EMPLOYMENT TRIBUNALS

Claimant: Mrs Letica Mensah

Respondent: St Mary's Care Ltd

Heard at: London South Croydon; in public; in person

On: 14-17 November, in chambers 18 November 2022 & 13 January 2023

Before: Employment Judge Tsamados
Ms A Sansome
Mr W Dixon

Representation

Claimant: Ms O Durojaiye, lay representative and friend Respondent: Mr E McFarlane, Consultant

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The First Claim

a) The complaints of direct disability discrimination, discrimination arising from disability are well-founded.

b) The complaints of indirect disability discrimination, failure to make reasonable adjustments and unauthorised deductions from wages are well-founded to the extent indicated in our reasons below.

c) It was not appropriate for us to make a finding in respect of harassment related to disability, the complaint of direct disability discrimination covering the same allegations being well-founded.

The Second Claim

d) The complaints of unfair dismissal, damages for breach of contract, direct disability discrimination, discrimination arising from disability are well-founded.

e) The complaints of harassment related to disability and entitlement to accrued holiday pay are well-founded. The complaint of harassment related to disability is well-founded to the extent indicated within our reasons below.

f) The complaints of indirect disability discrimination, failure to make reasonable adjustments, victimisation and unauthorised deductions from wages in respect of occupational sick pay are not well-founded.

g) The Respondent was in breach of its obligation to provide the Claimant with a compliant written statement of employment particulars as at the date of presentation of the Second Claim Form.

Remedy Hearing

h) There will be a remedy hearing listed for one day, if required, as indicated in paragraphs 311-312 of the Reasons set out below.

REASONS

Background

1. The Claimant, Mrs Mensah, has brought two claims against her ex-employer, the Respondent, St Mary's Care Ltd.

2. The first claim, in case number 2304162/2019, was received by the Employment Tribunal on 26 September 2019 following a period of Early Conciliation between 27 July and 27 August 2019. This brought complaints of disability discrimination and entitlement to holiday pay and arrears of pay.

3. In its response which was received on 11 November 2019, the Respondent raised a jurisdictional issue relating to time limits within which the claim was presented and denied the claim in its entirety.

4. The second claim, in case number 2305132/2020, was received on 15 September 2020 following a period of Early Conciliation between 22 and 26 August 2020. This brought complaints of unfair dismissal, disability discrimination and entitlement to notice and holiday pay.

5. In its response which was received on 4 August 2021, the respondent similarly raised jurisdictional issues relating to time limits and denied the claim in its entirety. The Respondent also indicated that in as far as this claim

repeated matters raised in the first claim which it had responded to in its first response, it did not intend to repeat its response.

6. A closed preliminary hearing (a case management discussion) took place on 24 March 2020 and was conducted by telephone, by the, then, Acting Regional Employment Judge Davies. That hearing was in respect of the first claim. At the hearing, the Claimant was represented by Counsel and the Respondent was represented by a Litigation Executive. The record of that hearing indicates that the parties were ordered to agree a list of issues by 15 June 2020 and standard orders were made to prepare the case for the full hearing. This was set for 3 days commencing 26 October 2020.

7. A further closed preliminary hearing took place on 20 July 2022 and was conducted by Employment Judge ("EJ") Hughes. By this time, the second claim had been received. The parties were represented by those representatives that appear at our hearing. The record of the preliminary hearing indicates that the 2 claims were consolidated and the full hearing was re-listed for 5 days commencing 14 November 2022. This included a timetable for the proceedings. In addition, EJ Hughes set a series of case management orders in order to prepare the case for the full hearing.

The complaints and issues

8. EJ Hughes identified the complaints as follows:

   - Unfair dismissal;
   - Discrimination on the grounds of age and race;
   - Harassment;
   - Victimisation.
   - Unlawful deductions from wages;
   - Unpaid holiday pay;
   - Breach of contract relating to notice.

9. The parties accepted that the reference to age and race discrimination was in error. The discrimination complaint relates to disability.

10. EJ Hughes also set out the issues arising in the second claim. These are set out at pages 59 to 67 of the joint bundle of documents that was provided to us. These pages are annexed to this Judgment.

11. The issues arising from the first claim are set out within a note provided by the Claimant's then Counsel to the first preliminary hearing on 24 March 2020. This document is at pages 43 to 49 of the joint bundle. These pages are annexed to this Judgment.

12. The representatives agreed that these were the issues to be determined by this Tribunal and I explained that we would not depart from them unless there were exceptional circumstances.

Evidence

13. The Respondent has prepared an electronic "Joint Bundle" consisting of 340 pages. We will refer to this using the prefix "B" followed by the relevant page numbers. The respondent also provided a "Witness Statement Bundle" consisting of 48 pages.

14. In addition, we were provided with a number of separate documents during the course of the hearing. From the Claimant: payslips for July and August 2017, and January and February 2018; and the Judgment and Reasons of the Employment Tribunal in the case of Mrs Durojaiye v St Mary's Care Ltd Case No. 2300832/2019. The Claimant is Ms Durojaiye's mother, who she represented at that hearing.

15. We heard evidence from the Claimant and on her behalf from her daughter, Ms Philippa Mensah, and also from Ms Durojaiye, by way of their witness statements and in oral testimony. We heard evidence on behalf of the Respondent from Ms Nirva Patel, the Managing Director, by way of her witness statement and in oral testimony.

16. We were also provided with the following documents: from the Respondent, a Chronology and Cast List and Outline Submissions; and from the Claimant, a three page document containing submissions as to time limits.

Conduct of the hearing

17. I explained the order of events and procedure mainly for the benefit of Ms Durojaiye who, despite being involved in a number of Employment Tribunal cases, is a lay representative.

18. Ms Durojaiye indicated that the Claimant had difficulties with concentration and memory. She explained that the Claimant wished to rely on her own memos (written notes) when giving evidence, her witness statement having been drafted by her daughter, and that she may need prompting when answering questions. I responded that the Claimant's evidence has to be her own testimony, she has to attest that either she has prepared her witness statement or has been involved in its preparation, that she has read through it recently and it is true to the best of her knowledge and belief. If she wished to rely on memos, I suggested that she provides Mr McFarlane with copies to see if he has any objection. If he has no objection then we would also need to have copies. If he does object, we would need to see the memos and make a decision as to whether they should be relied upon or not. I also made it clear that the memos must not extend the evidence that is contained within the Claimant's witness statement. I suggested that the representatives speak outside during our adjournment to read and let us know the position.

19. I had already made it clear to the Claimant that we would have regular breaks and in the light of the above matter, I reassured her that any questions in cross examination and from the Tribunal panel would be gentle and not

intended to trip her up, and that she could be referred to her witness statement or the documents in the bundle, where appropriate, so as to assist her in answering.

20. In the event, the parties did not come back to us as to the use of the memos.

21. We read the witness statements and referenced documents, heard evidence and submissions between 14 and 17 November 2022. We met privately, in chambers, on 18 November and again on 13 January 2023 to deliberate and reach our decision.

22. I must apologise to the parties for the length of time that it has taken to perfect and send out our Judgment & Reasons. This was due to my part-time working pattern and pressure of work.

Findings of fact

23. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

24. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

25. The Claimant was originally employed by the Respondent's predecessor in title, The Francis Taylor Foundation ("FTF"), from 6 December 2000. Her employment transferred to the Respondent by way of a "TUPE transfer" (that is under the Transfer of Undertakings (Protection of Employment) Regulations) along with 13 other employees in 2006.

26. The Respondent is a private limited company which owns St Mary's Nursing and Residential Care Home based in Streatham, London, providing accommodation and care services to a range of residents including vulnerable adults, some of whom are bedridden. The Home is regulated by the Care Quality Commission ("CQC"). It was defined by CQC at the time of the events in question as providing accommodation and nursing or personal care and accommodated up to 80 people in one adapted building. The Respondent employed 40-50 staff in care roles, as well as domestic, maintenance, administrative and kitchen staff.

27. Mr Subir Patel was a shareholder and Director of the Respondent company but did not take an active role in the business until 2014 when he bought the remaining shares. Mr Patel did not attend the hearing or give evidence. His daughter, Ms Nirva Patel, from whom we heard evidence, started working for the Respondent in 2018 and became a company director in September 2019

and describes herself as the Managing Director. Mr Subir Patel stepped back at this point although he is still a Director of the company.

28. There were a number of Home Managers during the course of the events in question. At one point the Home Manager was Mueti Moomba in late 2016 and 2017 and then the Home Manager was Jonathan Kamara until he left at some point after 9 May 2019. Priscilla Chibanda was the Operational Director but then became the Home Manager when Mr Kamara left. She is still employed by the Respondent. Yogesh Patel was a Consultant who was present in the meeting of 9 May 2019 but has since left and is now in India. None of these persons attended the hearing or gave evidence.

29. The Claimant was originally employed as a Health Care Assistant (Night Duty) working 22 hours per week. We were referred to her contract of employment dated 7 December 2000 at B69-72. This document contains the Claimant's original terms and conditions of employment with FTF and has not been updated to reflect any changes made since then. It contains clauses setting out, inter alia, entitlement to notice of termination of employment and holiday and pay at B70-71. We were also referred to the Claimant's Job Description at B113-117 which sets out the range of duties that she was required to undertake. Her job involved both light and heavy duties. Her written evidence states that light duties included serving tea, feeding clients, observing, taking in and giving reports, setting tables, taking dirty linen to the laundry, disposing of yellow and red bags, and cleaning; heavy duties involved providing personal hygiene to the service users, the use of a hoist and bending, duties which she conducted paired with another carer (in view of her knee condition).
30. The Claimant's hours of work were subsequently increased to 46 per week from 27 September 2016. We were referred to a change of hours form which the Claimant stated had been incorrectly dated 2 July 2017 (at B75). Her pay-slip issued on 31 July 2017, which covers payment for the period 18 June to 22 July 2017, and one issued on 31 August 2017, which covers payment for the period 23 July to 19 August 2017, do not show a dramatic increase in pay occurring at that time. On balance of probability, we accept that the change occurred prior to 2 July and in the absence of any contradictory evidence we accept that the change was made from 27 September 2016.

31. We were also referred to the FTF Employee Handbook at B98-111, in particular the section covering the Occupational Sick Pay Scheme at B102. We were also referred to FTF documents containing a mission statement, disciplinary and grievance procedures and an equal opportunities policy at B227-246.

32. In addition, we were also referred to extracts from an Employee Handbook relating to the Capability, Disciplinary and Grievance Procedures at B90-96, although these appear to be issued by the Respondent rather than by FTF. There is also a Grievance Policy and Procedure at B112 which is clearly a document produced by the Respondent and not FTF as the index to the bundle would indicate. However, we were not taken to this page in evidence.

33. During 2017, the Claimant experienced problems with her right knee and informed the Respondent in about April 2017 that she was awaiting total knee replacement surgery. This took place on 12 August 2017 and the Claimant was absent from work from this date onwards. We were referred to her statement of fitness for work dated 16 August 2017 at B119. The Claimant was diagnosed subsequently with Osteoarthritis in her left knee. We were referred to further statements of fitness for work at B120-124 which cover her absences from work for the period until 29 April 2018.

34. On 23 February 2018, Mr Kamara (who was then the Home Manager) wrote to the Claimant inviting her to an informal welfare meeting. This letter is at B132. The letter states that the purpose of the meeting is to discuss the Claimant's ill-health absence, how long it was likely to be before she was well enough to return to work and what arrangements might need to be made to ensure her safety. The letter assured her that the meeting was informal and she could bring along a family friend, relative or fellow colleague. Whilst the letter gave the date of the meeting as 9 March it actually took place on 6 March 2018.

