Case Number: 3303394/2021

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss Georgia Smitten **v** Futurelink Employment Services Ltd

Heard at: Cambridge (CVP) **On:** 9th to 12th May 2023

Before: Employment Judge R Wood: Mr Thomas Doyle; Mr Brian Lynch

Appearances
For the Claimant:
For the Respondent: Mr A Burgess (Litigation Consultant, Peninsula)

JUDGMENT

1. The claimant was discriminated against on grounds arising out of her disability by the respondent.

2. The respondent failed to make reasonable adjustments pursuant to section 20 of the Equality Act 2010 and thereby discriminated against the claimant.

3. The respondent subjected the claimant to a detriment on the grounds that she did a protected act.

4. For the avoidance of doubt, the unfair dismissal claim is dismissed upon withdrawal, if it has not already been done.

5. The respondent is to pay to the claimant damages in the sum of **£36,735.59**

DECISION

1. This is a claim brought by Miss Georgia Smitten. She was employed by the respondent from 21st January 2019 to 12th January 2021 as a full time sales and marketing consultant. The respondent, Futurelink Employment Services Ltd, is a payroll company with about 14 employees.

2. It is agreed that the claimant was dismissed by the respondent on 12th January 2020. The respondent asserts that it was on the grounds of

misconduct, namely lateness and absenteeism going back practically to the beginning of her employment. The claimant states that she was dismissed because she was disabled by reason of mental health issues, and because she attempted to do a protected act, namely requesting that the respondent make reasonable adjustments by way of changes to her working conditions in order two accommodate her disability. The claimant further alleges that she was subject to other detriments. She was obliged to go through a disciplinary process as a result of her sickness absence; and was unable to attend a disciplinary meeting, which were issues arising out of her disability. It is also asserted that the respondent failed to make reasonable adjustments in respect of the claimant's disability.

3. The respondent argues that the claimant was not disabled, or at least not disabled throughout the relevant period. In any event, it was not aware of any such disability. It states that it acted in the way it did because of the alleged misconduct and not because of matters relating to the claimant's disability. Alternatively, it argues that it's action were objectively justified. It denies that it failed to make reasonable adjustments.

4. The claimant brought proceedings in the Tribunal on 26th March 2021. This followed a period of ACAS early conciliation from 8th February 2021 to 22nd March 2021. It was agreed between the parties that for these claims, anything that happened prior to 9th November 2020 fell outside the primary limitation period.

Findings

5. This case was heard remotely on 9th-12th May 2023. We heard evidence from the claimant, and from Mr Moss, who was, at the time, the sales director of the respondent. Both submitted witness statements which they adopted. They confirmed the contents were true.

6. Mr Moss was also the claimant's line manager at the time, and was ostensibly the person who made the relevant decisions. We found the claimant to be a credible and consistent witness. She gave clear answers which had the appearance of being straightforward and helpful. In contrast, we frequently found it challenging to follow the testimony of Mr Moss. It was often inconsistent, confusing and vague. At times, he gave the impression of seeking to avoid answering questions. In particular, he regularly preferred to place responsibility for his actions on his legal advisors, which we found unattractive. By way of example, he seemed confused and unsure as to whether he had made the decision to dismiss. Firstly, he told us that he had not made the decision; he then stated that it had been taken by three board members, including himself; he concluded by accepting that he had made the decision alone. There was quite a gulf in the respective quality of the clamant's and Mr Moss' testimony.

7. We are satisfied that the claimant was, during the course of her employment with the respondent, absent and late due to ill health related matters to an excessive degree. The claimant accepted this. The occasions upon which the

claimant was absent in 2019 and 2020 are conveniently set out in the witness statement of Mr Moss at paragraphs 13-15. These were not challenged by the claimant. She also agreed that during approximately the last 6 months of her employment, she had been on average about 10 minutes late on about one day each week. The respondent broadly agreed with her recollection on this issue. Surprisingly, we were told that the respondent had not kept any record of the number or extent of any late attendances by the claimant. If this was the reason for her treatment, one would have thought it was important enough to keep a record about.

