unjust decision, being disproportionate and inconsistent. Mr Bradley replied to her on 9 August 2018 and notified her that the appeal hearing would take place 17 September 2018 before Steve Bostock, who was the site director. She was informed of her right to be accompanied by a union representative, (p816).

47. In the meantime, Miss Telford received the notes of the disciplinary hearing and provided her grounds of appeal in an email sent on 14 September 2018, (p817). In this email she made reference to her previously unblemished employment record, argued that the data on the unencrypted USB stick was not 'official sensitive' and that her ongoing health issues affected her conduct.

48. The first appeal took place on 17 September 2018 before Steve Bostock as planned. Miss Telford was represented by Gill Wood of the union, Prospect (p819). The hearing ran from 1:30pm to 2:40pm. Mr Bostock did not reach a final decision because he wanted to look into the background concerning her health and the use of the unencrypted USB stick, but he nonetheless cautioned her that the appeal was dealing with a serious matter. Mr Bostock's evidence before the Tribunal was reliable and we accepted that he approached the appeal with an open mind. It is fair to say that he understood why Mr Norman had made the decision which he had, but quite properly felt that the investigations into the background of this matter was appropriate before he made his own decision.

49. In particular, Mr Bostock was concerned about 2 instances suggested by Miss Telford in her appeal that there were 2 instances of similar circumstances where employees mislaid USB sticks but were not dismissed. He received information concerning these cases from Janice Thompson in an email dated 17 September 2018, (p823). There were, however, important differences between these 2 cases and that which resulted in Miss Telford's dismissal. Both of the alleged 'similar' cases involved less serious matters. One arose from the loss of a Sellafield dongle containing official (rather than official sensitive information) and the other, involving the loss of an encrypted

Sellafield USB stick. As such, the gravity of Miss Telford's situation was greater than the two comparator cases and therefore did not involve the same circumstances.

50. A further email was sent by Mr Bostock to Mr Makin concerning the question of whether it had been possible to analyse all machines, in order that Sellafield could understand the extent of use of non-Sellafield unencrypted USB sticks across the site. Mr Makin replied in an email on 18 September 2018 explaining why this was not possible and while it is not necessary to discuss his reasons in detail, the Tribunal accepts that Mr Makin clearly explained why it was not a simple or practicable exercise and this enquiry was not a proportionate avenue to explore and would not have undermined the seriousness of Miss Telford's case. She had not been able to demonstrate that anyone else had been treated less severely than she had been, in no less serious circumstances, but importantly, Mr Bostock's actions demonstrated a willingness to investigate matters further so that he could be satisfied that he had sufficient information available before reaching his decision.

51. Following these enquiries, Mr Bostock prepared his decision letter, and this was sent on 19 September 2018. Miss Telford's appeal was rejected, (p831). The Tribunal accepted that Mr Bostock was thorough and proportionate in the way that he conducted his hearing of the first appeal. At Sellafield, there was one further right of appeal and Miss Telford was notified of this right in the letter. In an undated letter, she gave notice that she wished to exercise that right, effectively raising the same issues that she raised in her first appeal, (p832).

52. The second appeal took place on 1 November 2018 before Heather Roberts (HR director) and further investigations took place. Miss Telford was accompanied by Ms Cottier rather than a union representative and the hearing was just over an hour in length, running from 2pm to 3:05pm, with a short adjournment for Ms Roberts to consider her decision. Ms Roberts decided not to uphold the second appeal and provided her decision in a letter (date), (p898). Miss Roberts gave credible evidence, and we did not hear anything from her during cross examination which suggested that she had applied the appeal process in an unreasonable way or treated Miss Telford in a potentially discriminatory way.

Miscellaneous allegations

53. There was an allegation that Mr Cartmell briefed Miss Telford's colleagues following her dismissal in a detrimental way, but we did not hear any convincing evidence to support this allegation. It was denied by Mr Cartmell and do not find that any evidence that he said anything unfavourable about her to staff at a briefing as she alleged.

54. There was also an allegation relating to the staff Christmas party in 2018 and what appeared to be an argument that Miss Telford was not invited to attend

it. We found this allegation to be somewhat difficult to understand and following a dismissal on grounds of conduct, it would be surprising for an invitation to be extended to the member of staff concerned and also surprising why that person would even want to attend. To some extent, the allegation appears to reflect Miss Telford's inability to reflect and understand the seriousness of what gave rise to her dismissal. However, whatever her reasons for raising this complaint, we did not hear any convincing evidence during the hearing which would persuade us that this matter was connected in any way with less favourable treatment connected with Miss Telford's disability.