35. The Claimant attended the meeting on 6 March 2018 with Mr Kamara. Her daughter, Philippa, accompanied her. We were referred to the Respondent's notes of that meeting at B133-134.

36. The Claimant's evidence is that the meeting lasted for over an hour and the notes do not fully reflect what was discussed. Further, she did not see these notes until they were disclosed by the Respondent in evidence as part of these proceedings. Her further evidence of the meeting is as follows. She said that she was still undergoing physiotherapy and was also on strong painkillers. She requested to take her entitlement to annual leave before the end of the leave year. Mr Kamara advised her that she was not entitled to it because she had been paid Occupational Sick Pay. The Claimant told him that she was no longer receiving sick pay but unable to claim welfare benefits because she was still employed. She told us that she accepted his explanation at the time. The notes do make a reference to Mr Kamara promising to check the Claimant's contract of employment to establish her rights and then feed it back to her but in the context of a discussion about welfare support only. The Claimant's daughter confirmed the Claimant's evidence of what happened at the meeting. Beyond the notes of the meeting, the Respondent presented no direct evidence as to what happened. On balance of probability, we accept the Claimant's evidence of what was discussed at this meeting.

37. Under the terms of her contract of employment, the Claimant was entitled to Occupational Sick Pay for 10 weeks at the rate of full pay and then 6 weeks at the rate of half pay.

38. The Claimant worked 4 days per week at 46 hours. She had a previous period of 10 working days of sickness in 2016 for lower back pain as her

statement of fitness for work at B118 indicates (from 3 to 21 August 2016). This represents 2.2 weeks.

39. However, we were only provided with a limited number of pay-slips. For the absence from August 2017 onwards her pay-slips indicate that she received 5 days of sick pay in August 2017 (in one of the separate documents provided to us) and September 2017 totalling 4 weeks' sick pay (at B272), October 2017 1 week's sick pay (at B273), November 2017 2.5 weeks' of sick pay (at B274). This comes to a total of 8 weeks and 3 days of Occupational Sick Pay. In January 2018 (another of the separate documents provided to us), the Claimant received a payment of sick pay for the period 12 November to 9 December 2017, representing a period of 4 weeks, but for which she received 5 weeks' sick pay. In February 2017 (a further separate document), the Claimant received 4 weeks' sick pay for the period 14 January to 10 February 2018. It is not clear what the Claimant received for the period between 10 December 2017 and 13 January 2018. We were not provided with any further pay-slips for this period or any after February 2018. We do not know if the Claimant was still receiving sick pay as at the date of the meeting on 6 March 2018.

40. In her written evidence, Ms Patel stated that the Claimant was entitled to a total of 10 weeks' full pay and 6 weeks' half pay as Occupational Sick Pay which totals 13 weeks in the sum of £8,761.05. She further stated that this amount was paid to the Claimant but she was overpaid by 298 hours in the sum of £3,196.47. We had nothing further to indicate how these amounts had been calculated and whether in fact they represented that the Claimant had been paid what was owed.

41. We took the view that we could not take this matter any further forward in the absence of evidence.

42. Mr Kamara wrote to the Claimant on 30 August 2018 in the same terms as his previous letter, inviting her to a further return to work meeting to be held on 7 September 2018 (at B135-136).

43. On 7 September 2018, the Claimant attended the meeting with Mr Kamara, again accompanied by her daughter. We were not provided with any notes of this meeting.

44. The Claimant's evidence of what happened at the meeting is as follows. She explained that she was fit to return to work but her GP had advised her to undertake light duties for a period of time and that she was no longer able to do the night shift. She requested a change to day shifts. After a discussion, Mr Kamara said that he would allocate her 1 to 1 working with a particular service user, who we refer to as "HJ", who did not require 2 carers, to undertake monitoring, observation and feeding, and that HJ's personal hygiene would be handled by another carer. The Claimant also asked for an occupational health ("OH") assessment following her GP's advice and Mr Kamara responded "Do you want to lose your job?" The Claimant did not

reply to this because she did not understand what he meant and was quite surprised by it given that both her GP and her union representative had advised her to request an assessment. It was agreed at the meeting that she would return to light duties on day shifts on 28 October 2018. Her daughter's evidence of the meeting corroborates her own evidence. But Ms Mensah added in her written evidence that the comment from Mr Kamara was aggressive, rude and unnecessarily sharp and that she could see that her mother was intimidated and nervous as a result. In oral evidence, Ms Mensah added that he "just flipped" when the Claimant asked for the OH assessment.

45. The Respondent denies that the meeting took place as alleged by the Claimant and her daughter. However, we only have the Claimant and her daughter as witnesses to that meeting. Nevertheless, Mr McFarlane challenged their evidence on the following basis. It was unlikely that Mr Kamara would have made such a statement if the arrangement was for the Claimant to return to work, there was a planned return to work as the Claimant alleges and she did not mention this matter in emails to her union representative which she sent in the evening of the day of the meeting asking about the necessity of being assessed by an occupational therapist and as to pay (at B250). In response to cross examination, the Claimant maintained that the meeting had happened as she said and that her daughter witnessed it. In response to cross examination, Ms Mensah stated that there was a plan to return to work on a 1 to 1 basis and the focus in the email was on returning to work and so it was not relevant to go into the detail of what had happened at the meeting in the subsequent emails.
46. It did seem curious to us that the Claimant had not mentioned the comment from Mr Kamara in the emails to her union.

47. However, on balance of probability we accept the Claimant's evidence as supported by her daughter.

48. On 25 October 2018, the Claimant sent an email to Mr Kamara informing him that she would not be returning to work from 28 October as her health condition had changed (at B137). Mr Kamara responded later that day seeking clarification as to whether she would be returning at all or at some other time in the future (also at B137). The Claimant replied on 30 October that she had been diagnosed with Gallstones and was awaiting a Cholecystectomy and would advise when she was fit to return to work (at B138).

49. We were referred to her statements of fitness for work at B127-129 which cover the period 29 October 2018 to 28 April 2019.

50. At the Claimant's request, a meeting was arranged with the Respondent for 23 April 2019 to discuss her return to work (at B139). The Claimant attended the meeting which was with Mr Kamara and Ms Chibanda, who was at this time the Operational Director. The Claimant was again accompanied by her daughter.

51. The Claimant's evidence of the meeting is as follows. She had not met Ms Chibanda before. As they were going into the meeting room, Ms Chibanda told her daughter to stay outside stating that she could not attend the meeting and shut the door in her face. She was shocked and embarrassed by Ms Chibanda's behaviour given that her daughter had always accompanied her to meetings. Mr Kamara told Ms Chibanda to allow her daughter into the meeting but before they could even sit down, Ms Chibanda said in a threatening manner "why are you here, there is no job for you at St Mary's". The Claimant responded that she could work in the kitchen or undertake any light duties. Ms Chibanda replied that there are no light duties and even if you work in the kitchen I do not want to see you sitting down when others are working. Ms Chibanda went onto say that St Mary's cannot employ you and so you should stay back home for your safety.

52. Ms Mensah's evidence of the meeting was as follows. Before she could enter the room behind her mother, a lady she had never met before (but subsequently found out was Ms Chibanda) stated sharply "you are not allowed to attend this meeting" and shut the door in front of her. A few moments later Mr Kamara opened the door and allowed her to enter. Without any formal introduction, the first thing that Ms Chibanda said to her mother was "why are you here, there is no job for you at St Mary's". It was very uncomfortable and intimidating. Mr Kamara looked disinterested. The environment was so hostile. Her mother responded I cannot just sit at home, I am keen to return and have bills to pay, I am fit to work light duties. Ms Chibanda responded "St Mary's can't employ people on light duties, there are no jobs for that, even if you work in the kitchen, I don't want to see you sitting down when others are working."
53. The Claimant's further evidence of the meeting is as follows. She reminded Mr Kamara of the planned 1 to 1 return to work and he said that this arrangement was no longer available. Her daughter's evidence corroborates this. The Claimant told Mr Kamara that she no longer received sick pay, could not claim benefits because she was still employed and had to work in order to pay her bills. Her absence was due to disability, she had always provided sick notes and no one had ever told her that her employer would no longer be able to employ her because of her disability. Mr Kamara replied that even though her sick notes were up to date, St Mary's could no longer employ her. The Claimant requested this in writing and Mr Kamara replied that they would seek advice from HR Partners. Ms Mensah's evidence was not materially different to the Claimant's.

54. The Respondent denies the Claimant's allegations as to what happened at the meeting. Its position is set out at paragraph 24 of its response to the Claimant's first claim (at B34). This is essentially repeated by Ms Patel in her witness statement. That Ms Chibanda did not behave in an unprofessional manner; that she suggested that if the Claimant was fit to return to work, she should return to day duties rather than night duties until she is feeling 100% again; this would allow the Respondent to support her, ensure her health and safety, and ensure the standard of work; the Claimant was asked to attend

training on day shifts, which she declined and requested night shift work; she was told that the Respondent would make enquiries (of its HR Partners).

55. We considered the position carefully. The Respondent did not call any direct evidence as to the meeting beyond its notes of the meeting at B140-141. These are lacking in detail. The Claimant had not seen these notes until they were disclosed as part of these proceedings. Ms Patel said in her witness statement that the Claimant had asked for night shifts when it was clear that she had not, and further that the handwritten notes at B141 were written by Ms Mensah. Clearly they were not written by Ms Mensah which Ms Patel accepted in oral evidence. We felt this important because it emphasised that the Respondent gave no direct evidence of what happened at this meeting.

56. Mr McFarlane again challenged the Claimant's credibility as to her account of the meeting on the basis of correspondence written at the time. He referred to her email to her union representative dated 25 April 2019 at B252 which references the meeting on 23 April but does not go into the level of detail subsequently alleged in these proceedings. On this basis he put it to the Claimant that she had embellished her account of what happened. The Claimant denied this. Mr McFarlane also referred the Claimant to her later grievance email dated 13 May 2019 (at B154) in which she set out in quotes what she alleged Ms Chibanda had said in the meeting of 23 April which did not go as far as the allegations contained in her witness statement. He put it to the Claimant that what she said in her witness statement was "all wrong". The Claimant denied this and explained that there was a 12,000 word limit on their witness statements and so they had to take a lot of things out that were mentioned in other documents[1].

57. We note that the email of 25 April does mention that Ms Chibanda insisted that the Claimant attend on her own and that she said there is no job for her so what did she mean by light duties. The email does go into some detail albeit not all of it. We further note that the quoted comments in the email of 13 May 2019 are not that dissimilar to the Claimant's witness statement evidence. We accept the Claimant's explanation as to the word limit and the need to edit the witness statements.

58. On balance of probability we accept the Claimant's evidence of what occurred at that meeting.

59. After the meeting, the Claimant obtained a further statement of fitness for work from her GP (at B131) advising that she was fit to carry out light duties. This is dated 25 April 2019 and was for a period of 10 weeks. It identified the assessed condition as "gallstone with recurrent abdominal pain currently on waiting list for surgery". It indicated that the Claimant may be fit for work on the following basis:

[1] This is a reference to paragraph 33 of the record of the preliminary hearing held on 20 July 2022, in which EJ Hughes set a word limit for her witness statements of 12,000 words in total (at B54).

"Fit for a phased return as has been off work for over a year she is fit to carry out light duties can return to work as from 29/4/19"

60. The Claimant sent this statement to the Respondent by email dated 26 April 2019 (at B142). The email stated the following:

"Dear Neva Patel,

This is my off sick note to confirm the meeting we had with Jonathan and Priscilla on 23rd April. I went to my GP and he gave me this note. Also please if you could confirm that you have received this email as my off sick ends 28th April and I start work 29th April.

