



# **EMPLOYMENT TRIBUNALS**

**Claimant:** Ms A Searle

**Respondent:** Every Sensation Care Ltd (R1)  
Mr T Younas (R2)

**HELD by** CVP                      **ON:** 21-25 November 2022

**BEFORE:** Employment Judge Wade  
**Members:** Mr T Downes  
Mr D Pugh

## **REPRESENTATION:**

**Claimant:** Mr A Effiong, lay representative  
**Respondent:** Ms N Twine, Counsel

Note: A summary of these reasons was provided orally in an extempore Judgment delivered on 25 November 2022, which was sent to the parties on 28 November 2022. A request for the written reasons was received from the claimant on 3 December 2022. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the Judgment given on 25 November is also repeated below:

## **JUDGMENT**

1 The claimant's constructive unfair dismissal complaint against the first respondent is well founded and it shall pay to her the sum of £2176 as a Basic Award.

2 The claimant's allegation of disability related harassment concerning questions posed to her GP without her consent succeeds, and the Tribunal awards £17,000 as compensation for injury to feelings/exacerbation of a psychiatric injury and £1856.92 in interest, for which they are jointly and severally liable.

3 The claimant's remaining Equality Act complaints are dismissed.

4 The assessment of Compensatory Award/pecuniary loss is adjourned to 14 December 2022, subject to further Orders.

## REASONS

### Introduction

1. The claimant, a registered nurse and former care home manager, presented claims of constructive unfair dismissal and disability discrimination on 5 October 2021, and this final hearing was fixed at a case management in hearing in December 2021. A Tribunal had already decided that the claimant was a disabled person by reason of depression, from 2 June 2021, not long before her resignation. The second respondent is a director of the first respondent – a company which operates in the care sector.
2. The claimant was a litigant in person when the claims were presented, but from the summer of this year she has been represented by Mr Effiong, who had prepared a helpful skeleton indicating a number of preliminary evidential and other matters. The Tribunal dealt with those at the start of the hearing together with clarifying the documents that were available to us. There was a relatively late conversion to a CVP hearing.

### Evidence

3. The Tribunal has heard oral evidence from the claimant, Miss Searle and her former colleague, a former deputy, Miss Jones. On behalf of the respondent we heard from Mr Younas, Miss Kauser (human resources) and Mr Donovan (area general manager). We had a compact file of relevant documents, to which there were some additions in the course of the hearing – notably unredacted versions of the claimant's medical records. We also had the opportunity to listen to a recording of the claimant's grievance meeting. The hearing file contained a transcript of eighty pages or so of communications between the claimant and Mr Younas, which informed many of our findings. A particularly material extract is reproduced in full below.

### Allegations and Issues

4. The issues were set out in a helpful list agreed by the parties on the basis of previous case management hearings. The issues are apparent in the headings and conclusions below, including in relation to alleged failures to make reasonable adjustments and harassment. Allegations 6, 7, 9 to 11, and 16 to 19 of those listed below were also pursued as disability related harassment. The factual allegations said to be breaches of the implied term of trust and confidence were:
  - 4.1. causing or permitting unreasonable increase in the claimant's hours of work and workload from March 2020, during the coronavirus pandemic;
  - 4.2. the second respondent dismissing the claimant's complaints and particular requests for assistance on 8 January 2021;
  - 4.3. causing or permitting the claimant to be sent notifications of coronavirus test results on her personal mobile on 17 June 2021;

- 4.4. the second respondent questioning the claimant's medication on 21 June 2021;
- 4.5. the second respondent requesting the claimant consent to a medical report being obtained from her GP on 21 June 2021;
- 4.6. the second respondent asking the claimant to consent to a medical report being obtained on 23 June 2021, when she says that she had advised the second respondent that it was premature as she was in the early stage of treatment;
- 4.7. sending a consent form to the claimant on 23 June 2021 containing questions proposed for a GP;
- 4.8. the second respondent failing to heed the claimant's concerns in relation to the management of absence on 25 June 2021;
- 4.9. on 2 July 2021 the first respondent's HR manager putting questions to the claimant's GP for preparation of the report which did not mirror entirely those the claimant had consented to;
- 4.10. the second respondent failing to heed the claimant's concerns in relation to the questions put to her GP on 13 July 2021 and chastising the claimant by WhatsApp;
- 4.11. generally managing the claimant's sickness absence differently to other staff from 2 June 2021
- 4.12. failing to carry out a full and fair investigation into the claimant's grievance;
- 4.13. failing to provide the claimant with a copy of the first respondent's grievance policy ahead of the meeting on 15 July 2021;
- 4.14. failing to offer the claimant a venue other than Adeline House for the grievance hearing;
- 4.15. the first respondent's HR manager failing to conduct the grievance hearing fairly reasonably on 15 July 2021;
- 4.16. dismissing the grievance by letter of 24 July 2021;
- 4.17. failing to provide claimant with the minutes of the grievance hearing held on 15 July 2021 until 3 August 2021;
- 4.18. the second respondent emailing claimant at 23:56 hours on 2 August 2021;
- 4.19. fabricating the minutes of the grievance hearing on 15 July 2021.

### The Law

5. The relevant provisions are Sections 94, 95 and 98 of the Employment Rights Act 1996 (constructive unfair dismissal); Sections 40 and 26 of the Equality Act 2010 (harassment); and Sections 20 and 21, with Schedule 8 of the Equality Act (reasonable adjustments).
6. Principles derived from case law were within the skeletons and submissions of Mr Effiong and Ms Twine and are expressed within our conclusions where relevant.

7. There was no point of law in dispute between the parties.

Findings of fact - background

8. The claimant was employed by Every Sensation Care Ltd (“ESC”), the first respondent on 29 May 2017 as the registered care home manager of its facility which provided nursing and social care for older adults. Mr Younas is a director of ESC. He was the claimant’s direct line manager. He was also the CQC “responsible person” for the setting at the material times, while she was the “registered manager”. That partnership between them worked very well. After a CQC assessment designated the setting requiring improvement, in 2018, they worked hard to improve that rating to a “good” on the next inspection. There is no doubt that their relationship, when working effectively, was very powerful in providing care to residents.
9. The claimant has a neurological condition, idiopathy intercranial hypertension - increased cerebrospinal fluid in the brain - “IIH”. That had been first diagnosed in 2008. Its symptoms include headache, pain, and other symptoms which flare up or could be brought on by stress. She also had experienced depression and anxiety symptoms at that time as a result of changes in her life driven by IIH and she subsequently had a number of significant episodes of depression and anxiety.
10. The reasons of the previous Employment Tribunal for its conclusion that the claimant was a disabled person from 2 June 2021 are not available to us, but are unsurprising given these findings and the claimant’s impact assessment, which was also before us.
11. The working relationship between the claimant and Mr Younas had faced challenges in the past. When the setting was subject to the “requires improvement” designation, the claimant had initially become defensive and made some inappropriate comments to Mr Younas and his fellow director at the time. Indicative of their relationship and the claimant’s value to Mr Younas as a nurse qualified registered manager, he was prepared to work with her and let that conduct go, effectively, as an aberration, and something that they could work through. Nurse qualified managers are, to adopt his words, like hens’ teeth. He respected the claimant.
12. The onset of the pandemic in March 2020 was an unprecedented challenge, which came after this setting had been designated as “good”. That assessment can no doubt be credited to their work at that time. The claimant’s sense of responsibility for the setting continued into the pandemic. The strength of their relationship was to be further tested.
13. Mr Younas knew of the claimant’s IIH condition; he is also a pharmacist. He asked friends about it and he did his own research when it first came up. The claimant did not tell him, either in January 2021 when IIH was flaring, or at any time prior to June of 2021, that she had experienced previous episodes of depression and anxiety, or the impact those episodes had on her life at the time.
14. The first respondent has a sister company, which operates a number of care home settings, and together the first respondent and associated companies employ around 20 registered nurses, including, at the material times, the claimant.
15. Miss Kauser was the HR manager for both this setting and those others at the material times. The respondents’ key performance indicators were: occupancy and minimising the use of agency staff. The claimant was recognised to be an employee who likes to have control and freedom to run things as she sees fit, and