The law

Unfair dismissal

55. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.

56. In this case the reason relied upon by the Respondent is conduct which is a reason falling within subsection (2).

57. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)).

58. It is clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair.

59. The Polkey principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

Disability discrimination

Direct discrimination

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

Causation

61. In some cases the reason for the treatment is inherent in the act itself.

62. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause.

Comparators

63. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Discrimination arising from a disability

64. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

65. In City of York Council v Grosset 2018 ICR 1492 the Court of Appeal held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment under S.15, even if the employer did not know that the disability caused the misconduct.

66. Unfavourable treatment will not be unlawful under S.15 if it is objectively justified.

Failure to make reasonable adjustments

67. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial

disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

Time limits in discrimination complaints

68. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Case law referred to in submissions

69. Ms Connolly referred to a number of authorities in her final submissions and they are as follows, (with a brief description of the salient points determined which are relevant to this case):

a) *Hadjioannu v Coral Casinos Ltd* [1981] IRLR 352

When considering allegations that a claimant has been dismissed when others in similar circumstances have been treated less harshly, a Tribunal should adopt a 'tariff' approach to industrial misconduct, with each case being determined on its own merits. Truly 'parallel' circumstances are something which is not often encountered.

b) *Lyfar v Brighton & Sussex University Hospitals Trust* [2006] EWCA Civ 1548

Allegations of continuing acts for the purposes of time limits arguments should be carefully considered and should not be applied to a series of unconnected or isolated acts.

c) *Greco v General Physics* UKEAT/0114/16

This case also considers the question of continuing acts and reiterates the well-known case law on the subject, noting that while a single manager may be responsible for a series of alleged acts against an employee, they must be related and connected in some way and not just a collection of different matters.

d) *Wilko Retail Ltd v Gaskell* UKEAT/0191/18/BA

Another case relating to the question of consistency of treatment concerning conduct unfair dismissal complaints. The decision reminded us that the range of reasonable responses test extended to questions of consistency and providing the assessment by the dismissing manager of the similarities and differences was one which a reasonable employer could have made, a Tribunal should not interfere with the decision to dismiss.

e) *Adadeji v University Hospitals Birmingham NHS Trust* [2021] EWCA Civ 23

Time limits were considered in this case of unfair dismissal and race discrimination and while considering the earlier case law and the correct approach to be adopted by the Tribunal, when deciding whether to exercise its discretion on just and equitable grounds under s.123 EQA to extend time, is to assess all factors including the length of and the reasons for delay.

70. While these summaries are not exhaustive, further consideration will be given to these cases as relevant in the discussion below.

Discussion

Unfair dismissal

71. Miss Telford was dismissed by Sellafield by its manager Mr Norman at the disciplinary hearing on 19 July 2018. Although the letter confirming the dismissal was dated 20 July 2018, the Tribunal are satisfied that the decision to dismiss (and that the reason for dismissing was Miss Telford's conduct), were communicated to her at the end of the disciplinary hearing. Accordingly, the letter simply confirmed what she already knew to be the case from the previous day.

72. The respondent relies upon the potentially fair reason of Miss Telford's conduct, which is a potentially fair reason for a decision to dismiss under s98 ERA.

73. Miss Connolly helpfully summarised in her submissions the well-known test to be applied by Tribunals when considering unfair dismissal cases involving conduct. We will deal with the key questions in turn.

74. Firstly, we accepted that Mr Norman who made the decision to dismiss on behalf of Sellafield reasonably believed that the conduct alleged had taken place for the following reasons:

a) Mr Norman gave credible evidence which was supported by the documentation in the hearing bundle that he believed that Miss Telford stored and retained company information relating to THORP on a personal unencrypted USB stick. Indeed, Miss Telford accepted she had done so.

b) The information contained on the unencrypted USB stick was categorised as being 'official sensitive' information and this was confirmed following the analysis of the data in the Alduin report, because it related to THORP. While Miss Telford maintained an argument that the data could not be categorised as official sensitive, her evidence was not credible concerning this matter and she was unable to undermine the high degree of sensitivity placed upon the PDC data by Mr Norman.