Thank You".

61. The Claimant also sent emails to Mr Kamara and to Ms Chibanda in similar terms on the same date also attaching the statement of fitness for work (at B143 and 144).

62. On 29 April 2019, Mr Kamara wrote to the Claimant inviting her to a meeting on 3 May (at B146). The content of this email is set out below:

"Good afternoon Leticia

During your Return to Work interview on 23/04/19 i did inform you that i was going to seek advice from our HR partners in regard to your return to work on light duty. I can confirm that i have now taken advice from them. Therefore, I am inviting you to a meeting on Friday 3rd May, 2019 to discuss the way forward.
If for any reason you are not able to attend this meeting please contact me so that we can reschedule it.
Hoping to hear from you soon
Kind regards Jonathan
Kamara"

63. On 3 May 2019, the Claimant attended the home with her daughter and after waiting for 45 minutes Mr Kamara told them that the meeting could not proceed because Ms Chibanda had had an accident and that he would notify them of a new date. Ms Mensah expressed her concern that having taken a day off work they were not told in advance that the meeting could not proceed. Mr Kamara said it was not necessary for her to attend all of the meetings and that her mother should be coming alone. The Claimant was concerned that her daughter was being excluded from further meetings although it does appear that Mr Kamara's remarks were more in the context of Ms Mensah expressing her concerns about taking unnecessary time off work.

64. We were referred to a draft of a letter contained in an email dated 6 May 2019 regarding this meeting (at B151). This email is from Ms Durojaiye to the Claimant. The parties were not certain if this letter was actually sent. Mr McFarlane put to the Claimant that whilst this email mentions the meeting of 23 April, it does not mention the alleged behaviour by Ms Chibanda. However, we formed the view that there was no reason that it should because the Claimant's focus was on returning to work.

65. Whilst the Claimant believes that there is something more to this set of circumstances, clearly it as simply unfortunate that the meeting could not proceed and that her daughter had unnecessarily taken time off work to attend.

66. On 9 May 2019, the Claimant attended a further return to work meeting with Mr Kamara and Mr Yogesh Patel, who was introduced as the new manager. Her daughter accompanied her to the meeting.

67. The Claimant alleges that Ms Chibanda was initially in the room but left. Ms Mensah further alleges that when Ms Chibanda left, she muttered something under her breath, from which she made out the words "waste of time". The Claimant's evidence is as follows. The first thing that Mr Patel said to her was "can you bend down". The Claimant responded no and he replied if you cannot bend down then St Mary's cannot employ you. She explained that she could undertake light duties such as writing care plans and carer reports (the Claimant confirmed that she had completed an NVQ3), feeding and observation, medication, activities, cleaning equipment and serving meals and teas. Mr Patel responded that feeding would not provide sufficient work for an entire shift and that she could not serve drinks because she would not be able to push the trolleys.

68. In her further evidence the Claimant states that she requested an occupational assessment or risk assessment but Mr Patel ignored this. In addition, her evidence is that Mr Patel stated that the Claimant's personnel file was non-compliant with current regulations because she had only provided one reference instead of two and does not have the Disclosure and Barring Service ("DBS") checks (the criminal records check, "CRB", as it was formerly known). He further stated that she would not be able to return to work until these matters were dealt with, the DBS forms would be sent to her and she was expected to provide a personal reference. The Claimant's evidence is that she stated that she had been employed by the Respondent for 18 years and so the Respondent would have to provide the reference because she had no other employment reference. Mr Patel insisted that one was required for a DBS check and she had to provide one. The Claimant responded that she had never been asked for a reference in the past for any DBS renewal. On balance of probability we accept the Claimant's evidence.

69. Ms Patel said in oral evidence that the Respondent would have required a DBS check for all employees and that where there was only one reference a note to this effect could simply have been placed on the Claimant's file on her return to work. However, we note that in the meeting Mr Patel was in fact stating that no action would be taken on the Claimant returning to work until she had provided the DBS check and the reference. Indeed, Ms Patel's oral evidence was somewhat equivocal. She was asked if the Claimant was provided with the necessary online login to obtain a DBS check. Her answer was that she was not sure whether "admin" sent this to her or not but it would have been something they would have done when the Claimant returned to

work. When it was put to her that the Claimant had been told that she could not return to work until she obtained a DBS check, so how was she going to obtain one without the log in, Ms Patel repeated that this would have been provided when the Claimant returned to work. Similarly, Ms Patel was unclear whether or not the note explaining why the Claimant had only provided one reference had been put on her file or not.

70. The Respondent's notes of this meeting are at B152-153. We note in particular that these record that Mr Patel opened the meeting as follows:

> *"Yogesh explained to Leticia that having gone through her job specification she is not able to perform in her former role as a Care Assistant. Leticia reckon (sic) that she is not able to carry out her former role as she is not able to lift or bend in doing her work. She suggested if she can come into feed the residents. But Yogesh explained to Leticia that he cannot offer her a role to only come into feed the residents since meals are served at different times in the day and it only takes about 2 hours at any particular meal time. Moreover, there are people already employed in that role and they also do the washing-up which Leticia may find difficult to do."*

71. On considering the notes we formed the following view. Mr Patel appears to be making an assessment of the Claimant's inability to undertake certain duties and further without giving any explanation of how he was able to reach those conclusions. The Claimant requested a risk assessment but Mr Patel ignored this.

72. On 13 May 2019, the Claimant raised a grievance addressed to Mr Subir Patel. She sent this to the Respondent by email and also by recorded delivery to Mr Patel's address as a Director shown at Companies House, which was his home address. This is at B154-157 and contains an attached letter headed "Request for an Occupational Therapist Assessment to Return to Work" but actually it outlines the difficulties that the Claimant feels she is facing.

73. By email dated 13 May 2019, Ms Patel wrote to the Claimant enclosing a Medical Questionnaire for completion and return (at B158). She sent it again on 15 May (also at B158). On 16 May 2019, the Claimant's daughter responded by email querying whether this was the correct form as she had been advised that it was for new starters (at B159). She also requested that all contact with her mother be by email given the Claimant's state of health.

74. By email dated 28 May 2019, Ms Patel wrote to the Claimant raising a number of matters. With regard to the medical questionnaire: that her last form was dated 2001 and her circumstances may have changed, she has refused to co-operate by completing and returning the form; and that she could not respond to her daughter without the Claimant's consent.

75. The Claimant responded to this in an email to Ms Patel dated 29 May 2019 summarising her position (at B164-165).

76. We viewed this as a lack of communication by the Respondent as to why they needed this form, the Claimant attempting to determine whether it was in fact

the correct form, having been advised by her union that it was for new starters and what she required was an OH referral form, and the Respondent not addressing this point.

77. Ms Patel's email of 13 May also took exception to the Claimant sending correspondence to her personal home address, asked her to explain where she had got this address from and asked her to refrain from sending further correspondence there (B163). The Claimant responded to this in her email of 29 May 2019, taking exception to the accusation that she had sought out and sent correspondence to her home address (B164-165).

78. Much was made of this by the Respondent but it appeared to us of no consequence. The Claimant had obtained Mr Patel's address from Companies House and was unaware that this was also Ms Patel's home address. In any event, whilst Ms Patel signed for the letter, it was not addressed to her.

79. During June 2019, there was considerable correspondence about the OH form, whether it was the correct one and whether it was complete. This led to some delay in its provision, a lack of understanding and a delay in completion and return by the Claimant. The correspondence is at B165-170. The OH referral was still outstanding in July 2019, as the emails at B172-176 indicate, with the Claimant continually pressing for the matter to be dealt with.

80. Ultimately, an OH assessment was conducted on 8 August 2019. The Claimant attended this with her daughter. A report was produced and sent to the Claimant on 5 September and with her agreement released to the Respondent the following day (at B261-262).

81. The report is at B177-180. It sets out the reason for referral and the Claimant's current/relevant health history. We note in particular the following (at B178):

"Leticia's abdominal condition has settled and stabilised following the gallbladder surgery.

Her knee condition has also stabilised and she is able to stand and walk steadily and independently for up to 2 hours. She cannot kneel but can crouch low. She has no problems sitting and managed to negotiate a flight of stairs today at a steady pace holding on. She can carry out regular household tasks such as shopping, cooking cleaning etc. At present there are no plans for any further significant medical treatment and I understand her GP has indicated she could return to adjusted duties.

I agree with her GP that Leticia is able to now return to amended duties and probably part time day duties."

82. Under the heading opinions and recommendations the report states as follows (at B178):

"Before any return management are recommended to carry out their own documented risk assessments on site including manual handling and specific task analyses to assess fully what Leticia can and cannot do reasonably. From these assessments, reasonable adjustments can be considered. If it is possible, I would suggest that a cautious phased return starting with reduced hours possibly 2 to 3 hours per day can then be gradually increased, if all is going well, to a maximum 20 hours per week.

If this does not prove possible then an alternative role and possibly of a more sedentary nature should also be considered."

83. Under the heading is the employee fit for normal hours and duties required by his/her post, the report states as follows:

"Leticia is not fully fit to return to full time care work night duties as before but she is fit at present to carry out a modified and part time role. Please see text above."

84. On 26 September 2019, the Claimant presented her first claim to the Employment Tribunal. This was not sent to the Respondent by the Employment Tribunal until 14 October 2019.

85. On 1 October 2019, Ms Patel wrote to the Claimant requesting her attendance at a medical capability hearing to be held on 4 October (at B181). This sets out the purpose of the hearing as follows:

"… to discuss:

- *your absence from work due to ill-health;*
- *the enclosed copy of the medical report from your GP/Consultant/the Occupational Health Practitioner;*
- *the likelihood of you returning to your job/work in the near future;*
- *whether there are any reasonable adjustments that can be made to your job or in the workplace that would facilitate a return to work;*
- *whether there is any alternative employment available that would be suitable for you."*

86. The letter went on to state that there was a possibility that the Claimant's employment could be terminated on the grounds of ill-health if the hearing indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alternative employment available. The letter offered the Claimant the right of accompaniment by a fellow employee or Trade Union Official.

87. On 2 October 2019, the Claimant's Career Coach at Croydon Talking Therapies wrote to Ms Patel on behalf of the Claimant (at B182). Her letter sets out the Claimant's medical condition and asks to escort the Claimant to a return to work meeting as a reasonable adjustment. The letter deals with the Claimant's physical impairments but also set out the service that Talking Therapies provides for people experiencing anxiety and stress.

88. In a letter dated 7 October 2019, Ms Patel wrote to the Claimant again in the same terms as her letter of 1 October but rescheduling the meeting to 11 October, in effect, at the Claimant's behest due to her ill-health (at B187-188 and 183).

89. On 10 October 2019, the Claimant sent an email to Ms Patel explaining that she had not noticed the attachment to her email containing the letter of 7 October as to the revised meeting date and was unable to attend. Her email also referenced the letter from Talking Therapies to which her therapist had received no response and stated that she would be attending as her representative at the hearing. This email is at B189-190.

90. On 11 October 2019, Ms Patel replied by email proposing a further meeting date of 17 October, confirmed receipt of the letter from her therapist and asked the Claimant to forward her email to the therapist (at B190).

91. On 14 October 2019, Ms Patel sent an email to the Claimant in response to her therapist's request to postpone the meeting. This would appear to be because the Claimant had an appointment with her therapist that same day. Ms Patel's email asked for proof of the appointment given that this would be the third time the meeting had been rearranged (at B191). The Claimant provided proof to the Respondent in the form of her appointment letter from Talking Therapies dated 15 October 2019 (at B194-195).