8. Having been absent for 28 days in 2019, the claimant was then absent for a further 33.5 days in 2020. Only six of these days occurred after 3rd March 2020. There was a day of absence on 20th July due to reasons which the claimant could not recollect; two days on 18th and 19th August, which we find were due to anxiety related symptoms; and then a day of absence on 21st September (not due to mental health issues). Finally and critically, the claimant was absent on 14th and 15th December 2020. We accept the claimant's evidence that this was due to anxiety issues. This was, in part at least, the catalyst for the events of January 2021.

9. It was not until 6th January 2021 that the respondent invoked the disciplinary process in respect of the claimant. We did not accept Mr Moss' testimony on this point. The letter of 28th September 2020 was explicitly not a disciplinary letter, as he had suggested. Neither did we accept that the claimant had been issued verbal warnings under the disciplinary policy. There was no contemporaneous documentary evidence to corroborate Mr Moss on this point.

10. We found it difficult to understand why the respondent had not taken action earlier in 2020, if attendance levels were viewed as a serious matter. Instead, it had been raised in September and then December, when the claimant's attendance had significantly improved. It raises the question: why was the matter so urgent in December 2020/January 2021.

11. We accept the claimant's evidence, and in particular the content of her impact statement [258]. In particular, we accept that she began to have mental health symptoms in about March 2020. Before September 2020, she suffered from social anxiety, severe mood swings, emotional distress, stomach issues, sickness due to nervousness, loss of concentration, sleep loss, and loss of interest in hobbies. We note in passing that this was not uncommon at the time. The impact of the pandemic and repeated lockdowns, had a profound effect on many people's mental health state.

12. In or about July 2020, the claimant was given additional duties covering for the customer services team, who were short staffed. She was told this was not a long term change. She was told she could use a do not disturb function on the telephones to avoid taking calls. However, we find that it was made clear that she was expected to provide cover for most of the time i.e for about 50% of the time she was at work. We find that the claimant found this an

additional stressor in her working day. She was still performing these duties at the time of her dismissal.

13. On or around 8th September 2020, the claimant took on new duties which involved her travelling to construction sites. Given her social anxiety, she found this challenging. We accept on balance that this caused an exacerbation of her symptoms, including nausea and diarrhoea. This prompted the claimant to speak to Mr Moss on 8th September 2020 about the difficulties she was having at work, and about feeling mentally challenged. There are no notes of this discussion.

14. There was a formal sickness review meeting held on 25th September 2020. The minutes are at [130-131]. The stated purpose of the meeting was to discuss her absence levels, to identify underlying issues, and to identify what help the respondent could offer to the claimant. The claimant told Mr Moss that she had stomach issues mainly, and anxieties. She also stated that she had been '*overwhelmed with work lately-dealing with inbound calls for customer services and my own marketing work. I have not been happy and feel drained sometimes'*. Notwithstanding, the claimant was not offered any assistance as a result of the meeting. In a follow up letter, she was warning that further issues may be the subject to formal disciplinary action [132]. The Tribunal felt that this letter was lacking due regard for the welfare of the claimant.

15. We find that Mr Moss was aware that the claimant was struggling with anxiety and low mood related mental health issues from at least September 2020. He accepted as much in evidence on more than one occasion. The claimant sat opposite Mr Moss. They communicated regularly. He was in a prime position to be aware of any health concerns. They had regular discussions, which included informal chats about the claimant's health and wellbeing. On more than one occasion, Mr Moss suggested that the claimant seek medical assistance. He would not have done so if he did not believe that she had a significant medical condition, in this case, a mental health condition.