provided she was endeavouring to meet those key indicators, Mr Younas was prepared to work with her approach, when any challenges arose.

16. Miss Jones was only employed for five hours per week as deputy manager and the rest of her time was for administration only. That was indicative of the resources that were available given the occupancy in this setting, which was not at capacity or anywhere near it, at the material times.
17. Both Miss Jones and the claimant would undertake clinical or caring duties on shift, when staffing shortfalls meant that was imperative.
18. The Covid pandemic placed a huge strain on the claimant and her deputy manager and they both worked additional hours. They pragmatically operated a time off in lieu arrangement, which meant that they could take time off in lieu, not necessarily when convenient to them, or when they might have best needed respite, but they did work through the pandemic in that way.
19. The claimant also took a usual holiday entitlement, but she had with her the setting "on call" mobile telephone with her at times, and she also used her own personal mobile phone as part of her duties. On occasions she would receive calls from people when she was off duty, and that was because of her sense of responsibility for the setting, and that its staff and its residents properly regarded her as their leader.

#### Findings and conclusions on the allegations

20. The respondent caused or permitted an unreasonable increase in hours from the onset of the coronavirus pandemic. We consider the claimant is mistaken in this allegation. The claimant's medical notes include history about a previous onset of depression in another setting in 2015, when the claimant identified very clearly (a) the extent of her excessive hours of work and (b) that they were causing great difficulties for her, as part of the context for that episode.
21. In contrast, in her reporting to a counsellor in connection with the onset of the 2021 episode, she identified the responsibility and the changes in the duties as problematic for her, with no mention of excessive hours. That was a clinical conversation, in which the claimant was frankly discussing the source of her difficulties with the Covid pandemic, The requirement for testing and testing protocols and pandemic and infection control measures and the management of those, which took her away from interacting with staff and residents, was the issue reported. She attributed 30 hours or so a week to that part of her role. We find that part of the cause of the strain on the claimant was undoubtedly that change in the duties that happened as a result of the pandemic. We find that because of the ability to take time off in lieu (and that the claimant did so), the hours of work were not increased overall in a way which was outside normal working hours limits, albeit at times, particular days were extended.
22. As an allegation that the first respondent permitted or caused an increase in hours of work, we do not find that it was so and the respondent's records reflected this. To the extent that on any particular day hours were longer, the reasonable and proper cause of that was the needs of the residents in a pandemic. The first respondent's conduct in this respect was with reasonable and proper cause and in any event not such that it was likely to destroy or damage trust and confidence in the context at the time.
23. The respondent dismissing the claimant's requests and particular request for assistance on 8 January 2021. By November 2020 the claimant was feeling the

strain of the pandemic. The general picture in the communications between the claimant and Mr Younas was that they communicated in all manner of ways: picking up the phone, WhatsApp, email - they had very good communications between them. They were warm, cordial, and friendly to each other throughout this time, indicative of their good working relationship sustaining.

24. On 19 November Mr Younas had sent a message to the claimant, around midnight, asking for a task to be done. The claimant had sent him a message saying, "please don't message late at night " or words to that effect. His rather blunt response to that was, "turn off notifications". He did then refrain as best he could from sending messages late at night. His practice was to communicate when matters occurred to him – he did not expect the claimant to read or attend to matters then, but he wanted to communicate when the matter was fresh in his mind. The claimant identifies her message in reply as indicating the strain that she was under, because they had communicated out of hours throughout their working relationship. She says her message should have been an indicator to him that something was wrong with her health, whereas he simply took it at face value and acted upon it. He tried not to message after hours thereafter, and their warm and friendly messages continued.
25. By January of 2021, between Christmas and New Year, the setting had had a Covid outbreak. It is somewhat extraordinary and a huge credit to the claimant and her colleagues that their setting had not had an outbreak until this point, but the claimant was under great strain as a result. She was in contact with Mr Younas and she and Miss Jones felt unsupported by him. They wrote as much in their messages around 8 January. It is clear Mr Younas did not accept the suggestion that he had not been supportive, because around that time he was providing support to a number of different settings within the group, and was himself working very hard seeking to help everybody. The claimant and Miss Jones had certainly felt unsupported and isolated at that time.
26. The claimant's allegation is that when they raised these matters, Mr Younas dismissed their complaints. That is not our finding. He took the matter very seriously, he did not agree that they lacked support; he arranged a prompt meeting, they discussed matters, and their relationship returned to its normal, cordial good state. The respondents did not dismiss requests for assistance, nor engage in conduct calculated or likely to destroy trust and confidence in matters arising out of the outbreak or earlier.
27. Returning to the chronology thereafter, the claimant told Mr Younas about the effect of stress on her IAH and that she was experiencing a flare up in January 2021 after the Covid outbreak. She had explained her medication and her symptoms. He promptly offered a week off with a different manager covering for her. The claimant referred to herself as a "control freak" in explaining why she turned down that offer at that time. She said she would much rather deal with it in another way, in her own way, and she did so taking a week off a little later in February. In short, she felt profound responsibility to continue to manage matters at the setting.
28. The claimant then began to feel mentally unwell through March, April, and May; her family were identifying as much and her counselling notes support how long she had been feeling low. Her personal routine was suffering, her sleep was suffering, her household tasks were suffering, but she was attending at work and carrying on as normal as best she could.
29. Mr Younas was not aware between March and May that the claimant was unwell. At the very end of May or on 1 June, she was unable to grapple with a small rota

task which ordinarily would have been easy for her. She could not concentrate or complete the task. She had something of a breakdown, was in tears and upset at work and that was the moment at which she accepted, and Miss Jones became aware, that she was unwell. She went home, and was in contact with Mr Younas explaining matters by a text message and indicating she was trying to access mental health help through her GP and/or the community mental health team (IAPT).