92. In an email dated 15 October 2019, Ms Patel rescheduled the meeting for 1.30 pm given that the Claimant's appointment was at 10.15 am (at B197). In a reply sent on 16 October, the Claimant advised Ms Patel that she will not be attending the meeting *"as it can be postponed until after the court date"*. In oral evidence, the Claimant said she was not well enough to attend the meeting although she accepted that she did not say this in her email.

93. By a letter dated 23 October 2019, Ms Patel wrote to the Claimant setting a final date for the medical capacity hearing for 30 October 2019 before *"an impartial Face2Face Consultant from Peninsula"* (at B201-202). The letter further states:

> *"As your employer we are duty bound to ensure that this matter is dealt with as swiftly as possible and without reasonable delay. Therefore, we feel a postponement until a Court hearing that is not yet scheduled is unreasonable."*

94. The letter also indicates that no further postponements will be granted. It requires the Claimant to attend the meeting in person or alternatively she can send written representations or take part by telephone.

95. On 29 October 2019, Ms Durojaiye wrote to Ms Patel indicating that she was the Claimant's representative in the Employment Tribunal proceedings (at B203). Her email set out the following:

> *"Leticia is suffering from work related stress anxiety, depression, which she developed as a result of St Mary's negligence in dealing with her return to work promptly since the 29th of April 2019 immediately after obtaining the Occupational health report.*
>
> *Antonia Mathurin from Croydon talking therapy also emailed you to say Leticia is attending talking therapy however in spite of Leticia's state of health, you are still pressurising her to attend a capability hearing on the 4th, 11th, 17th, 30th of October. This meeting should have been organised 6 months ago.*
>
> *Leticia is very depressed is on depression tablets as result (sic) she is not fit and stable to attend the scheduled meeting tomorrow.*
>
> *I would suggest that you contact her to find out about her state of health to ensure she is fit and stable to attend a meeting before making any arrangements."*

96. On 30 October 2019, Ms Patel sent an email in response requesting copies of the Claimant's most recent sick notes (at B204).

97. We do not know if these were sent but we do know that the meeting was postponed.

98. On 6 November 2019, Ms Patel sent an email to the Claimant rescheduling the meeting for 11 am on 13 November 2019 (at B207-208). The email sets out a chronology of the events relating to attempts to hold the capability hearing and repeated the alternative options to in-person attendance.

99. The letter states (at B208):

"I feel that we have been more than reasonable, and provided you with multiple opportunities to attend the medical capability. As you have exercised your right to postpone the hearing, please be aware that no further postponements will be granted. Therefore, if you fail to attend, the Face2Face Consultant will proceed with the hearing in your absence. In such circumstances, the Face2Face Consultant will make their recommendations based upon the information available to them at the time of the hearing. However, in this event, you may provide written submissions to the Face2Face Consultant by 5pm on the scheduled date of the hearing should you wish to do so.

We urge you to attend the hearing in person to avoid the Face2Face Consultant having to make findings without having had the benefit of speaking to you."

100. On 13 November 2019 (the day of the hearing), Ms Durojaiye sent an email to Ms Patel at 9.16 am (at B210). Her email criticised the Respondent's behaviour towards the Claimant and ended with the words:

"Please see attached Leiticia (sic) sick notes. You will be advised ad (sic) to when she will be fit to attend any meeting".

101. The sick notes, or more properly the statement of fitness for work certificates, referred to appear to be at B211 although these are too small for us to read. The only statement of fitness for work certificate that we have seen and which covers this period is the one at B130, which is dated 4 November, covering the period 14 October to 30 November 2019 and which indicates that the Claimant is not fit for work due to *"Depression NOS"*.

102. The Respondent did not respond to this email or to the sick notes but simply went ahead with the meeting. It does seem odd that the Respondent having previously postponed the meeting on production of medical evidence did not do so on this occasion. Ms Patel did not give compelling evidence as to why the Respondent chose to go ahead with the meeting beyond stating that they had already rescheduled the meeting a number of times, they could not just wait for her to contact them and criticising the Claimant for not advising when she was fit to attend.

103. The meeting on 13 November 2019 proceeded in the Claimant's absence. We were referred to a report dated 25 November 2019 prepared by a Consultant from Face2Face, an external agency, which appears to be part of Peninsula (the organisation that Mr McFarlane is a Consultant for), who conducted the hearing on behalf of the Respondent. This is at B212-223.

104. The report sets out the background and the documents referred to. It poses a series of questions to the Claimant which are recorded as *"the employee*

did not respond" presumably on the basis she was not present at the hearing. This is recorded in "Appendix 1 – Minutes of Hearing LM" (at B218-221).

105. However, having considered the report we formed the view that if the Consultant had access to all of the background information (and Ms Patel confirmed in evidence that she had access to this), why was she unable to wholly or partially set out answers to the majority of these questions even in the Claimant's absence?

106. At B217, the Consultant recommends that the Claimant should be dismissed on grounds of capability and continues:

"In light of the fact that the business is unable to sustain Letitia (sic) Mensah's level of absence and there are no further adaptations that can be put in place, St Mary's Care Ltd will now have to consider the termination of employment on the grounds of capability".

107. The Consultant indicates that the grounds for dismissal relied upon are based on the answers to questions given by Ms Patel and the adjustments looked into by Mr Patel in May 2019.

108. By letter dated 16 July 2020, Ms Patel wrote to the Claimant advising her of her dismissal (at B224-225). This letter attaches a copy of the Consultant's report and sets out a chronology of the events leading to the meeting on 13 November 2019. It continues (at B225):

"In reviewing our records, I realise that an admin error resulted in the report not being issued. Please find attached their report, which represents my decision following your failure to attend the medical capability hearing.

Under these circumstances and taking into account the fact we had to find a permanent replacement for you, I regretfully been left (sic) with no alternative other than to terminate your employment on the grounds of ill health.

You will be paid 12 weeks' pay in lieu of notice."

109. The letter advised the Claimant of her right of appeal within a time limit of 5 days. The letter ended by stating how sad Ms Patel was that the Claimant's employment had ended in this way and took the opportunity to thank her for her contribution and service and to wish her well for the future .

110. Whilst the letter does not contain the date of dismissal, the Claimant has stated in her second claim to the Tribunal that her employment ended on 17 July 2020 (at B287) which we assume is the date of receipt of the letter of 16 July. The Respondent has accepted this date in its response to the second claim at B299. In the absence of anything more, we therefore find that the Claimant was dismissed on 17 July 2020.

111. Ms Patel said in oral evidence that she accepted that there was a delay in issuing the dismissal letter but stated that there was *"a lot going on"* (a reference to Covid-19) and the Respondent *"had another claim"* (a reference to another Employment Tribunal claim). However, we found her explanation uncompelling. This was not a matter buried in the mists of time, given that the Respondent already had an ongoing Tribunal claim involving the Claimant

(the first claim was issued in September 2019) and one would have thought this would be uppermost in or at least at the forefront of the Respondent's mind.[2] We acknowledge that from February/March 2020 onwards the country was at the start of the COVID-19 pandemic and that care homes were greatly affected. However, we still believe that the delay was inexcusable.

112. Whilst the Claimant was dismissed with 12 weeks' pay in lieu of notice, the Respondent has not paid this to the Claimant because it queries the amount that the Claimant should receive as it disputes the number of hours that she was employed to work each week. In addition, the Claimant has not received payment in respect of her accrued but untaken annual leave.

113. The Claimant did not exercise her right of appeal. In oral evidence she stated that she had difficulties accessing her legal representatives at the time.

114. The Claimant presented her second claim to the Employment Tribunal on 15 September 2020 (at B284-317).

115. With regard to the claimant's entitlement to Occupational Sick Pay we have referred to the clause set out in the FTF document at B102. Ms Durojaiye also referred us to the Judgment in her mother's claim against the Respondent at paragraph 136 which simply restates the entitlement at B102. The Respondent's position is that Occupational Sick Pay is purely a one-off entitlement. In oral evidence, I asked the Claimant why she believed she was entitled to Occupational Sick Pay? She replied that, although she had never received sick pay before, she knew that there were some people working for the Respondent who had received sick pay more than once and on an annual basis.

116. Our position is that whilst the document at B102 is not clearly drafted, were it to be an entitlement on a rolling period of absence (as the Claimant is in effect alleging), we find that the document refers to a period of absence from work and an entitlement for that period of absence. In the Claimant's case she had one period of continuous absence for which she received 10 weeks full pay and 6 weeks half pay.

117. We also considered whether there was an argument that the Claimant was denied the right to return on amended duties as recommended by her GP (at B131) and so should be paid her wages for that period of time (for 10 weeks) until she fell sick again (in November 2019 at B130). Her Occupational Sick Pay had ended after 10 weeks and 6 weeks. The Claimant was off sick from August 2017. Her Statutory Sick Pay ("SSP") ended on 10 February 2019 (at B267). Her statement of fitness for work recommending amended duties was dated 25 April 2019 (at B131).

[2] The Claimant submitted her first claim on 26 September 2019, the Respondent presented its first response on 9 November 2019 and there was a preliminary hearing on 24 March 2020.

118. With regard to the Claimant's entitlement to paid annual leave we make the following findings of fact.

119. We accept that the Claimant was employed for 46 hours per week.

120. The amounts of gross and net pay are to be determined in the remedy hearing.

121. The Claimant was not paid in respect of her entitlement to annual leave for 3 years. The Claimant's Schedule of Loss at B281 sets out her claim in respect of the leave years 1 April 2018 onwards. However, there is no mention of the claim for the earlier period from 12 August 2017 when she first went off sick? There is also no claim as to whether holiday entitlement accrued during the notice period although and we do not what 69 hours claimed for that period represents.

122. It is accepted that the Claimant was entitled to statutory notice of 12 weeks' and, in the absence of being given that notice, 12 weeks' payment in lieu.

Submissions

123. Mr McFarlane provided a document headed Respondent's Outline Submissions which he spoke to. Ms Durojaiye provided a document relating to time limits which she spoke and she made oral submissions in relation to the substantive complaints. We do not propose to set these submissions out within our Judgment, except where appropriate to do so. But we have taken them fully into account in reaching our decision.

Essential Law

124. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, (b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case"

125. Section 15 Equality Act 2010:

"1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

126. Section 19 Equality Act 2010:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

127. Section 20 Equality Act 2010:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

128. Section 21 Equality Act 2010:

"1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…"

129. Section 26 Equality Act 2010:

"(1) A person (A) harasses another (B) if—
a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

130. Section 27 Equality Act 2010:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

Conclusions

Time Limits

Equality Act 2010

131. Section 123 governs time limits under The Equality Act 2010. It states as follows:

(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 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 employment tribunal thinks just and equitable…
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(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.

132. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

133. The factors to take into account (as modified) are these:

- the length of, and reasons for, the worker's delay;
- the extent to which the strength of the evidence of either party might be affected by the delay;

- the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
- the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
- the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

134. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

135. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account (Apelogun-Gabriels v Lambeth LBC and another [2002] IRLR 116, CA).
136. If the delay was because the worker tried to pursue the matter in correspondence before rushing to Tribunal, this should also be considered (Osaje v Camden LBC UKEAT/317/96.