16. Following on from these discussions, on 16th November 2002, the claimant requested a a reduction in her working hours to four days a week. She also requested that she be permitted to work from home at least 2 days a week. She suggested a trial period in the run up to Christmas. On the same day, Mr Moss sent an email to management colleagues stating "*My understanding of this is clear-the role is full time from the office*." The email suggested there would be a meeting and a decision about the request that day. We have seen no evidence of such a meeting or decision. When asked about it during the hearing, Mr Moss stated there had been a board meeting 2-3 weeks later, when the request was refused. He also stated that the claimant had been notified of this. Again, we have seen no contemporaneous notes of board meetings, or any other documentation to support this testimony. We find that this request was dismissed without proper consideration, and that the company did not respond to the request.

17. On 14th December 2020, the claimant messaged Mr Moss to tell him she would not be attending work that day due to stress/anxiety/depressive issues. She felt emotional and was struggling to motivate herself to have a shower or to get dressed. We accept this evidence. She was off work that day, and the following day. She requested a welfare meeting in order to again discuss reducing her hours and responsibilities at work. The notes of the meeting are at page 135 of the bundle. During the meeting she had an emotional breakdown in front of Mr Moss. She spent much of the meeting in tears. We find that this would have been a significant and sobering experience for Mr Moss. She requested a reduction to part time hours, and to drop her customer service support role.

18. At the meeting, the claimant explained that her underlying health condition had started in March 2020 and related to social anxieties. It affected her stomach, which meant that she kept wanting to go to the toilet. She said she preferred for the issues she had raised to be resolved as soon as possible. She no longer wished to cover for customer services. She also requested working four days a week, Monday to Thursday, working 8.30am to 5.30pm. The claimant accepted that she had not consulted her GP about these matters. Indeed, the medical records demonstrate that she did not go to her doctor until 8th January 2021, when she sought a fit note in respect of the proposed disciplinary hearing [262]. We will return to this shortly. Importantly, we accept the claimant's explanation for the delay in seeking help. She explained that she was in denial about heaving mental health problems. She resisted going to her GP until things got out of hand. She accepted that attending her GP was overdue in December 2020. In the Tribunal's view, this was a plausible explanation. It is not uncommon for those with mental health conditions to delay treatment, or seeking help. There were also additional barriers to obtaining medical assistance during 2020, which was dominated by the pandemic. For reasons which we will come to shortly, we did not see the delay in obtaining medical treatment as inconsistent with the suggestion that she had a mental health condition during the relevant period.

19. At the conclusion of the meeting on 16th December, Mr Moss indicated that he thought it unlikely that the business would agree to her working four days a week but he stated that it would consider its options following the meeting, and seek opinion from Peninsula, who were the HR resource for the respondent. We find that the respondent gave no further consideration as to the claimant's requests for adjustments to her working conditions. In our judgment, the requests were not given proper consideration. The claimant was never provided with a reasoned decision relating to her requests.

20. The claimant remained at work up until 23rd December 2020. After the Christmas break, she returned on Monday 4th January 2021. On Wednesday, and without further discussion, she was presented with a letter inviting her to a disciplinary hearing [138]. The letter contains an error. The hearing was to be held on 8th January 2021, and not 7th January 2020. Nothing really rests on this.

21. We are satisfied that the respondent sought to rely on four matters of concern. These were excessive absences; regular lateness; the request to work part time; and the request to be taken off customer care duties. We are satisfied that the inclusion of matters 3 and 4 were not an 'administration error' [200]. These were treated as allegations of misconduct by the respondent, and Mr Moss in particular. We have no doubt that the respondent was later told that it was ill-advised to have relied upon these matters as examples of misconduct in the context of this case. However, that is not the same thing at all.

22. On the following day, 7th January, there was an exchange of text messages between the claimant and Mr Moss whereby the claimant made it clear that she was not fit to attend the following day but had not yet been able to get a GP fit note.