75. The Tribunal also accepted that Mr Norman as the dismissing officer in this case carried out as much investigation as was reasonable in all the circumstances:

a) Firstly, he had access to the report produced from Operation Alduin, which was detailed and explained the seriousness of the data breach which had taken place including the impact upon additional employee time required to deal with the incident.

b) Secondly, he had access to the investigation report, which involved an interview with Miss Telford, relevant witnesses and additional enquiries and communications before it was determined that there was a case to answer. This report was not challenged by Miss Telford or her union representative. Moreover, she had accepted that the unencrypted USB stick, which was found, was her property. Although following her dismissal, the appeals were very much focused on Miss Telford's disability, proportionality and similar cases not being treated in the same way, it was not alleged by Miss Telford that these investigations were inadequate. For the avoidance of doubt, the Tribunal accepted that the appeals were handled in a fair and reasonable way and proper and appropriate enquiries were made to consider the issues raised by Miss Telford.

c) Medical evidence obtained by Makin during his investigation from Dr Bickerton in OH, but at its highest, it was deemed possible that her memory might have been affected and importantly the risk was not described as significant or likely. Miss Telford did say that she could not remember taking the USB stick, but did recall dropping her bag and may not have picked up everything that fell from it onto the carpark tarmac. Ultimately, she did not provide any convincing evidence that her health issues/disability materially affected the conduct under investigation by Sellafield. She may have worked atypical hours because of her medication, but she did so to function effectively at work and there was no credible evidence to suggest that her decision-making skills and overall capability for her role were so impaired that she decided to use an inappropriate USB stick and to remove it from her office. The flexibility of hours that Miss Telford was permitted to work were reasonable adjustments made by Sellafield as her employer and they had every reason to assume as an employee with many years of service could operate with minimal supervision and make appropriate decision relating to the management of data.

76. The Sellafield Disciplinary policy provides that negligence or irresponsibility can be conduct which could be gross misconduct justifying summary dismissal, (p702). Miss Telford stored official sensitive information on an unencrypted personal USB stick. She knew that this action was a breach of Sellafield's procedure, she continued to use the USB stick, nonetheless. We accepted that Miss Telford knew the risks of data leaving the Sellafield site, that data being used with external non-Sellafield equipment and then subsequently reinserted in Sellafield IT equipment.

77. Miss Telford was an experienced employee in control systems engineering and as such, could in no way be considered to be an employee with limited IT experience and knowledge of data handling. The Tribunal found that an employee's long service works both ways and it can reasonably justify a dismissal if there was an expectation that they should have known better. This would be especially the case, where there is an absence of personal insight on the part of the employee in question in terms of their responsibility into the actual '*wrong'* under investigation. The Tribunal failed to see any evidence that Miss Telford recognised her wrongdoing, even though she had used her own personal unencrypted USB stick and took it off site and continued to use that stick on other non-Sellafield machines.

78. We also found that Ms Connolly was correct in asserting in her submissions that Sellafield's unique work meant that employee conduct in relation to security was something which would be treated strictly given the potential consequences to nuclear safety. The Tribunal heard no evidence which persuaded them that the alleged comparators were responsible for conduct of a similar nature to that of Miss Telford, with a lower penalty being imposed. The two 'similar' cases identified during the appeal and investigated by Mr Bostock revealed two lesser breaches which were not of same magnitude as Miss Telford's failure and as such she was not treated in a disproportionate or inconsistent way.

79. Ultimately, we must conclude that the decision to dismiss was a decision which was within the range of reasonable sanctions available to a disciplinary hearing manager for the conduct in question. It may have seemed harsh to Miss Telford, but it was not disproportionate. Applying the principles described by Miss Connolly in the ***Hadjioannu*** case (see above), we accepted that Miss Telford's treatment was disproportionate when compared with the similar cases that she referred to. They involved conduct that was less serious than Miss Telford's conduct for the reasons given above and accordingly, Miss Telford cannot argue that dismissal was not a proportionate or consistent sanction.

80. Finally, in relation to the unfair dismissal, an issue that was raised by Miss Telford was the duration of the disciplinary process and its impact upon the overall fairness of the dismissal. We noted that her suspension began on 12 April 2018, with her disciplinary hearing that gave rise to her dismissal taking place on 19 July 2018. Taking into account the issues under investigation, this was not a long process and did not affect the overall fairness of the disciplinary process and the decision to dismiss.