30. There then unfolded a chain of messages between them which again are typical of their warm and functioning working relationship. Mr Younas explained a manager had been put into the setting and the claimant need not worry. Their ordinary communications included the claimant telling him she was starting anti depressants around 11 June, would use holiday until 21 June, and then “should be back 28 June”, on the basis the nurse was recommending at least two weeks’ absence from the start of medication.
31. Causing or permitting the claimant to be sent notifications of coronavirus test results on her personal mobile on 17 June 2021.
32. On 17 June some notifications of Covid testing at the setting had been sent to the claimant’s mobile phone. That had arisen through error in that when the test results were organised, a “drop down” box was offered giving options for where the results were to be sent. Mr Donovan, who was covering, or anyone else present in the office undertaking that task in place of the claimant, had used the claimant’s details in error and she had received the results.
33. Again, the exchanges between the claimant and Mr Younas at that time were typically warm and friendly, and the claimant was also in touch with Miss Jones to resolve that error. At this stage there was no indication of the test results having any impact on the claimant, and communications continued with Mr Younas.
34. The claimant had also been asked about a DBS (disclosure and barring service) communication for a member of staff – although on leave, she was also concerned matters were addressed. That then prompted an enquiry and Mr Donovan had to look for the DBS. He found a reference for a firearm’s license, which had been given by the claimant in respect of a “handyman” employed at the setting. He was concerned when he came across that, and he forwarded that to one of the email addresses for which Miss Kauser, as HR Manager, was responsible shortly after 17 June.
35. Dealing with the claimant’s allegation then, the Covid test notification was an error, it certainly was not conduct calculated to destroy trust and confidence. The claimant was not troubled by it particularly at the time. That is the overwhelming impression of the communications. It was a matter that was dealt with, and there was nothing untoward about that at the time. Errors can destroy or seriously damage trust and confidence, but we find this error played no part in the claimant’s resignation.
36. Allegations 4-8: questioning the claimant’s medication and seeking a medical report. It is convenient to include below the entirety of the exchanges between Mr Younas and the claimant during this material period until her resignation, including, as they do, emoticons.

[17/06/2021, 10:09:26] 📧: It may have been because the manager who's supporting has pressed it! Keep sending them as they come please if you can. x

[17/06/2021, 10:22:31] Amanda Adeline New : Will do. Thanks x

[17/06/2021, 10:23:28] Amanda Adeline New : image omitted

[17/06/2021, 10:31:21] 📧: Thanks x

[17/06/2021, 10:32:42] Amanda Adeline New : Just msgd T, she's gonna check um on email. So I can just ignore them. If any missing she'll check with me. Thanks x

[17/06/2021, 10:37:34] 📧: Great thanks x

[21/06/2021, 11:42:31] 📧: Hi Amanda, you ok? Do you mind me asking which anti depressants are you taking please? When were they prescribed? Who prescribed them? Can you sign a medical consent form for us to get a medical report to determine when you will be fit to return. We need to know from your gp whether you will be able to carry out your day to day duties based on what you have told me thus far?

[21/06/2021, 11:52:46] Amanda Adeline New : Hi Tanzeel. I'm happy to comply with any request regarding health. However I have been taking holidays until today and so far have not been invited to any wellbeing meeting. I would have expected a well being meeting before being asked for a medical report.

I was prescribed Mirtzapine 15mg one nocte on Friday 11th June when I managed to get hold of Amanda.(Amanda Thompson Nurse practitioner)

If you send me medical request, I will sign and return.

The reason I'm off is stress, anxiety depression.

[21/06/2021, 11:57:00] Amanda Adeline New : Its is a illness just like any physical illness and I expect when recovered to return to normal duties.

[21/06/2021, 12:02:55] 📧: Thanks Amanda, I have a duty of care towards you and the home however based on the fact that you said you will be self referring for mental health before your annual leave, I want to know from your gp as to whether you will be fit to return and what we as an employer would need to put in place to support.

[21/06/2021, 12:10:41] 📧: Medical-report-request-and-consent-forms.doc document omitted

[21/06/2021, 12:31:27] Amanda Adeline New : Hi Tanzeel. You have attached a blank document. I would prefer the questions you wish to ask the GP to be filled in prior to me signing it please.

[21/06/2021, 12:32:53] Amanda Adeline New : Also I can't print it at home. Could you complete with the information you want and I can either collect from the home or post to me please. Thank you.

[21/06/2021, 12:35:09] 📧: Ok thank you

[21/06/2021, 12:39:40] 📧: I'll sort the form and send accordingly :)

[21/06/2021, 12:40:55] Amanda Adeline New : Thank you x

[21/06/2021, 12:41:57] 📧: X



[21/06/2021, 14:01:03] 📱: Also could you send me this sick note please when you have it? Do you know how long it'll be for please?

[21/06/2021, 15:29:07] Amanda Adeline New : Hi Tanzeel, Amanda ringing me tomorrow to discuss. She said 2 weeks. As soon as I get it I'll forward it. Thanks x

[21/06/2021, 17:12:25] 📱: Thank you 😊 x

[22/06/2021, 13:33:36] Amanda Adeline New : Just spoke to Amanda NP again. Sick note is for 2 weeks from Monday.

Amanda said I only started treatment 10 days ago so asking for a medical report so soon is pointless. I need to give the tablets chance to work and see how therapy goes before they can give any idea if there will be any long term impact.

My sick note is at moorends GP. I'll have to walk up and get it in the next couple of days.

[23/06/2021, 09:20:14] Amanda Adeline New : Hi Tanzeel, Terry has my sick note. Thank you

[23/06/2021, 09:20:39] 📱: Thanks Amanda will ask her to scan it over 😊 hope you're better soon x

[23/06/2021, 09:22:48] Amanda Adeline New : Thank you x

[23/06/2021, 17:37:22] 📱: Hey you ok, medical consent form posted as promised 😊 x

[23/06/2021, 18:17:08] Amanda Adeline New : Was out in the kitchen and must have missed Sofias call and Knock. Yes got the letter thank you. Will return it ASAP. Thanks. X

[23/06/2021, 18:18:18] 📱: Thank you x

[28/06/2021, 11:20:46] 📱: Hey you ok x

[28/06/2021, 11:29:48] Amanda Adeline New : Hi Tanzeel, I'm ok. Got my call with the mental health team at 2 today. X

[28/06/2021, 11:49:59] 📱: Awww ok

[28/06/2021, 11:50:03] 📱: Let me know how it goes please x

[28/06/2021, 11:50:21] 📱: Also when do you think we could have the letter back by please x

[28/06/2021, 11:50:44] Amanda Adeline New : I'll drop it off today after the call. Thank you x

[28/06/2021, 11:50:51] 📱: Thank you xx

[28/06/2021, 15:07:48] Amanda Adeline New : Hi Tanzeel, just spent an hr on the phone with the therapist. I have a score of 19/27 which is severe depression and 12/21 anxiety which is moderate. Referring me for cognitive behaviour therapy.

I'm not up to popping in with letter today but mum passing so I'll ask her to drop it off.

Thanks x

[28/06/2021, 15:08:19] 📱: Thanks for letting me know. Has she said anything about the meds and if the dose etc is right? x

[28/06/2021, 15:12:41] Amanda Adeline New : She asked the name and dose but didn't comment further. I'm going to speak with Amanda this week so I will ask her. X

[28/06/2021, 15:20:35] 🧡: Okay great, thank you 😊 x

[01/07/2021, 12:30:37] 🧡: Hello

[01/07/2021, 12:30:41] 🧡: How you feeling x

[01/07/2021, 12:31:06] 🧡: Do you have a new sick note for next week or are you back Monday please? x

[01/07/2021, 12:35:52] Amanda Adeline New : I have a call booked with GP today. I'll update when I've spoken to them. X

[01/07/2021, 12:47:24] 🧡: Great thank you x

[01/07/2021, 12:47:33] 🧡: How you feeling yourself?