23. On 8th January 2021, the respondent emailed the claimant a letter at 13.51hrs [143]. It requested medical evidence which excused her from attending a meeting and not just from going to work. It required the evidence by 11th January 2021, which was to be the date of the rescheduled meeting. The 8th was a Friday; 11th was the Monday i.e. the next working day. As an alternative to attending personally, it was suggested that she send written representations and/or send a representative to the hearing. Alternatively to participate by telephone.

24. The claimant was able to send a fit note to the respondent later that afternoon [146-147]. It specified a diagnosis of 'mood disorder' This was the first time the claimant has attended a medical practitioner about her mental health problem. It was also the first time her condition had been formerly diagnosed. It stated she was not fit for work but went no further. She was signed off until 22nd January 2021.

25. The next thing that happened was that the respondent held a disciplinary hearing in the claimant's absence on 11th January 2021. We are satisfied that the claimant genuinely believed that she had provided sufficient medical evidence to excuse her attendance. She was therefore surprised to receive the letter on 12th January, advising her that she had been dismissed for misconduct in her absence [150]. The notes of the hearing appear at [148].

26. These documents are significant because they too include the same items 3 and 4 from the disciplinary invitation letter as instances of misconduct. They are explicitly described in the notes by Mr Moss as 'allegations', which he read out. Moreover, the respondent makes plain that it also treated her failure to attend the hearing 'without giving advance notification or good reason, as a separate issue of misconduct. That made 5 items of misconduct which contributed to the dismissal, if one takes these documents at face value.

27. Mr Moss was asked about this at the hearing before us. He accepted that it would have been inappropriate for the respondent to have relied upon matters 3 and 4 as alleged misconduct. He denied that he had done so. We do not accept his evidence on this point. If it was an error, then it was repeated in

two important letters, and in the notes of the hearing. His suggestion that the error was the result of poor advice and the use of a standard format of letter, was in our view lacking in substance and credibility. Mr Moss also accepted that it would have been unreasonable to have relied upon her non-attendance as misconduct. Nonetheless, he accepted that he had done so. Again, he pointed the figure at his advisors. In effect, Mr Moss conceded that 3 of the five allegations relied upon in the dismissal letter should not have formed part of the case against the claimant.

28. The claimant was dismissed with immediate effect on 12th January. She was given a payment in lieu of notice which was equivalent to 2.5 weeks notice. This was short of the one month to which she was entitled. This was later rectified.

29. On 14th January 2021, the claimant raised a grievance [155]. We do not dwell on this aspect of the case. There were issues dealt with which were common to the disciplinary process and appeal, but it did not add much of relevance in our view. Nonetheless, the Tribunal read all of the documentation relating to grievance, and has taken it on board where appropriate. The grievance was dismissed on 5th February 2021 [199]. She appealed this decision and it too was dismissed by letter dated 25th March 2021 [289].

30. The claimant also appealed her dismissal by letter dated 9th February 2021. She attended a meeting on 25th February 2021. The appeal was dismissed on 25th March 2021 [288]. As short as it was, this last document was instructive. It states '*….you were given suitable opportunity to attend or to engage in the process by other means, thus allowing adjustments which would not be required typically for someone with under 2 year's service.*' This echoes the wording of the dismissal letter which states '*having reviewed the circumstances, including the fact that you have a short amount of service, I have decided that your employment should be terminated*'. This is also consistent with paragraph 57 of Mr Moss' witness statement.

31. We find that these documents were referring to clause F2 of the respondent's disciplinary process [104]. It states '*we retain discretion in respect of the disciplinary procedure to take account of your length of service and to vary the procedure accordingly. If you have short amount of service, you may not be in receipt of any warnings before dismissal*'. It is clear that at the time, the respondent relied upon this clause of the procedure when disregarding some of the other sanctions short of dismissal. There had been no finding of gross misconduct by the respondent. The procedure otherwise required that a first act of misconduct was unlikely to result in dismissal.