137. Where a claim is outside the time limit because a material fact emerges much later a tribunal should consider whether it was reasonable of the worker not to realise s/he had a prima facie case until this happened (Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490, EAT)

Employment Rights Act 1996

138. Section 111 of the Employment Rights Act 1996 states that a complaint of unfair dismissal must be received by the Employment Tribunal within 3 months of the date of dismissal subject to an extension of time provided by an application to ACAS for Early Conciliation within that initial time limit. Under section 23 of the Employment Rights Act 1996, a complaint of unauthorised deduction from wages must fall within the same time limits or if there are a series of deductions, the last of them must form within the same time limits.

139. Late claims can be allowed to proceed if the claimant can persuade the Tribunal of two things. First, the claimant must show that it was not reasonably practicable to present her claim in time. The burden of proving this rests firmly on the Employee (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if s/he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

140. Whether it was reasonably practicable for the claimant to submit her claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the claimant's reasons.

141. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to employers and does not mean 'physically possible', which would be too favourable to employees, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?'

142. May LJ in Palmer stated that the factors affecting a claimant's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the claimant; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or her adviser which led to the failure to present the complaint in time.

143. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA).

144. Where the claimant satisfies the Tribunal that it was not reasonably practicable to present her claim in time, the Tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.

The claims before us

145. We are directed to deal with time limit issues in respect of the First Claim at paragraph 2 of the list of issues at (B43-44) and in respect of the Second Claim at paragraphs 4 to 6 of the list of issues (at B59-60).

146. The first claim was presented to the Employment Tribunal on 26 September 2019 following a period of Early Conciliation between 27 July and 27 August 2019. This means that the earliest incident which could be in time would be on 28 April 2019.

147. The complaint of direct disability discrimination is set out at paragraph 13 of the list of issues (at B45-46). The only allegation which is on the face of it out

of time is at paragraph 13 (b) in that it is alleged to have occurred on 23 April 2019. However, we accept that this forms part of a continuing course of conduct and so along with the other matters relied upon were all presented in time.

148. The alleged unfavourable treatment giving rise to the complaint of discrimination arising from disability is set out at paragraph 18 of the list of issues. We found that this allegation arose from 29 April 2019 onwards and so it is in time.

149. The complaint of indirect disability discrimination is set out at paragraphs 22 to 25 of the list of issues (at B46-49). The provision, criteria and/or practices ("PCPs") relied upon are set out at paragraph 22. We find that these are alleged to have occurred as follows: (a) and (b) at the meeting held on 9 May 2019; and (c) at the meeting held on 23 April 2019 and in Ms Patel's email to the Claimant of 28 April 2019. They are therefore matters that were presented in time.

150. The complaint of failure to make reasonable adjustments is set out at paragraphs 26 to 31 of the list of issues (at B47-48). The PCPs relied upon at paragraph 27 are the same as those relied upon for the complaint of indirect disability discrimination and so are also matters that were presented in time.

151. The complaint of harassment related to disability is set out at paragraphs 3238 of the list of issues (at B48). The Claimant relies upon the same allegations as relied upon in her complaint of direct disability discrimination which we have found to have been presented in time.

152. The complaint of unauthorised deductions from wages is set out at paragraphs 40-43 of the list of issues (at B49). The Claimant says that the Respondent made a series of deductions in effect arising on each pay day. She was paid monthly in arrears for work carried out mid-month to mid-month. So the final date a deduction could take place would have been in her wages paid in May 2019 which would cover the period claimed.

153. The second claim was presented to the Employment Tribunal on 15 September 2020 following a period of Early Conciliation between 22 and 26 August 2020 and so the latest date an act could be in time is 23 May 2020.

154. The complaint of unfair dismissal is set out at paragraph 3 of the list of issues (at B60-62). The effective date of termination is 17 July 2020 and so the complaint was presented in time.

155. The complaint of direct disability discrimination is set out at paragraph 6 of the list of issues (at B62). Dealing with each allegation of less favourable treatment in turn:

a) Paragraph 6.1.1 not accepting fit notes. We struggled to identify which statement of fitness for work that the Claimant was relying on. If it is the one dated 25 April 2019 then the allegation is out of time. If it is the one dated 4 November 2019 then it is also out of time. We think on balance of probability that the Claimant relies on the statement for 4 November 2019. We did not consider the non-acceptance of a fit note to amount to a continuing course of conduct. We then considered whether it was just and equitable for us to extend time so as to allow jurisdiction to hear this element of the complaint. We find that the Claimant was not aware that the statement had not been accepted until she was notified that the capability hearing had gone ahead in the outcome letter of 16 July 2020 which she received on 17 July 2020. Thus we extend time to allow this allegation to be heard;

b) Paragraph 6.1.2 failing to notify the Claimant of the capability hearing. The last date set for the capability hearing was 13 November 2019. Whilst the Claimant was notified of this date, she was not notified whether the hearing had gone ahead or not until she receive the dismissal letter on 17 July 2020. On that basis, the Claimant only became aware of this material fact at that later date. In the alternative, we are also willing to exercise our discretion to extend time so as to allow jurisdiction to hear this allegation;

c) Paragraph 6.1.3 failing to carry out investigations before the capability hearing. We are unclear what investigations are alleged to have not been carried out, but assuming that they should have been carried out by the date of the 13 November 2019 meeting and the Claimant was unaware of any inadequacy that she alleges until she received the dismissal letter, then for the same reasons as above, we accept this allegation as presented in time;

d) Paragraph 6.1.4 failing to consider the Claimant's length of service before deciding to dismiss. This should have been considered at the 13 November 2019 meeting and the Claimant was not aware that the Respondent allegedly did not consider her length of service until she received the dismissal letter. Thus for the same reasons as above, this allegation is also in time;

e) Paragraph 6.1.5 failed to heed the occupational therapy report. This was sent to the Respondent on 6 September 2019 and taking the view that the alleged failure continued from that date onwards up until communication of the dismissal it would again be in time for the same reasons as above.

156. The complaint of discrimination arising from disability is set out at paragraph 7 of the list of issues (at B62-63). The allegations at paragraph 7.1 are the same as those relied upon for the complaint of direct disability discrimination, which we have already found to have been presented in time.

157. The complaint of indirect disability discrimination is set out at paragraph 8 of the list of issues (at B63-64). Dealing with each of the PCPs in turn:

    a) Paragraph 8.1.1 failing to notify staff of capability meetings or similar. The Claimant was notified of meetings. However, we are unclear what this covers. Is it that the meetings will take place or that they have taken place? If it is the latter then the allegation is in time. But if it is the former, then the allegation is presented out of time and we do not find it appropriate to exercise our discretion to extend time;

    b) Paragraph 8.1.2 not giving a dismissal warning in the event of failing to attend a capability hearing or similar. We are concerned whether this was applied/could apply to anyone other than the Claimant or even to her at all. But setting that to one side, the last time it could have happened would be the notification of the meeting set for 13 November 2019. On this basis the allegation is presented out of time;

    c) Paragraph 8.1.3 not informing staff promptly of decisions to dismiss. We had concerns as to whether this amounts to a PCP and whether it was applied/could apply to more than just the Claimant. But in terms of time limits, it is ongoing from the date of the report of 25 November 2019 to the dismissal letter of 16 July 2020. So the failure was ongoing and the complaint is presented in time;

    d) Paragraph 8.1.4 failing to advise staff of the purpose of capability meetings. We had concerns as to whether this PCP was applied/could apply to more than just the Claimant. Further, the purpose of the capability meeting was spelt out in all of the letters sent to the Claimant by the Respondent. But in terms of time limits, the last time it could have happened would have been in the notification of the meeting set for 13 November 2019. On this basis the allegation was presented out of time and we do not believe it appropriate to exercise our discretion to extend time.

158. The complaint of failure to make reasonable adjustments is set out at paragraph 9 of the list of issues (at B64). The PCP relied upon is requiring the Claimant to attend the capability meeting in person. Again we had concerns as to whether this was applied/could apply to anyone else. Further, as to whether it was applied at all, given that the Respondent did state that the Claimant could attend in person, submit written submissions or attend by telephone (in the letters at B183, 201 & 208) and present written submissions (in the letter at B185). But setting that to one side, this PCP can only have been applied/apply up to the notification of the meeting set for 13 November 2019 and so was presented out of time. We do not believe it appropriate to exercise our discretion to extend time.

159. The complaint of harassment related to disability is set out at paragraph 10 of the list of issues (at B64-65). The allegation is set out at paragraph 10.1.1. Dealing with the first part, repeatedly sending the Claimant dates for

capability meetings. This is out of time given that the last notification was to attend the meeting set for 13 November in the letter of 6 November 2019. Dealing with the second part, not accepting that the Claimant was not fit to attend. This is in time given that the Claimant was not aware that the meeting went ahead (disregarding her statement of fitness for work) until she received the dismissal letter on 17 July 2020.

160. The complaint of victimisation is set out at paragraph 11 of the list of issues (at B65). This was presented in time because the alleged detriment is the Claimant's dismissal on 17 July 2020.

161. The complaint of entitlement to accrued but outstanding annual leave is set out at paragraph 12 of the list of issues (at B65). This was presented in time, the Claimant had not taken or received payment for annual leave for a number of years prior to her dismissal.

162. The complaint of unauthorised deductions from wages is set out at paragraph 13 of the list of issues (at B65-66). The Claimant seeks the repayment of deductions from wages between 29 April and 17 July 2020. On this basis the complaint was presented in time.

163. The complaint of damages for breach of contract is set out at paragraph 14 of the list of issues (at B66). This is for notice pay outstanding or due at the effective date of termination and so the complaint was presented in time.

Equality Act 2020 Burden of Proof

164. Under section 136 EQA, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

165. We have followed the guidance given as to the burden of proof by the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258.

166. The Employment Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

167. Madarassy also found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

168. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

169. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Disability discrimination

Disability

170. With regard to the first claim. The Respondent accepts that the Claimant was a disabled person as a result of her knee condition, a whole knee replacement, which took place on 12 August 2017. The medical records at B337 and statements of fitness for work at B119-124 support this.

171. Whilst the Respondent has not commented on the osteoarthritis in the Claimant's left knee, for which she was awaiting an operation, this is referred to in a statement of fitness for work dated 27 April 2018 at B125. A further statement dated 29 October 2018 references the knee condition and gallstones at B127 and this continues to be referenced in the statements at B128, 129 & 131. Whilst we acknowledge that the Claimant had these impairments, we had no specific evidence from her beyond these statements. However, we accept that disability extended to the left knee but had insufficient evidence on which to reach a finding as to the gallstones.

172. With regard to the second claim. The Respondent also accepts that the Claimant was a disabled person in respect of her mental impairments in an email dated 23 September 2022 (given to us as a separate document), which must be a reference to anxiety and depression as set out in the list of issues in respect of the second claim (at B62).

THE FIRST CLAIM

Direct discrimination

173. Under section 13 of the Equality Act 2010 ("EQA"), it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

174. The issues that we have to determine are set out at paragraphs 13 to 21 of the list of issues at B45-46.

175. In terms of the treatment alleged in paragraph 13 and our findings of fact:

a) Paragraph 13 (a) amended to read April 2019 we accept took place;

b) Paragraph 13 (b) (i) we accept that Ms Chibanda said words to this effect and (ii) we accept Mr Kamara said words to this effect;

c) Paragraph 13 (c) (i) we accept that Mr Y Patel said words to this effect and that the conversation requiring the Claimant to provide a CRB (now called DBS) check and a further reference took place;

d) Paragraph 13 (d). This is alleged to have occurred from 9 May 2019 onwards. The Claimant's request for an assessment to identify the duties that she could undertake and to undertake a risk assessment or arrange the same was not addressed at the 9 May meeting but we think we understand the Respondent's position to be that the OH assessment and capability meeting were intended to deal with this. However, no action was taken following the OH assessment and so we accept that this allegation is made out;

e) Paragraph 13 (e). This is also alleged to be ongoing from the meeting held on 9 May 2019. It appears to relate to the delay and confusion in arranging a referral to OH. So to that extent we accept that it is made out;

f) Paragraph 13 (f) failing to address the Claimant's grievance of 13 May 2019. We find that the grievance was not addressed by the Respondent beyond Ms Patel taking issue with the Claimant's letter of grievance being sent to her home address;

g) Paragraph 13(g). This is alleged to have occurred on 28 May 2019 and arises from paragraphs 20 and 24 of the particulars of the first claim (at B21-22) and B163. We accept that this took place.