81. While it was not necessary to consider the implications of *Polkey* or contributory fault, (given the findings that we have already made that the dismissal was fair), we would say that had we been wrong in reaching this conclusion, we would have found significant fault on the part of Miss Telford. This means that had the disciplinary process been found to be unfair, we would have found that a fair process would have still yielded the same outcome of dismissal. In addition, substantial contributory fault would also have been relevant in this case and in the absence of truly comparable instances of employees being treated in a lesser way, this could have been as much as 100% contributory fault.

82. For these reasons, we must accept that Miss Telford was dismissed for the fair reason of her conduct, that Mr Norman had reasonable grounds to find that she was responsible for that conduct, following a detailed and appropriate investigation and his decision to dismiss was a proportionate sanction and within the range of reasonable responses.

Discrimination

Disability

83. There was no dispute that Miss Telford was disabled in accordance with section 6 EQA, by reason of IBS, chronic pain, asthma and endometriosis. The other impairments which Miss Telford relied upon were not accepted by Sellafield as being relevant to her claim. We agreed with this assertion and the major issues disability discrimination in this case appeared to relate to the four accepted impairments and there was no prejudice to Miss Telford in the additional impairments not being included in our consideration of these complaints.

Time limits and complaints which the Tribunal had jurisdiction to hear

84. Unlike the complaint of unfair dismissal, time limits played a significant part in the Tribunal's consideration of this complaint. To assist in our management of the decision making in this case, we have already referred to time limits in our discussion of the issues in this case, above. There were three issues which we accepted were out of time and these were:

    a) An allegation that Sellafield failed to make reasonable adjustments by refusing to delay the disciplinary hearing,

    b) An allegation that Sellafield directly discriminated against Miss Telford, when Mr Norman was appointed to act as a disciplinary hearing manager,

    c) An allegation that Sellafield directly discriminated against Miss Telford when Mr Cartmell held a briefing with his team and her former colleagues, about Miss Telford following her dismissal.

Consideration of the allegations accepted by the Tribunal

85. First of all, it is important to note that we heard limited evidence from Miss Telford in her evidence or arising from her cross examination of Sellafield's witnesses concerning these allegations.

86. In terms of alleged failure by Sellafield to delay the disciplinary hearing, we noted in the findings of fact that Miss Telford entered into an exchange of emails with Mr Bradley shortly before the final hearing took place. There was initially an indication that Miss Telford would be in difficulties because of health and personal issues and Mr Bradley was clear in saying that she could request a postponement of the disciplinary hearing if she felt this action was required. Instead, she replied in a way which effectively confirmed that she was ready to attend the disciplinary hearing on the next day and made no further reference to a postponement being required in that email. Indeed, the note of the disciplinary hearing recorded no request for a postponement having been made by Miss Telford or her union representative.

87. However, had such a request for a postponement been made by Miss Telford, we find that there was no suggestion from the available evidence that Mr Bradley or his colleagues would have refused such a request had it related to Miss Telford's health, (or indeed her personal circumstances). Accordingly, a potential reasonable adjustment may have been appropriate, had it been requested and would have been allowed had such a request been made. There may have been a question as to whether Miss Telford's relevant disability related to an impairment which was accepted as a disability in these proceedings. However, for the reasons given above, we were not required to consider this particular allegation in order that we could determine this particular issue.

88. In terms of Mr Norman's appointment as a disciplinary hearing manager, we found that he was an appropriate hearing officer and decision maker because of his management grade level and background knowledge. However, this background knowledge did not place him in a position where he was in conflict with his ability to hear the case fairly and in a way that would treat Miss Telford less favourably than a comparable non-disabled colleague in a disciplinary hearing.

89. Mr Norman was not Miss Telford's line manager and while he had some previous contact with her in relation to the SOVA renewal application. However, apart him being unable to deal with the application immediately (for understandable reasons), there was no suggestion of her being singled out and certainly not in connection with disabilities. The decision to appoint him as a disciplinary hearing manager was not less favourable treatment, was a reasonable and appropriate step to take and was certainly not connected with Miss Telford's disabilities.

90. Finally, in terms of the allegation that there was less favourable treatment when Mr Cartmell had a meeting with Miss Telford's former colleagues, post dismissal, we were unable to find any evidence of such a briefing taking place as alleged based upon the evidence before us. At its highest, Mr Cartmell made a decision regarding HR being the single point of contact following Miss Telford's dismissal and this was simply concerning her request to recover her personal possessions. This was not less favourable treatment and did not amount to discrimination in relation to Miss Telford's disabilities.