32. When asked about this, Mr Moss denied that there had been any reliance on short service. He accepted that short service referred to probationary like periods of service. In other words, a few months. He specifically stated that it could not reasonably apply this to someone who had been with the company for a few weeks short of 24 months. We agree with this interpretation of his own policy. However, as stated, it was clear that the clause had been applied

against the claimant. Indeed, it was apparent from [288] that Mr Moss equated short service with a period which was less than 2 years.

33. In the Tribunal's judgment, this reveals an important aspect of Mr Moss' thought process in the case. He was occupied by the fact that the claimant had not yet reached the two year point of her employment. The significance of this is that it is the point at which an employee is entitled to protection from ordinary unfair dismissal. We are satisfied that this played a part in his decision to dismiss, along with other factors to which we will return.

Legal Framework

34. The relevant legislation in respect of the allegations of discrimination (a protected characteristic) is contained in the Equality Act 2010 ("the Act"). In respect of discrimination arising from disability, section 15 reads as follows:

> ***"Discrimination arising from disability***
>
> *(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."*

35. In relation to the duty to make reasonable adjustments, the Act states as follows in section 20 and 21:

> **20 Duty to make adjustments**
>
> *(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.(4) The second requirement is a requirement, where a physical feature 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.*
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.*
>
> *….*
>
> *(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

……

21 Failure to comply with duty

(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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

36. In terms of the definition of a disabled person, section 6 states:

"Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

37. Section 136 of the Act provides that:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".

This provision reverses the burden of proof if there is a prima facie case of direct discrimination.

38. In summary, the Act provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

39. The application of these principles was summarised by the Employment Appeal Tribunal in *London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08*, which has since been upheld:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases

this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

(d) The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.

(f) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the

> claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as she was. However, as the EAT noted (in *Ladele*) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

Decision and Reasons

40. The Tribunal has adopted the 'list of issues' as the broad structure for its decision making in this case. However, we make a few general observations to begin with which have shaped and informed our answers to many of the individual issues set out in the list.

41. Firstly, we find that at the relevant time, in early January 2021, that the claimant was a disabled person as defined by the EA 2010. We find that she had a mental heath condition(s) which were characterised by anxiety and low mood. It was not the strongest case on disability that we have seen. We accept the respondent's point that there was a lack of medical evidence. Indeed, the first time the claimant saw her GP about this was on 8th January 2021. However, there was sufficient evidence upon which we could be satisfied that she was a disabled person.

42. Firstly, the respondent made relevant admissions. At a preliminary hearing on 28th September 2022, Judge Palmer recorded that the respondent conceded that the claimant was a disabled person by reason of anxiety from 8th January 2021; and by reason of a depressive condition from 28th March 2021. On our view, this was a clear, unambiguous and unequivocal admission. It was made by a professional representative. There is no suggestion that it was incorrectly recorded by a very experienced Employment Judge at the time. Mr Burgess seeks to rely on an email sent on behalf of the respondent on the following day, which he says amends the nature of the concession. We do not agree that it is materially different in meaning, and that the email did not effect the clear nature of the concession made before the Judge on the previous day.

43. Second, there were the diagnoses in January and March of mental health conditions [262]. On 28th March 2021, the GP notes that the symptoms reported had been 'ongoing for a year, worsening'. This supports the oral evidence of the claimant who stated that she had been suffering from mental health related symptoms since March 2020. It is likely that these symptoms would have preceded her trip to the GP in January 2021. As we have already stated, we accept her explanation for the delay in seeking medical treatment.

44. Further, Mr Moss accepted during the hearing that he had been aware that the claimant had been suffering from a significant mental health condition since September 2020. This is the only explanation for his attempts to have the claimant seek medical assistance. He had also offered access to the company Occupational Health/GP, albeit the respondent had not follow through on this. We also find that the claimant was having repeated discussions with Mr Moss about her mental health challenges from September onwards.