176. We find these matters to amount to less favourable treatment and that the primary facts support a finding that the Respondent could have unlawfully discriminated against the Claimant in the absence of a credible explanation and so the burden of proof has shifted to the Respondent to show that discrimination had nothing whatsoever to do with the less favourable treatment afforded to the Claimant.

177. We were particularly concerned by the shift in management approach towards the Claimant as her ill-health absence continued and she expressed the desire to return to work on amended duties. Mr Kamara had hitherto been supportive of the Claimant but his approach changed. Ms Chibanda was hostile towards the Claimant from the outset and Mr Y Patel

was dismissive of the Claimant and reached conclusions in the absence of any proper consideration of what duties the Claimant could do as opposed to what on a cursory basis he determined she could not do.

178. The Respondent's own evidence gives an indication of this in the meeting notes of 9 May 2019 and the paltry evidence from Ms Patel (who was not there). We were not assisted by the lack of appropriate witness evidence from the Respondent in determining whether or not the Respondent had discharged the burden of proof. Whilst Mr McFarlane did his best in submissions and accepted that for the majority of the acts of less favourable treatment the Respondent did not adduce evidence and he could only press the Claimant and her daughter as to credibility, we did not accept his submissions.

179. We therefore find that the Claimant was subjected to unlawful direct disability discrimination as alleged.

Discrimination arising from disability

180. A complaint of discrimination arising from a disability is essentially where a claimant is alleging that she has been treated unfavourably as a result of something arising from her disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

181. We accept paragraph 17 of the list of issues at B46 that the Claimant's absence from work from 12 August 2017 onwards (at B119) and her unfitness to work until April 2019 were matters arising from her disability.

182. We accept paragraph 18 of the list of issues that the Respondent treated the Claimant unfavourably by refusing to permit her to return to work from 29 April 2019 onwards. From the meeting held on 9 May 2019, the Claimant was required to provide a DBS check and a further reference before her return would be considered and this was never resolved.

183. We accept paragraph 19 of the list of issues that the Respondent treated the Claimant unfavourably in refusing to permit her to return to work because of her absence from work and her unfitness to return to work until April 2019. This was about her need to work which the Respondent was not supportive of. Had the Claimant been at work and these matters arose it is clear from the Respondent's own evidence that they would have given her the DBS log in details and put a note on her file as to the lack of a second reference.

184. With regard to paragraph 21 of the list of issues, the Respondent accepted the Claimant's physical disability and clearly had knowledge of the impairments or ought reasonably have been expected to know.

185. The defence is not included in the list of issues. But we are obliged to deal with it in any event. Has the Respondent shown that the treatment of the Claimant was a proportionate means of achieving a legitimate aim?

186. Mr McFarlane advances the Respondent's defence at page 3 of his written submissions. In oral submissions this was put succinctly as the need to ensure that the Claimant was not a hazard to herself or anyone else. We were not convinced by either submission.

187. At the meeting on 9 May 2019, there was no proper assessment of the Claimant's ability to return to work; whilst there was then a delayed referral to OH, the Respondent had received the report on 6 September 2019 but did not take any action beyond commencing capability proceedings in its letter to the Claimant dated 1 October 2019. The Claimant had requested a risk assessment but this was not pursued. The Respondent asserts that the capability hearing would have provided them with the answer but all that it would have done would be to go over the information that it already had. Even if the Claimant had been present at the meeting and answered the questions posed by the Consultant, the Respondent would not have been any the wiser. There needed to be a risk assessment. Ms Patel said in evidence that the Respondent would have had to go through the Claimant's job description and identified what she could do and Ms Patel said this would have been done at the meeting. However, looking at the transcript of the meeting we can see that it was never equipped to conduct a risk assessment. There was thus no consideration of the proportionality of the legitimate aims now relied upon.

188. We therefore find that the complaint of discrimination arising from disability is well founded.

Indirect discrimination

189. Indirect discrimination is defined in section 19 of the Equality Act 2010. In essence, indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

190. With regard to the PCPs set out at paragraph 22 of the list of issues.

191. (a) requiring employees to undertake work that involves lifting and bending and (b) requiring employees to work full 12 hours shifts (at the meeting held on 9 May 2019) we find were applied by the Respondent. The Respondent accepted that (b) was in the Claimant's job description.

192. (c) requiring staff to communicate with the Respondent directly and not through an intermediary, we find was not applied. It was subject to the permission and once given communication could be through an intermediary (in the Claimant's case, her daughter).

193. As to paragraph 23 of the list of issues (at B47), does the application of the PCPs put other disabled persons at a particular disadvantage when compared with persons who do not have this protected characteristic? We find that self evidently the answer is yes. We refer to the Claimant's statement of fitness for work at B131 and the recommendation contained in the OH report as to light duties and reduced hours.

194. As to paragraph 24 of the list of issues. Did the Respondent apply the PCPs at (a) and (b) of paragraph 22 to the Claimant. The answer is yes, at the meeting held on 9 May 2019 which the Respondent never resiled from.

195. With regard to paragraph 25 of the list of issues, did the application of the PCPs put the Claimant at that disadvantage in that (a) she could not undertake lifting and bending and (b) she could not work a full 12 hours shift, the answer is yes. Given that we did not find that the PCP at paragraph 23 (c) was applied, paragraph 25 (c) is not applicable.

196. The defence is not set out in the list of issues. But we are obliged to consider it. Can the Respondent show that the PCPs were a proportionate means of achieving a legitimate aim. The Respondent has addressed this in its written submissions at page 2. We do not find these submissions convincing. We refer to our conclusions with regard to the defence to discrimination arising from disability above. The Claimant had worked for the Respondent and its predecessor in title for 18 years and so she must have been able to do more than just lift and bend. The assessment of what she could not do, rather than what she could do, was based on a cursory view taken by Mr Y Patel which in turn was largely based on assumptions. Clearly there needed to be a risk assessment to determine what the Claimant could do.

197. We therefore find that the complaint of indirect disability discrimination is wellfounded to the extent set out above.

Failure to make reasonable adjustments

198. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

199. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply

an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

200. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

201. With regard to paragraph 26 of the list of issues (at B47) we have already concluded that the Respondent knew or ought reasonably to have known that the Claimant had a disability.

202. With regard to the PCPs set out at paragraph 27, we find that (a) requiring staff to undertake full duties, (b) requiring staff to work full hours were applied by the Respondent. Sub-paragraph (c) keeping the Claimant off work from April 2019 we do not find to be a PCP because the evidence we had only indicated that it was applied to the Claimant and not wider. As to subparagraph (d), requiring direct communication between themselves and employees, we find was not applied because it was conditional upon consent and once consent was given, communication could be through an intermediary.

203. As to paragraph 28 of the list of issues, did the application of the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in the following respects: (a) that she could not undertake full duties and (b) she was fit to return to work from April 2019 we conclude the answer to be yes by adding the words "on a modified basis as per the doctor's statement of fitness for work". Subparagraph (c) as to being unable to communicate directly owing to the medication she was on, we find not applicable.

204. As to paragraph 29, did the Respondent take such steps as were reasonable to avoid the disadvantage. In respect of (a) and (b), adding the words on a modified basis (as indicated above), the answer is no. In respect of (c) the answer is yes. In respect of sub-paragraph (d), had this been applied to the Claimant, the Claimant was in fact given permission for the Respondent to communicate with her daughter after providing her authorisation.

205. With regard to paragraphs 30 and 31 the answer is yes.

206. Clearly the Respondent did not investigate at all at the time and whilst they present their explanations now to refute the complaint, we were not convinced that there had been any proper analysis when it should have been undertaken.

207. We find that the complaint of failure to make reasonable adjustments is wellfounded to the extent indicated above.

Harassment

208. Having found in the Claimant's favour in respect of her complaint of direct disability discrimination, we are precluded from making a finding of harassment (under section 212(1) of the Equality Act 2010).

Unauthorised deduction from wages

209. The complaint in respect of unauthorised deduction from wages is set out at paragraphs 40 to 43 of the list of issues (at B49).

210. The Claimant alleges at paragraph 41 that she was entitled to be paid her salary from April 2019 onwards. This is on the basis that she was assessed by her GP as fit to return to work from 29 April 2019 onwards albeit on a phased return to work basis (at B131).

211. We have to determine what was properly payable to the Claimant in order to then go onto consider whether there have been any unauthorised deductions from her wages.

212. As a matter of contract it seems clear to us that whilst the Respondent might not have been required to offer the Claimant work, there was no entitlement for the Respondent to withhold pay where the Claimant was fit and able to work. The Respondent did not allow the Claimant to return on the ostensible basis that she needed to complete a DBS check and provide a second reference. However, she was not in a position to do so until she returned. The Claimant had requested a risk assessment and this was not carried out. The Respondent maintains that this was the purpose of the capability hearing but it is clear to us that this was not something that the meeting was equipped to carry out.

213. We therefore conclude that the Claimant was entitled to be paid for the period of time she was certified fit to work but was prevented from returning.

214. We then considered for what period wages were properly payable to the Claimant but not paid? Her next medical certificate is for a period commencing 14 October to 30 November 2019 which assessed her not fit to work by reason of depression (at B130). There appear to be no further statements of fitness for work thereafter and of course the Claimant did not return to work and whilst she was not told of her dismissal until 17 July 2020, the decision was in effect made in the report dated 25 November 2019.

215. We also considered the OH report based on an assessment on 8 August 2019 (at B177-which stated that the Claimant was fit to carry out a modified and part time role although that report also states that there is a need for the

Respondent to carry out its own risk assessments on site. This of course never took place.

216. We therefore conclude that the Claimant was entitled to her wages for the period 29 April to 14 October 2019 and she did not receive payment for this period.

217. The amount of these deductions is to be determined at the remedies hearing.

218. At paragraph 4, the Claimant also alleges that she is owed Occupational Sick Pay for the years 2018 and 2019. As we have indicated above we did not find that there was any outstanding entitlement.

THE SECOND CLAIM

Unfair dismissal

219. The complaint of unfair dismissal is set out at paragraph 3 of the list of issues at B60-62

220. Section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

221. We first had to determine whether the respondent had a potentially fair reason to dismiss the claimant within sections 98(2) and (3) of the 1996 Act. The Respondent alleges that this was by reason of capability, conduct and some other substantial reason in the alternative at paragraph 3.2 of the list of issues.

222. We conclude from the evidence before us that the potentially fair reason for the Claimant's dismissal was capability.

223. It is clear that incapability can stem from sickness, what is necessary is that the sickness or ill-health impacts upon the claimant's capability to do her job which can arise from resultant lack of attendance at work or inability to return to work.

224. There was no evidence to support that the potentially fair reason was conduct or for that matter some other substantial reason.

225. We then turned to consider whether the Claimant's dismissal satisfied the test of reasonableness under section 98(4) of the 1996 Act.