[01/07/2021, 13:50:53] Amanda Adeline New : Surgery rang. Calling tomorrow, Gp ran out of time apparently.

[01/07/2021, 13:51:35] 🧡: Awww ok that's fine x

[01/07/2021, 13:53:03] Amanda Adeline New : I'm still not sleeping or eating right. Still can't focus on anything. I'm do as the therapist said and making sure I get out the house every day for a walk. X

[01/07/2021, 13:53:41] 🧡: Ahhhh bless you, slow and steady. Will take time I guess x

[01/07/2021, 13:55:03] Amanda Adeline New : I'm use to being control and I can't control my brain arghhhhhh! Not me and I have zero patience anyway! I'm doing everything they tell me to do. I want this over asap. X

[01/07/2021, 14:04:52] 🧡: Aww fingers crossed! Just keep following what they say and it soon will be x

[02/07/2021, 09:03:32] Amanda Adeline New : Hi Tanzeel, they are doubling Mirtzapine to 30mg and another note for 2 weeks. Thanks x

[02/07/2021, 09:31:47] 🧡: Hi Amanda, thanks for letting me know. Please send the note on when they've sent it x

[02/07/2021, 13:02:20] 🧡: Could I please check your vaccination status please for the COVID Jab? Have you had 1 dose, 2 or zero? z

[02/07/2021, 13:24:24] Amanda Adeline New : Hi Tanzeel, its zero. Thanks

[02/07/2021, 13:24:46] 🧡: Thanks

[13/07/2021, 12:38:04] 🧡: Hi Amanda, I am very disappointed with your use of language just earlier, swearing and shouting is not appropriate way of communicating. You mentioned that I can shove your job. I am the director of the company and will not be spoken to in that manner. I have discussed your concerns with Sofia who has let me know that the only thing that was mentioned in addition was that should we as an employer do a referral to NMC for a fitness to practice. This was

because we are not medical professionals and wanted to know what the GP suggests to ensure our residents are safeguarded.

[13/07/2021, 16:00:41] Amanda Adeline New : Hi Tanzeel, I did apologise at the end of the call. I am sorry that I swore and raised my voice. It was not appropriate. I am however signed off with work related stress, depression and anxiety. I feel harrases and bullied by the company and this is exacerbating my illness. I have not felt supported in anyway.

I have been singled out and treated differently to any other employee. I'm very distraught about the way I have been treated so differently.

In regards to the grievance meeting on Thursday, I would like Debbie Grainger to accompany me.

Debbie is happy to accompany me but is on shit. Could you advise if Debbie can attend whilst on shift or if you would prefer to rearrange the meeting?

Thank you and Sorry again for my inappropriate behaviour.

[13/07/2021, 16:01:13] Amanda Adeline New : \*shift

[13/07/2021, 18:10:40] 🙏: Ok thanks Amanda.

Debbie can come but will have to leave the meeting if she is required on the floor e.g for an emergency etc

[13/07/2021, 18:12:28] Amanda Adeline New : Ok thank you Tanzeel

[20/07/2021, 14:18:22] 🙏: Hi Amanda x

[20/07/2021, 14:18:25] 🙏: You okay?

[20/07/2021, 15:09:50] Amanda Adeline New : Hi

[21/07/2021, 15:26:41] Amanda Adeline New : Hi Tanzeel just wanted to let you know. A letter you sent on the 13th for the meeting on 15th, posted as special delivery by 1 the next day. Only arrived yesterday afternoon. I know it doesn't affect any thing but wanted to let you know it took a week to arrive. Thanks.

[21/07/2021, 17:12:56] 🙏: Thanks for letting me know 😊

[27/07/2021, 12:51:08] Amanda Adeline New : Hi Tanzeel, I just popped in Adeline and dropped off my Credit card.

Teresa mentioned my pay this month. I should have a normal wage this month as last year we negotiated 4 weeks full pay for sick leave. Thanks

[27/07/2021, 16:06:09] 🙏: Hi Amanda, I have passed this on to payroll to sort accordingly

[27/07/2021, 16:20:40] Amanda Adeline New : Thank you

[27/07/2021, 17:00:39] 🙏: 😊

[30/07/2021, 11:05:42] Amanda Adeline New : Hi Tanzeel, I've been paid £2524.32.

My normal take home for 28 days is £2680.63

I've liaised with Teresa and she advised Rahmeez believes its 28 days pay plus 3 days ssp. If this is the case my wage should be just above my usual not over £100 less. Could you please look into it.

Thank you

[30/07/2021, 13:07:20] Amanda Adeline New : Hi Tanzeel, I posted 1 envelope to you containing two letters. I posted it on 28th July for special delivery by 1 the next day.

I've just checked and it hasn't been delivered or a redelivery arranged.

Did you receive the "we missed you" card?

The tracking number to arrange redelivery is JS442692042GB

Thanks

[30/07/2021, 13:28:37] 📧: Thanks Amanda will let the post guys know to chase it up

[02/08/2021, 17:30:05] 📧: image omitted

[02/08/2021, 19:23:25] Amanda Adeline New : Hi Tanzeel,

I'm afraid I cannot attend an appeal meeting until I have the minutes from the previous meeting. I was advised in the outcome letter dated 19th (post mark 24th) the minutes were enclosed, however they were missing. I did advise you of this but have yet to receive a copy.

[02/08/2021, 23:56:12] 📧: Thanks if you haven't got them in the post by tomorrow I'll request they are scanned over to you

[19/08/2021, 12:55:13] 📧: Hi Amanda I hope you are well. Have you de registered from CQC yet?