91. Accordingly, none of the 3 remaining allegations which were accepted as relevant issues in these proceedings are found to have amounted to treatment amounting to direct discrimination, discrimination arising from Miss Telford's disabilities or a failure to make reasonable adjustments because they did not take place as she alleged.

92. For the avoidance of doubt, all of the other issues which she advanced as forming part of her claim must fail for the reasons given above because they were presented out of time, they did not take place as alleged, or did (in the case of victimisation), did not include a relevant protected disclosure. The disability discrimination complaints are not well founded and cannot succeed.

Conclusion

93. This is an unfortunate case, and it is always sad to see an employee with such a period of long service lose their employment, especially in a job which Miss Telford clearly enjoyed. However, while she clearly felt that her employer had not behaved in a fair way towards her, she was unable to demonstrate that either the complaints of unfair dismissal or disability discrimination were well founded and should succeed.

94. She clearly had a number of health issues which had troubled her for many years and four of those were accepted by Sellafield as existing and being known to them at the material time. There was a clear history of an employer trying to accommodate and support an employee who had several impairments, and which interacted in complex ways which made reasonable adjustments difficult.

95. However, the Tribunal felt that Sellafield was a company that in this case, treated its employee fairly and attempted to afford her all reasonable support in allowing her to continue to remain in work. This included flexible working and the involvement of OH to assist in ensuring that appropriate support was provided and remained in place. At times, it may have seemed that Sellafield felt that by solving one problem, they opened up another and the provision of a separate room to ameliorate the impact of odours in the open plan office, caused her anxiety in respect of her IBS and the distance that this room was from the nearest toilets. There was certainly no evidence that they treated her less favourably by reason of her disabilities.

96. But an employer is simply expected to behave reasonably when it comes to adjustments and in this case, they have complied with that duty. Unfortunately, Miss Telford while clearly experiencing and anguish during the hearing, had reached a situation with her health issues that she was hyper vigilant to their impact when they appeared, even when she was in a relatively relaxed state. The Tribunal did its best to accommodate these issues and as a result, the generous listing for this final hearing left us with only enough time to deal with witness evidence and final submissions. As we have already said however, this was not a problem for the Tribunal as it was a proportionate means of supporting Miss Telford and it was in the interests of justice to adopt this approach.

97. This was a case which involved an employer who operated in a field where national security and safety was of paramount importance and it was essential that data security was taken extremely safety. The management of personal data has for all employers and employees become an increasingly important matter throughout the world of work, but with Sellafield, there was the added dimension of data being sensitive in terms of its potential impact on nuclear safety, the threat of terrorism and overall national security.

98. One does not have to be an enthusiast of the history of espionage to be aware of how the smallest of information breaches can form part of a much wider programme or strategy by a third-party body to undermine sensitive industries such as Sellafield. It is not hyperbole or hubris for an employer dealing with these environments to treat any data breach as potentially forming part of a much greater danger to the business, the local environment or indeed the nation as a whole. It is unfortunate that Miss Telford failed to recognise the real dangers and concerns which arose from the way in which she managed the Thorp PDC data, but for the reasons given above, this Tribunal must conclude that she was treated fairly, and dismissal was not a surprising outcome given what had happened.

99. Finally, we would say that for a case of this magnitude, it is no small feat for an unrepresented claimant to participate in a 10-day hearing covering a wide range of issues and evidence. This is even allowing for the adjustments made by the Tribunal in accordance with the overriding objective and relevant parts of the Equal Treatment Bench Book. While Miss Telford will no doubt be disappointed with the outcome of this hearing, the Tribunal recognised how hard she worked during the hearing and the efforts she made to continue, even though she felt it was challenging and difficult. Hopefully, she found the adjustments allowed by the Tribunal assisted her in this regard.

100. We must also thank Miss Connolly for the way in which she approached the case and in particular the sensitive way in which she treated Miss Telford (and took account of her impairments), while ensuring that she properly represented Sellafield and managed their witnesses, who at times had to show some flexibility as to when they expected to give their evidence. To have the cooperation of representatives in a case such as this was appreciated by the Tribunal and assisted us in ensuring that the case ran its course as smoothly as possible.

_____

Employment Judge Johnson

Date 9 December 2022

JUDGMENT SENT TO THE PARTIES ON

15 December 2022

FOR THE TRIBUNAL OFFICE

Appendix
Template for determining relevant complaints and Issues (referred to at paragraph 11 of the reasons to the judgment above)

1. Time limits

1.1 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.2 Was the unfair dismissal complaint] made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the effective date of termination?