226. The basic question in determining whether the test of reasonableness has been met in a case of dismissal arising from a single period of prolonged absence is whether in all the circumstances the employer could be expected to wait any longer and, if so, how much longer? Each case must be considered on its own facts and an employer cannot hold rigidly to a predetermined period of sickness after which any employee may be dismissed.

227. We would expect the employer to have found out the true medical position and to have consulted with the employee before making a decision. A medical report on the implications and likely length of illness should generally be obtained from the employee's GP or an OH adviser or company doctor or independent consultant. Where the employer obtains a report from an OH adviser or a company doctor, the employer should also be willing to consider a report from the employee's own GP or specialist. Whereas the former may be more familiar with working conditions, the latter may be better placed to judge the employee's health.

228. The Access to Medical Reports Act 1988 covers workers' access to reports prepared by a medical practitioner who has responsibility for their clinical care. An employer must not apply to a worker's doctor for a report without first getting the worker's written consent, having notified the worker in writing of his/her rights under the Act. Most employers have a standard notification and consent form for this, as indeed the respondent did. The worker is entitled to see the report before it is sent to the employer if s/he so requests and to make amendments with the doctor's agreement. The worker must be told of these rights at the time s/he is asked for his/her consent to the obtaining of the report.

229. Having apprised itself of the medical position, the employer's decision to dismissal ought to be based on the following factors:

    a) the nature and likely duration of the illness;

    b) the need for the employee to do the job for which s/he was employed and the difficulty of covering his absence. The more skilful and specialist the employee, the more vulnerable s/he is to being fairly dismissed after a relatively short absence;

    c) the possibility of varying the employee's contractual duties. An employer will not be expected to create an alternative position that does not already exist nor to go to great lengths to accommodate the employee. However, a large employer may be expected to offer any available vacancy which would suit the employee. What is reasonable very much depends on the facts;

    d) whether or not contractual sick pay has run out is just one factor either way;

e) the nature and length of the employee's service may suggest the employee is the type of person who is likely to return to work as soon as s/he can, but length of service would not necessarily be relevant in any other way.

230. It is important for the employer to have discussions with the employee and for the employee to know when his/her job might be at risk.

231. Turning then to look at the list of issues in the case before us.

232. Paragraph 3.3 effectively sets out the Burchell test.

233. The case of BHS v Burchell [1979] IRLR 379, EAT relates to conduct dismsals. This requires the Tribunal to consider the following:

a) Whether the employer believed that the employee was guilty of misconduct;

b) Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

c) At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

234. With modification this can apply to a capability dismissal although the list of issues does refer to "misconduct".

235. As modified, the question is did the Respondent hold a genuine belief in the Claimant's incapacity on reasonable grounds following as reasonable an investigation as was warranted in the circumstances?

236. There are then a series of sub-paragraphs within the list of issues in which the Claimant challenges the fairness of the dismissal.

237. Sub-paragraph 3.3.1 which alleges that the Claimant was not aware of the capability hearing on 13 November 2019. The Claimant was aware that the meeting was scheduled for that date but not aware that it had taken place in her absence until receipt of the dismissal letter dated 16 July 2020.

238. Sub-paragraph 3.3.2 which alleges there was no proper investigation of why the Claimant was unfit to work. We agree with this proposition. The Respondent's focus was on her inability to return in April and the OH certificate. However, from the notes of the May meeting and the capability meeting in November 2019 there was no proper investigation of either the physical or mental impairments and it was unreasonable of the Respondent not to do so.

239. Sub-paragraph 3.3.3 which alleges that the Claimant was not given a warning of any consequences of her failure to attend the meeting in November 2019. We find that the Respondent's letters at B179 & 183 clearly outlined the potential consequences of non-attendance.

240. Sub-paragraph 3.3.4 which alleges that the Respondent failed to make reasonable adjustments to facilitate the Claimant's participation in the meeting, for example by sending her questions in writing or holding the meeting remotely. We find that the Respondent offered the Claimant the option of written representations or joining by telephone but never sent her the questions. Given that they did not carry out an investigation they were not aware of the extent of the adjustments that they could reasonably have made.

241. Sub-paragraph 3.3.5 which alleges that the Respondent failed to inform the Claimant of the purpose of the capability hearing. We disagree with this. It is clear from the Respondent's letters that the Claimant was informed of the purpose of the capability hearing.

242. Sub-paragraph 3.3.6 which alleges that the Respondent failed to consider the Claimant's existing disability and that its own behaviour had impacted upon her ability to attend the hearing. We do accept that the Respondent failed to consider the mental impairment which was referred to by the Claimant's representative in correspondence and then in the statement fitness for work dated 4 November 2019 or whether their own conduct was a factor in this. It was not reasonable of them to failure to consider these matters.

243. At paragraph 3.4 of the list of issues, we are asked to consider whether the Respondent acted reasonably in all the circumstances as treating capability as a sufficient reason to dismiss the Claimant.

244. We do not accept that the Respondent carried out a reasonable investigation and so they could not have reached reasonable conclusions from which to arrive at a genuine belief.

245. We conclude that the Respondent could reasonably have waited in making the decision until the date that the Claimant's medical certificate ended and given that the decision was not communicated until July 2020 they could reasonably have reviewed the position. In answer to my question as to whether the Respondent could have reviewed its decision to dismiss, Ms Patel said that she felt that the Respondent had given the Claimant considerable time and as far as she was concerned, she was waiting for the Claimant to respond and she thinks she just assumed that the Claimant was not fit to return to work given the earlier indication in correspondence. This was not a reasonable position to take.

246. We concluded that the Respondent did not act reasonably in all the circumstances. We take into account the following: the Claimant had

provided a statement of fitness for work covering her until 30 November 2019; the last meeting with her was on 9 May following a fit note dated 25 April 2019 which covered a period of 10 weeks from 29 April; the OH report was carried out on 8 August 2019; there had been no risk assessment; the capability hearing took place in the Claimant's absence on 13 November, 2019; the transcript reveals a series of questions which of course the Claimant was not there to answer and which could have been sent to her advance but in any event the answers to those questions from the Claimant would not have addressed the issues of what she could do in the care environment and when she could return to work; there was no up to date medical information; the delay in communicating the decision further exacerbates this but presented the Respondent with a further opportunity to review their decision.

247. Even if the Respondent had not seen the Claimant's email of 13 November at the time of the meeting, the report was not prepared until 25 November 2019 recommending dismissal and the Respondent should reasonably have considered the email and statement of fitness for work by that point.

248. Although the Respondent submits that the Claimant's representative's email left it that *"you will be advised as to when she is fit to attend any meeting"*, we conclude that there is reasonably an onus on the Respondent to have enquired particularly if the last medical certificate expired on 30 November and it was proposing to terminate the Claimant's employment.

249. At paragraph 3.5 we are asked did the Claimant fail to engage in the Respondent's managing absence procedures? We find the answer to this to be yes however the Claimant was clearly unwell at that time. The Claimant did say in evidence that if she went to the meeting they would dismiss her. It was apparent to us that the Claimant could not face the meeting and the rescheduled dates were not reasonably spaced to accommodate her. However, she did not attend the last two dates for the meetings because of her ill health as supported by her final medical certificate.

250. At paragraph 3.6 we are asked to consider whether the Claimant's failure to engage with the managing's absence procedures amounted to a breach of the implied term of trust and confidence. We find the answer to that question no.

251. At paragraph 3.7 we are asked to consider whether dismissal was a fair sanction i.e. was it within the range of reasonable responses open to a reasonable employer when faced with these facts, to which we conclude that the answer is no. It was not a reasonable response at this stage open to a reasonable employer in the circumstances.

252. At paragraph 3.8 we are asked to consider whether the Respondent adopted a fair procedure. We were concerned because procedurally we formed the view that it was not reasonable to hold a medical capability hearing in the first place. There should reasonably have first been a discussion of the OH report and a risk assessment. But in any event it was not reasonable to hold the

meeting on 13 November 2019 without making further enquires as to the Claimant's ability to attend a further meeting after 30 November 2019 when her certificate fitness for work was due to expire. Moreover, procedurally it was unfair to delay in communicating the decision to dismissal until July 2020 and we did not accept that the Respondent had reasonable grounds for so doing as set out above.

253. We therefore conclude that the Claimant was unfairly dismissed and that the complaint is well founded.

55. At paragraph 3.9 we were asked to consider whether in the absence of a fair procedure the Claimant would have been fairly dismissed in any event and to what extent and when? This is in effect the application of the principles arising from the case of Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL. Polkey held that in cases of procedurally unfair dismissal, the compensatory award may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if a fair procedure had been followed. A percentage reduction can be as high as 100 per cent, although a Tribunal might still award loss of earnings for the time it would have taken to go through proper procedures.

254. We draw the following conclusions. If the Respondent had not conducted the capability hearing on 13 November 2019 and not dismissed the Claimant, all that we know is that the statement of fitness for work certificate covered her until 30 November 2019, her mental health was improving (taken from her GP notes at B331) as of 21 January 2020 and that she had completed her therapy (at B338) as at 3 April. We know no more about the physical impairments with the Claimant's knees and whether this was any better or worse. And we do not know what the position was as at mid July 2020 (when dismissal was communicated) and neither did the Respondent. It is therefore not possible for us to reach a view on the basis of the limited evidence that we had before us.

255. At paragraph 3.10 we are asked to consider if the dismissal is unfair, did the Claimant contribute to her dismissal by culpable conduct.

256. Under section 123(6) of the Employment Rights Act 1996, if the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it can reduce the compensatory award proportionally as it thinks fit. This is known as "contributory fault" and Tribunals usually make a percentage reduction, eg 25 per cent or 50 per cent, but in very rare cases, it can deduct 100 per cent. There are two separate questions: (1) did the Claimant's conduct cause or contribute to the dismissal? and (2) if so, by how much would it be "just and equitable" to reduce any compensatory award made?

257. We conclude as follows. The Claimant could have communicated with the Respondent better than she did but this has to be seen in the context of her ill-health and the Respondent's obligations to her as a disabled person particularly as to reasonable adjustments. So we do not feel it just and

equitable to reduce any compensatory award made (either here or to any award for discrimination in respect of any element of contribution).

Damages for breach of contract

258. This complaint is brought under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

259. The Respondent accepts that the Claimant did not receive payment in lieu of notice. She was entitled to the statutory maximum notice of 12 weeks given her length of service and we find that she was entitled to be paid wages on the basis of a 46 hour working week.

260. The amount of damages will be determined at the remedy hearing.

Disability discrimination

Disability

261. It has been conceded by the Respondent that the Claimant was a disabled person by reason of anxiety and depression. This would be from the fit note at B130 dated 4 November 2019 covering a period from 14 October to 30 November 2019.

Direct discrimination

262. The complaints of direct disability discrimination is set out at paragraph 6.1 of the list of issues at B62. This paragraph asks us to determine whether the Respondent had done one or more of a number of things set out in a series of sub-paragraphs. We reach the following conclusions from our above findings.

263. Sub-paragraph 6.1.1, the Respondent did not accept the Claimant's fit note of 25 April 2019.

264. Sub-paragraph 6.1.2, the Respondent did notify the Claimant of the capability hearing which took place on 13 November 2019, although of course she was unaware that it had actually taken place until she received the dismissal letter in July 2020.

265. Sub-paragraph 6.1.3, the Respondent did fail to carry out investigations before the capability hearing.

266. Sub-paragraph 6.1.4, the Respondent did fail to consider the Claimant's length of service before deciding to dismissal.