37. The regulatory requirements of the CQC meant that the absence of a registered manager needed to be reported after 28 days. There is a form for that reporting, which requires notification of when the person is expected to return to the setting. Those regulatory requirements were in place in addition to the respondents' general duty of care to the residents, and Mr Younas was aware of them.
38. It is in this context and for this reason that Mr Younas sought further information from the claimant about her medication on 21 June, after around three weeks' absence. This was done with courtesy and reasonable and proper cause. Similarly, seeking further information in the form of the questions seen by the claimant, to inform the reporting to the CQC, allegation 5.
39. As to allegations 6 and 7, asking for a report when it was premature, and sending the questions to be asked; the latter was done because the claimant had asked for that to be done; as to the premature aspect, the claimant's mental health nurse considered a report premature, and Mr Younas was told of her view, but the position remained that he needed to be able to give a likely return date on the CQC form, and wished to have advice about that. He had reasonable and proper cause for seeking that before a welfare meeting, given the time pressures. The request related to that CQC reporting, and not to the claimant's disability.
40. As to allegation 8, failing to heed concerns on 25 June, we think the pleading contains a date error and that in truth this was pressing on with the consent for medical report on 23 June. The claimant had said quite gently to Mr Younas that she had not had a welfare meeting yet and that she was at the very early stage of her treatment. She had been providing him with very up to the minute contemporaneous input about the treatment and the dialogue that she was having with her GP practice and mental health practitioner.
41. For the reasons above, this employer conduct does not breach the implied term at this point at all, but clearly the claimant reasonably expected Mr Younas to meet with her and to talk to her in a welfare sense at the appropriate point. Such a meeting to discuss an illness or condition was envisaged in the respondent's sickness and absence policy which was set out over some 12 pages.
42. The policy's aim was to ensure that staff are treated fairly during sickness absence. It was a policy available to Mr Younas, to the claimant, and to Miss Kauser at the time. It also enables, in the context of longer absences, conversations with the person who is absent **or** provision of a GP medical report. The respondents' approach was: we are permitted to seek a medical report and so we will. There was no action taken to address the claimant's suggestion that a welfare meeting might help her, on 23 June, but the claimant's warm and friendly messages with Mr Younas continued. Between them (the claimant, Mr Younas and Miss Kauser), they organised the typing up of the questions to be put to the GP in the consent form.
43. The questions were provided to the claimant, and she provided the questions back in hard copy with her consent. So far, in our judgment, the necessary trust and confidence was being maintained on both sides, and the conduct of the respondents did not relate to the claimant's disability or if so, it was not with the prohibited purpose or effect.
44. The claimant was initially troubled by the approach of seeking a medical report so soon, and the management of her illness in comparison with another staff member. So much so she raised a grievance about it on 1 July. She was able to maintain cordial communications with Mr Younas as above, but she said in her grievance

that the approach to seek early advice was not helping her recovery. The Tribunal accepts the explanation that Mr Younas gave her in relation to his duty of care to the residents and CQC regulation as the reason to seek early advice, and that is reasonable and proper cause.

45. We also pause here to note that there is a very clear entry in the claimant's medical records that she herself recognised in late May/early June that her decision making was being affected by her illness; and she records that as being a reason to seek medical help and treatment. That is entirely consistent with the responsible and careful approach that both she and Mr Younas were taking at that time.
46. The claimant was also discussing with her clinicians her treatment goals during counselling. She had had an assessment on or around 18 or 19 June and thereafter accessed CBT treatment. One of the treatment goals she identified was to find a new job. The context for that entry in the notes was that she had identified as causative of her episode of depression the additional responsibilities within her job role which had arisen from the pandemic. In particular, the level of distress and strain in her dealing with bereaved and angry families making allegations. That was identified by her, unsurprisingly, as a source of her depressive episode and illness. That was the context in which she repeated that a long term goal was/is to find a new role.
47. The claimant's fit notes at this time recorded work related stress, anxiety and depression, as the reason for her being unfit to work and her absence continued. Allegations 9 – 11, putting different questions to the GP to those for which consent had been obtained
48. When the parties organised the claimant's consent to a medical report from her GP, the claimant had been troubled by one of the questions – "Did Amanda do a self referral to mental health on the 1<sup>st</sup> of June" - because it seemed to doubt her integrity; in that context she raised her initial grievance. She had discussed matters with her counsellor and felt she had no choice but to proceed with the seeking of advice from the GP. The remainder of the questions to be asked were either supportive of her or neutral.
49. On 13 July 2021 the claimant was provided with the GP report and her consent was attached. It immediately became apparent to her that the questions posed by Ms Kauser on 2 July 2021, and subsequently answered by the GP, were different to those to which she had consented. In particular Miss Kauser had omitted the following two questions: "when is Amanda likely to return to work?" and "will the company need to make any reasonable adjustments?"; instead the letter asked: "Amanda's sick note stated that she has low mood and stress – has she discussed what has caused this?" and "would you recommend that we as an employer contact NMC in relation to "fit to practice?".
50. The first set of questions inherently recognised and included an employer's duty to make reasonable adjustments under the Equality Act for a colleague with a long term condition. They also addressed the information needed for the CQC form. In truth, there was little objectionable about those questions and the claimant had come to see that.

51. It then beggars belief that the reasonable adjustment and likely return questions were completely omitted from the letter that Miss Kauser sent to the GP. Not only that but additional questions were added relating to the cause of the ill health and a referral to the NMC on fitness to practice. The context was an employer which employs many nurses.
52. The GP responded to two of the questions asked in the letter, giving information about the cause, to which the claimant had not consented, but otherwise recommending an occupational health report would be needed to answer other questions. He did not, because he was not asked, advise about reasonable adjustments and likely return date, and so the stated purpose of the report, completing the CQC form, was not fulfilled.
53. Trust and confidence **is** put in jeopardy by conduct which is incompetent and careless: in this case Miss Kauser did not care to have the original consent letter in front of her when she drafted the letter to the GP. She had previously used a template form which was cognisant of equality act duties when she sought the claimant's consent. Similarly it is damaged by conduct which is high handed, arrogant and disingenuous, - Miss Kauser assumed the instruction letter would not be seen by the employee anyway. On any view this conduct strikes absolutely at the heart of the confidence that a member of staff must have in their employer in dealing with their private health matters.
54. In this case the claimant had already shared her concerns about an early seeking of a report and had raised a grievance, but she had been told that it was for CQC reasons. By omitting the relevant question about when the claimant was likely to return, Miss Kauser also undermined the reason that the claimant had been given to seek the report.
55. Lack of care and disregard for the employer's Equality Act duties was not the explanation for the NMC/fitness to practice question. It was added without the claimant's knowledge, as a result of a meeting of the second respondent and his brother, both directors of the respondent. They resolved, some time between 24 June and 2 July that the question should be included. There are no minutes of that discussion and we only heard from the second respondent about it. Miss Kauser was asked to include the question.
56. There was no regard at the time to NMC Guidance for Employers in such situations, which was readily available. The first respondent had not previously referred, nor sought advice about referring, its nurses to the NMC to consider whether they were fit to practice. It had not before had a Registered Manager absent for three weeks or so for mental health reasons. A fitness to practice referral was plainly not necessary, and cursory research would have made that clear. This was a nurse at the early stage of absence, who had sought appropriate treatment for an illness.
57. The second respondent had been regulated by the "GPhC", as a pharmacist; he understood regulation; he understood the difference between "fitness to practice" and "fitness to work". He understood that the former was very serious indeed. It was the latter, or rather a likely return to work date and being capable of working, which was required for the CQC form. His explanation for asking the GP whether

there should be a referral about fitness to practice, rather than fitness to work, was, he said, “to protect the company”, should the claimant be in a position to return. In seeking this additional question, he did not ask the claimant about it despite knowing that she had taken herself away from work as soon as she felt her performance was being affected.