45. The evidence is such that we are satisfied that the claimant had a mental health impairment, which had a substantial adverse affect on her ability to carry out normal day to day activities. As we have already stated above, we accept the evidence in her oral testimony and in her impact statement to this end. Further we are satisfied that the affect was long term. At the relevant time in early January, we are satisfied that she had been so impaired since at least September, and that it was likely to last for at least a further 9 months, making 12 months in total. In short, the claimant was a disabled person as defined by the EA 2010.

46. We would also make the following general observation. In our judgment, it was clear the respondent, or more specifically Mr Moss, took the view that it no longer wished to invest in the claimant. This was because Mr Moss had come to conclusion that the claimant had a significant mental health condition, which was likely a disability under the EA 2010, and which was likely to be a headache in the future from a management perspective. Further, the claimant had made requests for reasonable adjustments i.e. changes to her working conditions which were unattractive to the respondent. Accordingly, the decision was taken to dismiss her if possible. We are quite clear that the undue haste to discipline the claimant and then terminate her employment was motivated by the knowledge that she would soon reach the stage where she had statutory protection from ordinary unfair dismissal, and that if they were going to dismiss her, it had to be done no later than 20th January 2021. For the reason set out above, we are satisfied that it was these factors which were operating on Mr Moss' mind when he made the decisions which are to be examined by us in this case. It was not about absenteeism and/or lateness, or at least not primarily so. The decision to dismiss was predetermined and improperly motivated.

47. Turning then to the claim of discrimination arising from disability, we find this claim proved. Referring to the list of issues, we find that all of the alleged acts of unfavourable treatment are made out. Having assessed all of the evidence and having listened carefully to the testimony of Mr Moss, we are satisfied that this was treatment which was caused by the claimant's sickness absence and/or her inability to attend the disciplinary hearing, and that these issues arose out of her mental health disability. Although much of her absence in 2019/20 was not related to her mental health issues, it was the cause of her absences in August, and then importantly, December 2020.

48. The respondent asserts that such unfavourable treatment was a proportionate means of achieving a legitimate aim. It suggests that the aims were to address the absences and lateness because of the impact it had on the business; and as regards the dismissal, by avoiding further stress to the claimant by not delaying the disciplinary process.

49. We do not accept these arguments. In relation to both, we do not think that there was any genuine consideration of these aims at the time by the respondent. It had decided to dismiss the claimant, and opted for the quickest way to do so. If it had been so concerned about absences, then why would it not have dealt with the issue several months earlier. As it was, by December, the claimant's attendance had improved considerably. In terms of lateness, this too had been ongoing as an issue for several months. The respondent did not even keep a record of her late attendance. Mr Moss, in a moment of frankness, conceded that her lateness didn't bother him. If they had wanted to deal with lateness and absence, then this could have been achieved by adopting a timeline which accommodated the claimant's mental illness, by utilising the capability procedure, and by imposing a lesser sanction than dismissal, thereby giving her the opportunity to continue to improve and to seek further medical advice.

50. As to the second of the purported aims, we take the view that it was primarily for the claimant and her GP to advise the respondent as to whether it was in her best interests to proceed to hearing on 11th January. Given that her condition was anxiety related, it simply makes no sense that the respondent genuinely took the view that having the hearing on 11th was in the claimant's best health interests. If they were motivated by this aim, then they ought to have been guided by the dates set in the fit note, or to have sought further clarification of the medical advice. Justification was not made out here.

51. I turn then to the claim for reasonable adjustments. We find that the alleged PCP's are all made out on the evidence. Further, that the PCP's put the claimant at a substantial disadvantage compared to someone without the claimant's disability. She made contemporaneous complaints about her working hours, and having to cover for customer services. We are also satisfied that in broad terms, the PCP's placed her at a significant disadvantage because she had a mental health condition which was characterised by anxiety and low mood, and that the PCP's exacerbated these symptoms. This was clearly demonstrated in the period between September 2020 and January 2021. By reason of all of our findings above, we are satisfied that Mr Moss was aware of these matters from September 2020. Indeed, he admitted as much.