267. Sub-paragraph 6.1.5, the Respondent did fail to heed the Occupational therapy report.

268. At paragraph 6.2 we are asked to decide whether these matters amounted to less favourable treatment by reference to a hypothetical comparator. We found it hard to envisage any analogous situation where the Respondent would have treated others the same. So the answer is yes it was less favourable treatment.

269. At paragraph 6.3 we are directed to determine whether if so this was because of disability? We have to say that on the primary facts and given the lack of and gaps in evidence provided by the Respondent and given the Respondent's general conduct towards the Claimant, we find there is enough on which to infer that it was.

270. At paragraph 6.4, we are asked to decide whether the Respondent is able to prove a reason that the treatment occurred for a non-discriminatory reason not connected to disability. For the reasons set out in the above paragraph we find that the respondent failed to do so and did not satisfy us that unlawful discrimination played no part whatsoever in the way in which the Claimant was treated.

271. We therefore conclude that the complaint of direct disability discrimination is well-founded.

Discrimination arising from disability

272. This is set out at paragraph 7 of the list of issues at B62-63.

273. Paragraph 7.1 sets out the unfavourable treatment alleged by the Claimant in a series of sub-paragraphs. These are identical to the ones relied upon at paragraph 6.1 in respect of direct discrimination and so we repeat our findings here.

274. At paragraph 7.2, the Claimant sets out the something relied upon arising in consequence of her disability, namely that she was unfit for work and unable to take part in the capability process. We find that these things did arise as a consequence of her disability and in respect of the capability process specifically with regard to the last two dates set for the capability hearing.

275. We find that the unfavourable treatment, namely that the Respondent dismissed the Claimant because of her sickness absence, is made out, as we are asked at paragraph 7.3.

276. Paragraph 7.4 and 7.5 ask us to consider the defence to discrimination arising from disability. At paragraph 7.4 the Respondent identifies its aims as proper management of staff attendance and maintenance of the workforce capable of doing the job. From our findings we conclude that there was no proper analysis of these matters in the context of the Claimant's mental impairment. In oral submissions, Mr McFarlane also stated that a further aim was to protect the safety of the Claimant and the Respondent's service users. We

did not accept this submission because it was like suggesting that it was an all or nothing consideration and secondly there is nothing arising from the evidence to support this assertion. The factors arising as to proportionality were simply not addressed by the Respondent either in evidence or submissions.

277. At paragraph 7.6, we are asked to consider whether the Respondent knew or could reasonably have been expected to know that the Claimant had the disability and if so from what date. From our findings we conclude that the Respondent did know and could reasonably be expected to know from 4 November 2019 statement of fitness for work, although the earlier email correspondence hinted at the mental impairment as well.

278. We therefore find the complaint of discrimination arising from disability wellfounded.

Indirect disability discrimination

279. The complaint of indirect discrimination is set out at paragraph 8 of the list of issues at B63-64.

280. We considered the PCPs listed at paragraph 8.1. However, we formed the conclusion based on the evidence that we heard that sub-paragraphs 8.1.1, 8.1.2 and 8.1.3 (failing to notify staff of capability meetings or similar; not given a dismissal warning in the event of failing to attend a capability meeting or similar and not informing staff promptly of decisions to dismiss) fail. The basis for this is that they do not denote PCPs which could be applied any wider than the Claimant. With regard to 8.1.4 (failing to advise staff of the purpose of capability meetings), this was not a PCP and in any event was not applied to the Claimant because she was clearly advised of the purpose of a capability meeting in the letter sent to her.

281. We therefore find that this complaint is not well founded.

Failure to make reasonable adjustments

282. The complaint of failure to make reasonable adjustments is set out at paragraph 9 of the list of issues at B64.

283. Paragraph 9.1 raises the same question as to knowledge as set out at paragraph 7.6 in respect of discrimination arising from disability and we reach the same conclusions as above.

284. Paragraph 9.2 identifies the PCP relied upon as requiring the Claimant to attend the capability meeting in person. We conclude from our findings that whilst the Respondent urged the Claimant to attend in person it offered other options but did not require her to attend.

285. On this basis we find this complaint is not well-founded.

286. We have already found that it would have been reasonable for the Respondent to have sent the Claimant the questions it wished to ask at the meeting in advance and to postpone the meeting but we have dealt with this in the context of the unfair dismissal claim.

Harassment

287. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

288. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his/her dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his/her dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (**Richmond Pharmacology v Dhaliwal** [2009] ICR 724).

289. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

> *"In deciding whether conduct had that effect, each of the following must be taken into account:*
>
> *a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.*
>
> *b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.*
>
> *c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."*

290. At paragraph 10.1 the Claimant sets out the allegation that she relies upon as amounting to harassment, namely that the Respondent repeatedly sent her dates for capability meetings, not accepting that she was not fit to attend. On one hand we accept that this is correct but we also accept that the Respondent accepted that the Claimant could not attend and rescheduled all

of the meetings save for the one arrange for 13 November 2019. Further, the Respondent did not take into account the final fit note provided by the Respondent indicating that she was suffering from depression.

291. With regard to the remaining issues within paragraph 10. We accept that this was clearly unwanted conduct and that it related to the Claimant's protected characteristic of disability. In terms of paragraph 10.4 we did not accept that this conduct had the purpose of violating the Claimant's dignity creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant. By reference to paragraph 10.5, we did find that the conduct did have this effect taking into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The Claimant did in fact feel or perceive this behaviour to amount to harassment and we find it reasonable for her to have that feeling or perception in view of the wider context of what had been going on at work since she attempted to return to work and taking into account that this was part of a chain of events which led to this point.

292. We therefore partially found this complaint to be well-founded.

Victimisation

293. The Claimant's complaint of victimisation is set out at paragraph 11 of the list of issues at B65.

294. It is unlawful to victimise a worker because she has done *a "protected act".* In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 EQA.

295. The EHRC Employment Code states that a protected act need not be the *only* reason for the detrimental treatment; it is enough if it is *one of* the reasons. This is consistent with the law on direct discrimination, where the protected characteristic need only be an important factor in the discrimination.

296. Paragraph 11.1 of the list of issues identifies the protected act which the Claimant relies upon as being her claim in claim number 2304162/2019 to the Employment Tribunal (the first claim). The Employment Tribunal file indicates that a copy of the first claim was sent to the Respondent on 14 October 2019.

297. Paragraph 11.2 identifies the matter relied upon as dismissing the Claimant. The Face2Face report recommending dismissal is dated 25 November 2019 and the Claimant was notified of the decision to dismiss her in a letter dated 16 July 2020.

298. Paragraph 11.3 asked us to determine whether the Claimant's dismissal was a detriment. Clearly dismissal is a detriment.

299. Paragraph 11.4 in effect asked us to determine the Claimant was dismissed because she had done a protected act . The Face2Fce report was received by the Respondent on 25 November 2019 and the dismissal letter was dated 16 July 2020.

300. We take into account that the protected act does not have to be the only reason for the dismissal but it is sufficient that it amounts to a significant factor, i.e. something more than trivial. We took into account a number of factors: the period of time between the protected act and the detriment; the protected act; that the detriment need not be a conscious act, it can be driven by a subconscious motive; and the reason why the Claimant was subjected to the detriment.

301. There was no evidence to suggest that Ms Patel who was involved in the capability hearing and made the decision to dismiss was not aware that the Claimant had submitted her first claim. However, there was nothing that obviously indicated a causal link between the protected act and the detriment. The Respondent had already started down the route of capability proceedings as of 1 October 2019 and there is no obvious stage in the Employment Tribunal proceedings after 14 October 2019 which would have influenced the decision to dismiss. The Respondent's response was presented to the Tribunal on 11 November 2019. No action was taken by Respondent beyond holding the capability hearing on 13 November 2019 and then the production of the report on 25 November 2019 recommending dismissal and the communication of this in the dismissal letter dated 16 July 2020.

302. We therefore find that this complaint is not well founded.

Holiday pay

303. This is set out at paragraph 12 of the list of issues at B62. We decided to deal with this as a complaint of unauthorised deductions from wages. This makes no difference to the outcome.

304. We make the following findings:

a) The Claimant's leave year was from 1 April to 31 March of each year;

b) The Claimant had accrued annual leave from 1 April 2020 to 17 July 2020 when she received notice of dismissal and also accruing through her 12 weeks' notice period.

c) The Claimant was entitled to 5.6 weeks' annual leave per annum.

d) During the above period, she had worked for 15 weeks and 2 days and was employed 4 days per week. From 1 April to 17 July 2020 she had accrued 6.7 days. During the 12 weeks' notice period she had accrued

5.1 days. This gives a total entitlement to accrued annual leave of 11.8 days of which she had taken none.

e) In respect of previous holiday years. In 2018/2019 she had not taken a total entitlement of 5.6 weeks which for someone working 4 days a week amounts to 22.4 days. The Claimant might be entitled to accrued annual leave from the leave year 2017/2018 but no evidence presented of this and not claimed in her schedule of loss (at B275-283).

f) However, under section 23(4A) of the Employment Rights Act 1996 for claims made on or after 1 July 2015, complaints of entitlement to holiday pay are limited to the period of two years from the date of presentation of the claim.

g) It might be arguable that the loss of holiday pay flows from the discrimination that we have found and so could form part of the award of compensation for discrimination. We leave this to be determined as part of the remedy hearing.

h) But for the purposes of the unauthorised deduction from wages complaints, any entitlement to accrued annual leave can only go back to 15 September 2018. This would give rise to a partial entitlement of 12.1 days.

i) Thus the total of the unauthorised deductions amount to 46.3 days and we leave the calculation of this amount in monetary terms to be determined at the remedy hearing.

Unauthorised deductions from wages

305. This is set out at paragraph 13 of the list of issues at B65-66. We have already dealt with paragraph 13.1 within the first claim but accepted the unauthorised deductions to 14 October 2019, at which date the Claimant presented a statement of fitness for work certificate indicating that she was not fit to work. She was not entitled to Occupational Sick Pay at this date and we heard no evidence to indicate whether the Claimant was subsequently fit for work again at some future point.

Damages for breach of contract

306. We have already determined this complaint at paragraph 4 of the list of issues.

Schedule 5 of the Employment Act 2002

307. More correctly this is a reference to our powers under section 38 of the Employment Act 2002 which allows us to award compensation in a successful claim covered by Schedule 5 of the Act where at the point at which the proceedings started the employer was in breach of its duty under sections 1 or 4 of the Employment Rights Act 1996 as to provision of a written

statement of initial employment particulars or of particulars of change. Schedule 5 includes complaints of unfair dismissal and discrimination.

308. The complaint is set out at paragraphs 15.14 to 15.16 of the list of issues at B67.

309. It is clear from the evidence presented to us that the Respondent has not provided the Claimant subsequent changes to her particulars of employment as at the date of issue of the proceedings.

310. We will leave any submissions as to the level of compensation to award to be determined at the remedies hearing.

Further disposal

311. The parties must notify the Tribunal if they require a remedy hearing by 30 June 2023. If we do not hear from the parties by this date, the case will be listed for a one day remedy hearing without further notice.

312. If a remedy hearing is required or listed, the Employment Tribunal will issue case management orders to ensure that the matter is properly prepared for that hearing. This will cover provision of a witness statement from the Claimant and, if appropriate, from the Respondent containing matters relevant to remedy, disclosure of documents and production of a bundle of documents relevant to remedies, an up-to-date schedule of loss from the Claimant and a counter schedule of loss from the Respondent. I would stress that the remedy hearing will not be an opportunity to raise issues relating to liability again.

Attached: Lists of Issues

Employment Judge Tsamados
28 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
13 May 2023

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FOR EMPLOYMENT TRIBUNALS

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