58. In reaching a conclusion about whether this conduct was related to disability, we note that the claimant had reported medication and pain and headache to Mr Younas in January 2021 in the context of her IAH condition. He had offered time off in relation to that. He did not consider at that time that there was any need to consider referring the claimant to the NMC or seeking advice from a GP about NMC referral about *fitness to practice*, despite IAH being a condition which self evidently could impair functioning; he had researched the condition himself and knew it was serious.
59. By the summer of 2021, the claimant had reported that she had referred herself to mental health services, had taken holiday, and over the course of their exchanges, it became apparent she was going to be signed unfit for work. Mr Younas knew of the CQC deadline. Unlike with IAH, Mr Younas conducted no research himself, about fitness to practice referrals or otherwise.
60. We consider that the difference in approach reveals a conscious, or subconscious, prejudice on the part of the second respondent in relation to mental illness. There was, in their minds, an apparent “need to protect the company” in circumstances of the claimant’s mental illness, where there had been none in relation to the claimant’s long standing IAH.
61. We also consider that use of a template consent form which asked questions about reasonable adjustments does not reveal very much about the workings of the mind of the person using the form. On the other hand, abandoning that supportive question when “free drafting” also suggests to us that Miss Kauser too, shared a subconscious or conscious prejudice against mental illness, and was not minded to consider reasonable adjustments in connection with it.
62. The claimant trusted her employer to deal with matters correctly, as she had done for staff reporting to her. She was in a vulnerable position being absent from work as a result of mental ill health after the strain of the pandemic and bereavement. She had already raised a grievance about the treatment of her illness in comparison with another member of staff, where no advice had been sought after three months’ absence. The first respondent’s conduct towards the claimant in relation to the GP advice was entirely destructive of trust and confidence in the way we describe above, and was without reasonable and proper cause. It was also, in our judgment unwelcome conduct related to disability.
63. Matters unsurprisingly then took a rather difficult turn. The claimant expressed to Mr Younas her understandable upset about the instructions to her GP, in a phone call on 13 July during which it was clear she was distraught, and her grievance meeting was put back to accommodate this new matter.



64. She then immediately apologised for her outburst by telephone in response to Mr Younas' text above, which, is alleged to be chastising her, and a further contributor to the breach (allegation 10). Two wrongs do not make a right, and Mr Younas had cause to challenge the nature of the claimant's outburst by telephone and she apologised for it. This is part of the context of their erstwhile good relationship, but the claimant was clear in her apology about the impact of the respondent's repudiatory conduct upon her. She has also established that such an early GP referral, was different to the treatment of other staff. They were not, however, registered managers, and their treatment does not help us a great deal in understanding the workings of the minds of Mr Younas, his brother and Miss Kauser. The respondent had reasonable cause for treating the claimant differently in seeking the report at this stage (had it used the questions to which the claimant gave consent (Allegation 11)). Neither did the conduct of the respondents (allegations 10 and 11) relate to disability.

#### Allegations 12 to 19

12. failing to carry out a full and fair investigation into the claimant's grievance;
13. failing to provide the claimant with a copy of the first respondent's grievance policy ahead of the meeting on 15 July 2021;
14. failing to offer the claimant a venue other than Adeline House for the grievance hearing;
15. the first respondent's HR manager failing to conduct the grievance hearing fairly reasonably on 15 July 2021;
16. dismissing the grievance by letter of 24 July 2021;
17. failing to provide claimant with the minutes of the grievance hearing held on 15 July 2021 until 3 August 2021;
18. the second respondent emailing claimant at 23:56 hours on 2 August 2021;
19. fabricating the minutes of the grievance hearing on 15 July 2021.

65. It was clear that an initial investigation involved Mr Younas speaking to Ms Kauser after the claimant called him; the information Miss Kauser relayed to him and he relayed on to the claimant by message was not true. The only difference between the questions in the consent form, and the questions in fact asked, was **not** simply the addition of the NMC question, as our findings reflect. Informally then, from the outset, Mr Younas was either in denial about the way matters had been handled or Miss Kauser had not provided him with a copy of the questions so he could see the differences, which were plain.

66. The NMC/fitness to practice question had been added at the request of Mr Younas, but the remainder of the errors were Miss Kauser's responsibility. Miss Kauser's conduct being in issue, it was unfair, or at the very least a challenge to fairness, for her to further investigate matters and conduct the grievance meeting. Nevertheless, she arranged to do so on 15 July with Mr Donovan present. The claimant was accompanied by a colleague, and was clearly angry and upset.

67. The grievance hearing was an opportunity for Miss Kauser to acknowledge her mistake, and apologise, if she was going to take the meeting at all. She did not provide a copy of the grievance procedure to the claimant, but she believed the claimant could access it remotely, and she therefore had proper cause for failing to do so (allegation 13). Similarly, the location of the meeting was not something

the claimant raised as an issue at the time (allegation 14), nor was it without reasonable and proper cause to organise the meeting there, the claimant's place of work, unless she indicated it was problematic.

68. As to the conduct of the meeting, it was difficult because the claimant was robustly, and at times, emotionally, trying to hold Miss Kauser to account. Miss Kauser inflamed the situation by refusing to answer one of the claimant's first questions, which was to confirm that the claimant had no disciplinary matters on her record. The meeting thereafter went from bad to worse, the Tribunal having been able to hear its entirety. There was no explanation for Miss Kauser not answering that question, when plainly the claimant had a clean disciplinary record. The claimant recorded the meeting because she was angry and upset at the management of her absence, and she did not believe accurate notes would be taken.
69. She was correct about accuracy, in that the notes of the meeting did not contain those early questions from her to Miss Kauser, nor were the notes a full record of what was said. They were not, however, a fabrication, in the sense of containing content which was not said, and allegation 19 is not made out in fact. The notes were Mr Donovan, as note taker, doing his best to summarise what was said during a difficult and highly strained half an hour. There were material omissions and the time was inaccurate: they indicated that the meeting started at 4 and finished at 5. It did start at 4 pm but it was 30 minutes long only; and half way through the claimant had to take a break because emotions were running so high.
70. The meeting ended with Miss Kauser indicating she would come back to the claimant. Her letter rejected the claimant's allegations by letter on 24 July, saying nothing untoward had been done. As to the medical consent issue, she said this: "You consented to the medical report and then withdrew consent saying we asked different questions however we asked the same questions, but they were just worded differently. The only question we added was "do you think we as an employer need to refer to NMC for a fitness to practice". That outcome, again, is disingenuous and it is an outcome without reasonable and proper cause. Of itself it was conduct likely to destroy or seriously damage trust and confidence in all the circumstances.
71. On 25 July the claimant wrote a letter of appeal pointing out there had been deceit in the GP questions issue, and a breach of data protection principles and that she had not been provided with the meeting minutes. She asked for the minutes within two days, which would have been ten days or so after the grievance meeting. Mr Younas invited her to an appeal meeting to take place on 5 August but could not, with that invitation, provide the minutes. The claimant chased these again after hours on 2 August and Mr Younas replied to her, as recorded in the message exchange above, at 23.56. The latter was not conduct without reasonable and proper cause (allegation 18); the claimant had raised the question after hours, and given their relationship, Mr Younas replied to her late that night in an attempt to ensure she had the notes for the appeal meeting. It was not ideal, but he was doing his best. This could not, objectively, breach the implied term, nor contribute to a breach.
72. Having received the notes of the meeting, which she considered inadequate and not reflecting the meeting, the claimant resigned by letter dated 4 August 2021. She considered she had suffered disability discrimination and that trust and confidence had been broken, including by the failure to uphold the grievance. She considered she had not been allowed time to recover and receive treatment and

was at a loss to understand why she had been treated differently given her exemplary service.