1.2.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

2. Unfair dismissal

Dismissal

2.1 Can the claimant prove that there was a dismissal?

Reason

2.2 Has the respondent shown the reason or principal reason for dismissal?

2.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

2.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

2.5 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.5.1 The respondent genuinely believed the claimant had committed misconduct
2.5.2 there were reasonable grounds for that belief;
2.5.3 at the time the belief was formed the respondent had carried out a reasonable investigation;
2.5.4 the respondent followed a reasonably fair procedure;
2.5.5 dismissal was within the band of reasonable responses.

2.6 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 What basic award is payable to the claimant, if any?

3.7 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3.8 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.8.1 What financial losses has the dismissal caused the claimant?
3.8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.8.3 If not, for what period of loss should the claimant be compensated?
3.8.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.8.5 If so, should the claimant's compensation be reduced? By how much?
3.8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.8.7 Did the respondent or the claimant unreasonably fail to comply with it?
3.8.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.8.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
3.8.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.8.11 Does the statutory cap of fifty-two weeks' pay apply?

3.9 What basic award is payable to the claimant, if any?

3.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did she have a physical or mental impairment?

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

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

4.1.4 If so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

5. Harassment related to disability (Equality Act 2010 section 26)

5.1 Did the respondent do the following alleged things:

5.1.1 [*date and brief details including name of person responsible]*

5.2 If so, was that unwanted conduct?

5.3 Was it related to disability?

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

5.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Direct disability discrimination (Equality Act 2010 section 13)

6.1 What are the facts in relation to the following allegations:

6.1.1 [*date and brief details including name of person responsibl*e]

6.1.2 *etc*

6.2 Did the claimant reasonably see the treatment as a detriment?

6.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances *of a without a disability* was or would have been treated? [The claimant says s/he was treated worse than [*names of comparators*] *or* The claimant relies on a hypothetical comparison.

6.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of *disability*?

6.5 If so, has the respondent shown that there was no less favourable treatment because of *disability*?

7. Discrimination arising from disability (Equality Act 2010 section 15)

7.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

7.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

7.2.1 [*date and brief details including name of person responsible*]

7.3 Did the following things arise in consequence of the claimant's disability:

7.3.1 [e.g. *the claimant's sickness absence between date and date*]?

7.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

7.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

7.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.6.1 [respondent provides details]

7.7 The Tribunal will decide in particular:

7.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.7.2 could something less discriminatory have been done instead;

7.7.3 how should the needs of the claimant and the respondent be balanced?

8. Indirect discrimination (Equality Act 2010 section 19)

8.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

8.1.1 [*PCP]*
8.1.2 [*PCP]*

8.2 Did the respondent apply any of those the PCPs to the claimant?

8.3 Did the respondent apply any such PCP to *persons with whom the claimant does not share the characteristic,* or would it have done so?

8.4 Did the PCP put *persons with whom the claimant shares the characteristic,* at a particular disadvantage when compared with *persons with whom the claimant does not share the characteristic*, in that [*specify nature of the disadvantage*?

8.5 Did the PCP put the claimant at that disadvantage?

8.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

8.6.1 [respondent specifies]

8.7 The Tribunal will decide in particular:

8.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

8.7.2 could something less discriminatory have been done instead;

8.7.3 how should the needs of the claimant and the respondent be balanced?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

9.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

9.2.1 [PCP]

9.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that [disadvantage]?

9.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

9.5.1 [adjustment]
9.5.2 [adjustment]

9.6 By what date should the respondent reasonably have taken those steps?

10. Victimisation (Equality Act 2010 section 27)

10.1 Did the claimant do a protected act as follows:

10.1.1 [*date and brief details including name of person responsible*]?

10.2 [*and/or:* Did the respondent believe that the claimant had done or might do a protected act, in that [ ]?]

10.3 Did the respondent do the following things:

10.3.1 [*include date*]

10.4 By doing so, did it subject the claimant to detriment?

10.5 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

10.6 If so, has the respondent shown that there was no contravention of section 27?

11. Remedy for discrimination or victimisation

11.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

11.2 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

11.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

11.9 Did the respondent or the claimant unreasonably fail to comply with it?

11.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

11.11 By what proportion, up to 25%?

11.12 Should interest be awarded? How much?