73. The claimant's repudiatory breach case has succeeded in the way we describe above – that is allegations 12, 15, 16 and 17 are further conduct without reasonable and proper cause likely to destroy trust and confidence, in addition to allegation 9, the GP questions issue.
74. We do not find the matters of unfairness and poor employer conduct in the grievance process to be conduct "related to" the claimant's disability. It is an example of where poor conduct, repudiatory conduct, may have a particular impact on someone because of their disability, but the conduct itself does not relate to it; or at least these are not facts from which we could conclude that it did. On our findings it arose because of a lack of experience or competence and an unwillingness to admit that things had gone wrong.
75. The thrust of the submissions on behalf of the claimant from Mr Effiong, was that because someone is unwell, and because they are treated badly, that treatment relates to their disability, but that is not the Section 26 test and we address that further below.

#### The Unfair Dismissal complaint

76. The Western Excavating v Sharp questions then require us to determine whether the claimant resigned in response to those breaches, and plainly she did. She was considering resignation and perhaps was even resolved upon it when she received the grievance outcome, but when she received the notes, she saw the material omissions, and considered enough was enough. The claimant did not affirm the breaches inherent in the handling of the medical report and grievance. At no stage did she indicate she was letting bygones be bygones about the GP questions or the handling of the grievance. She was absolutely clear that in her view the respondent had conducted itself improperly and in a discriminatory way in the handling of the medical report, and she made that clear through her call and her grievance meeting. She was entitled to resign and did so, in response to breaches we have found, and she has proven a Section 95 dismissal.
77. The respondent did not advance a case that if dismissal was proven, it was for a substantial enough reason and a reasonable dismissal. The Tribunal therefore upholds the unfair dismissal complaint as well founded. As far as the Equality Act allegations are concerned, these can be addressed relatively swiftly.

#### Reasonable Adjustments and Knowledge

78. The claimant's reasonable adjustment case was set out at paragraphs 9 to 13 of the list of issues. The material time is from June 2021. The claimant alleged that the respondents had practices (PCPs) of messaging late at night; of putting questions to her GP without confirming them first; and of failing to follow the absence management policy. The relative disadvantage she alleged from these PCPs was that they exacerbated her anxiety.
79. The respondent's case included that it did not know, and could not reasonably have known of disability and disadvantage at the material times (1 June to 4 August 2021).
80. Knowledge of disability involves understanding both the condition or impairment and the impact on day to day activities. The respondents knew of the onset of her condition and the prescribed medication in June because the claimant told the second respondent in their exchanges above, and provided fit notes. By 13 July

the GP had confirmed the claimant had referred herself to the long term conditions service of IAPT, reasonably informing the respondent of the long term nature of her condition. Had the respondents undertaken a welfare meeting, they would, in all likelihood have come to know of the adverse effect on day to day activities and the disadvantages she faced - greater anxiety from communications about work and generally. Had the question to the GP about reasonable adjustments been included as a question for him to answer, in all likelihood the GP would also have been able to give information about the relative disadvantages of the conditions with sensible recommendations for adjustments.

81. Putting all these matters together, we find the respondent ought reasonably to have known of disability and relative disadvantage by 2 August, assuming the original GP questions had been asked and answered by 13 July, and a welfare meeting had taken place between then and the end of July.
82. The duty therefore arose at end July/beginning August; the only adjustment which the claimant contends should have happened after that constructive knowledge and before her resignation then, is refraining from late messaging. The other reasonable adjustment allegations are actions the claimant alleges the respondent should have taken in June, at a time when it could not reasonably have known of both disability and relative disadvantage and they are dismissed.
83. As to that message on 2 August, the claimant had put a marker down about late messaging in November 2020. The second respondent had then complied with that. Reasonable adjustments are practical measures to help a disabled person at work or to return to work. In principle one can see that a commitment not to engage in out of hours or anti-social hours communications might well have assisted with the anxiety such messaging could cause, and could therefore been a practical adjustment in principle. The context is that engaging in out of hours communications had plainly been a feature of the communications between the second respondent and the claimant for a long time until November 2020.
84. The facts include that the claimant requested or chased the appeal notes out of hours herself on that particular evening. It was 7pm in the evening or so when she sent that message. It is not reasonable in those circumstances then, to say that Mr Younas failed to make a reasonable adjustment by responding to it. If she had requested the notes at 10am in the morning, then we might fairly and reasonably have upheld this complaint, as a failure to make a reasonable adjustment, but we have concluded it was not reasonable for Mr Younas to refrain from doing so when he was being chased for information after hours. No doubt he would have been criticised had he not provided a response as soon as he was able to provide it. He made that point himself.

85. In conclusion then, the reasonable adjustments allegations are dismissed.

### Harassment

86. The claimant alleges in Mr Effiong's skeleton that matters alleged as breaches of the implied term occurring in June, July and August of 2021 were also acts of disability related harassment. He also relied on conduct in the acknowledgment of the claimant's resignation and in these proceedings as acts of harassment, but the Tribunal did not permit an amendment in those terms. We indicated that if the Equality Act case succeeded, the Tribunal could consider aggravated damages in relation to such matters.

87. For each pleaded matter in turn then, and having regard to the findings above we ask or confirm:
- 87.1. Was the conduct unwelcome conduct related to disability?
  - 87.2. Did it have the purpose or effect of violating the claimant's dignity?
  - 87.3. Did it have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
  - 87.4. For brevity, we use a short hand for these last two questions: " did it have the prohibited effect? "
88. The first two matters are:
- 88.1. the second respondent asking the claimant to consent to a medical report being obtained on 23 June 2021, when she says that she had advised the second respondent that it was premature as she was in the early stage of treatment;
  - 88.2. sending a consent form to the claimant on 23 June 2021 containing questions proposed for a GP;
89. This conduct may have been unwelcome, but it did not relate to disability. See our findings above. The reason why these steps were taken was the need to report on Registered Manager absence to the CQC.
90. The next three allegations are:
- 90.1. on 2 July 2021 the first respondent's HR manager putting questions to the claimant's GP for preparation of the report which did not mirror entirely those the claimant had consented to;
  - 90.2. the second respondent failing to heed the claimant's concerns in relation to the questions put to her GP on 13 July 2021 and chastising the claimant by WhatsApp;
  - 90.3. generally managing the claimant's sickness absence differently to other staff from 2 June 2021
91. We have found that the first of these three allegations related to the claimant's disability as explained above. We also note that it is not necessary for a harassment complaint that those engaging in the unwelcome conduct have actual or constructive knowledge of all aspects of the matters which make up the definition of a disabled person; their conduct needs to **relate** to disability and for the reasons above we have found that it did, whereas in the second two matters it did not.
92. The GP questions' conduct, viewed objectively in our judgment, certainly had the effect of creating a hostile working environment for the claimant – she was devastated by the suggestion that her long held professional registration might be considered at risk by her employer at the very earliest stage of an episode of her illness, and in circumstances where she had been open about her situation and treatment. Was she reasonable in that perception, and was it reasonable in all the circumstances for the respondents' conduct to have that effect? We answer both questions in the affirmative, when one considers all the matters above. This complaint is upheld.

93. The final four harassment allegations are:
- 93.1. dismissing the grievance by letter of 24 July 2021;
  - 93.2. failing to provide claimant with the minutes of the grievance hearing held on 15 July 2021 until 3 August 2021;
  - 93.3. the second respondent emailing claimant at 23:56 hours on 2 August 2021;
  - 93.4. fabricating the minutes of the grievance hearing on 15 July 2021.
94. It is apparent in our findings above that we do not find that this conduct is made out in fact (as to the fourth one) or that it was unwanted conduct related to disability.
95. It will be apparent from that announcement of our conclusions and findings, that the only allegation that remains and is pursued personally against Mr Younas is the GP questions allegation, upheld as harassment – the questions asked did not mirror those the claimant had consented to. The unfair dismissal complaint is also upheld.
- Remedy introduction
96. We need to announce and inform the parties that as far as remedy is concerned the primary remedy for unfair dismissal is re-instatement or re-engagement and we need to confirm with the claimant her position on whether she seeks re-instatement or re-engagement with this employer.
97. It being confirmed the claimant does not seek those Orders, there are some matters with which we may deal today, and some we cannot. The respondent has a Polkey case on the financial loss/compensatory award case, which will require further evidence (as the matters have not been put to the claimant) and further disclosure is sought; equally likely to cause delay, the claimant now has an aggravated damages case relating to the acknowledgment of her resignation and the conduct of this case, which will need further evidence; further the assessment of the “but for” the contravention case on financial losses has complexity in view of the claimant’s health.
98. There is no expert evidence on causation, but the schedule of loss clearly reflects that the claimant considers the respondent’s actions have caused or exacerbated her depression and anxiety, such that she has lost earnings. She is in some difficulty with that, given the onset of an episode of depression and anxiety before any alleged breaches that we have found, or the contravention we have found. We do have some medical evidence in the form of fit notes, the medical records and GP letter; we also have a later (April 2022) DWP assessment of capacity to work, but the latter does not necessarily help with the “but for” question. We also have no counter schedule.
99. Separate orders will confirm that the claimant does not pursue instruction of a medical expert and the remedy issues involved in assessing a compensatory award and/or financial loss but for the contravention.

Discussion and the law

100. The parties having agreed that we can determine Basic Award and Injury to Feelings, the Tribunal confirms the sum of £2176 by way of Basic Award, agreed by the respondent from the schedule of loss.

101. As to evidence concerning injury to feelings, the claimant had provided a good deal of material in her Impact Statement. On behalf of the claimant it was also suggested that we should award damages in respect of psychiatric injury. The sum pursued in the claimant's schedule of loss in respect of Injury to Feelings is £20,000.

102. The directions of law we give ourselves include that in assessing an injury to feelings award we should focus on the actual injury to the claimant's feelings suffered by her. Awards must compensate fully but not be punitive. They reflect subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

103. Awards are not a way to untaxed riches and they must command public respect. We must have regard to general person injury awards, and must not duplicate. We are also required to consider interest whether or not claimed in a schedule of loss.

104. It may be helpful to bear in mind the position where a pre-existing condition is made worse. The 16<sup>th</sup> Edition of the Judicial College Guidelines (and the 15<sup>th</sup> edition was the same in this respect) gives this helpful general guidance in psychiatric injury cases:

The factors to be taken into account in valuing claims of this nature are as follows:

- (i) the injured person's ability to cope with life, education, and work;
- (ii) the effect on the injured person's relationships with family, friends, and those with whom he or she comes into contact;
- (iii) the extent to which treatment would be successful;
- (iv) future vulnerability;
- (v) prognosis;
- (vi) whether medical help has been sought.

The moderate category of such an injury is described as follows: While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

Cases of work-related stress may fall within this category if symptoms are not prolonged. Moderate psychiatric injury awards are in the range £5,860 to £19,070 now, and an exacerbation of an existing condition may produce an award of much less, £1000 to £2000, which may sometimes be treated as a minor injury.

105. On the other hand, the Vento guidance gives three broad categories or bands in which Tribunals are required to assess injury to feelings, giving examples of the sorts of discriminatory conduct which may appear in each band. The claimant puts her injury in the mid band, and the respondent, today, puts it in the lower band, recognising that only one of the claimant's alleged contraventions has succeeded.

106. To the matters above we make the following further findings to enable us to assess the claimant's injury to feelings case.

#### Further Findings

107. The claimant took great pride in her career as a whole – as both a nurse in her early career and latterly as a registered manager in care home settings. Her ability to support herself financially was very important to her. She had been taken off path from her early nursing career by her IAH and that had affected her greatly. She was, consequently, very determined to not be taken off track in her care for residents and staff in care settings. As we know, she had a profound sense of responsibility to deliver for those in her care.
108. The claimant also had insight into her condition and considered she needed a break and she was open and honest about that with the respondents. She had a plan (and we know control was important to her) to recover, and then to return to work with the respondents' support, before looking for a new post which might be more hands on, or without the amount of her time and strain taken up with infection control.
109. Instead of this, the contravention we have found stigmatised her mental health condition, and brought into question her professional status as a registered nurse, without seeking advice about supportive measures at all. In that sense it was profoundly hostile to her career. It worsened her anxiety. The context also included that there had been a wholly different approach to IAH; and that served to confirm the stigma that the claimant felt about her mental health, which was why she had not disclosed it at the start of her employment. The result of that contravention was to destroy her relationship with the respondents.
110. There was both short term and longer term injury to her feelings. On the day she discovered the questions that had in fact been asked, her emotional state was so destroyed that she lost control and swore in the call with Mr Younas; for which she apologised quickly. In that immediate aftermath (or at all) there was no corresponding apology from the respondents, and her emotional state became worse at a time when she was accessing both medication and counselling treatment. Without any apology or acknowledgment of their wrongdoing from the respondents, she resigned. This was a pivotal moment in her career (in the wrong direction) and in the longer term she has had to draw financial support from her mother, again, creating deep upset and guilt.
111. We take account of the claimant's long term condition, and that an episode had developed following the pandemic's effect on this setting, notwithstanding the claimant's previous good relationship with Mr Younas. The claimant was made vulnerable by this episode, and the medical evidence that we do have enables us to be confident in finding that the contravention worsened her mental state at a time when she was seeking to improve it.
112. Mindful of our direction that we must not duplicate or compensate twice, we bear in mind the immediate and profound immediate upset, and then the way in which the claimant's anxiety, depression and upset about the contravention continued into the longer term. She lost her employment in a way which she would never have wished, and was not her plan, at a time when she was ill.
113. This is not a lower band case; It is a mid band matter case. Applying the principles above we would assess a compensatory sum at £15,000 but we increase that to £17,000 because the claimant's vulnerability at the time worsened or



exacerbated her pre-existing condition, when she was in the very early stages of treatment.

114. It is then a matter of counting, to identify 71 weeks as the period over which interest is due, and the calculation of that produces 1856.92. This hearing is then adjourned to 14 December to address the remaining issues.

Employment Judge JM Wade  
Date 1 March 2023

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