52. Further, we find that the adjustments set out in paragraph 4.5 of the list of issues (save for 4.5.7) were reasonable and would have ameliorated the disadvantage mentioned above. None of these adjustments were genuinely considered by the respondent. It was clear that they were rejected out of hand. We find this was because by November/December 2020, the respondent had no genuine interest in accommodating the claimant at work.

53. In our view it was reasonable to have engaged with the claimant in terms of her proposal for reduced hours and removing her customer service duties. Mr Burgess argued that her role as sales and marketing consultant required her to work five days, and that marketing needed to be taking place each day of the week or the business would be impacted adversely. In our view, there was insufficient evidence that there would be such an impact. The claimant had worked half days as a temporary phased introduction back to work in February 2020 [218]. This had been intended to accommodate her health issues at the time. It was difficult to understand why similar adjustments could not be repeated in December/January.

54. Taken together, adjustments 4.5.1. and 4.5.2 would have increased the time the claimant spent on sales and marketing. She told us that she spent most of the time covering for customer services. This was not really challenged. In effect, we concluded that she was only spending about 50% of her time on sales and marketing. By removing the other duties, but reducing her to 4 days, she would still have changed from 2.5 days a week to 4 days a week on sales and marketing. It was difficult to see why this would have had an adverse effect on the respondent's business. Instead it was likely to have a significantly positive influence on her mental health. As such, these proposed adjustments were reasonable. We also note that Mr Moss admitted that not delaying the disciplinary hearing of 11th January by at least a few days was unreasonable. He stated that he had been encouraged not to delay, by his legal advisors, in effect against his better judgment. We did not believe Mr Moss on this issue, not least because his email of 26th January to Mr Mander, conceded that Peninsula's advice was to have facilitated the claimant's involvement in the hearing. In short then, the claim for reasonable adjustments is made out.

55. This leaves the final claim of victimisation. This was the only claim in respect of which Mr Burgess raised a jurisdictional issue. Although leave to amend the claim form had been granted, the question of whether the Tribunal should extend the time for bringing such a claim, and thereby accepting jurisdiction, had been left to this Tribunal. The question is whether is it just and equitable to do so. We find that it is. In brief, it would be extremely detrimental for the claimant to be deprived of a claim. On the other hand, Mr Burgess could point to no specific prejudice to the respondent, save that it would have to deal with another claim. Moreover, we are satisfied that this claim relied to a significant degree on primary facts and issues which were common to the other claims. We therefore accept jurisdiction.

56. There was no dispute that the claimant did a protected act for the purposes of this claim, namely making a request for reasonable adjustments on 16th December 2020. We have already found that the respondent did all of the things listed at paragraph 5.2. We further find that these things caused detriment to the claimant. The real issue here was whether the evidence establishes a causal link between the detriments and the claimant doing the protected act. Pursuant to our earlier findings, we are satisfied that there was such a connection. As stated, we are satisfied that Mr Moss was motivated, or primarily motivated by the realisation that the claimant had a significant

mental health issue which likely constitute a disability under the Act, and/or that the claimant had attempted to exercise her statutory right to have reasonable adjustments put in place. This made her an unattractive employee in his eyes. It is this which informed all of his actions. Accordingly, the claim for victimisation is also proved.

57. All of the claims are allowed.

Remedy

58. We then turn to remedy. We were asked only to consider damages. We had reference to the claimant's schedule of loss, her witness statement, and he answers to questions from Mr Burgess. We were grateful for the helpful submissions of Mr Burgess on all points relevant to remedy.

59. Dealing first with injury to loss of feelings. We were referred to the 'Third Addendum of the Presidential Guidance'. The claimant sought £18,000 under this head of damages. Mr Burgess for the respondent submitted that an appropriate award was in the region of £7,000. We award £18,000. In so doing, we have regard to the obvious impact that the discrimination and/or victimisation had on the claimant. We accept that the respondent did not cause the mental health issues, but it certainly exacerbated them, in terms of severity, and probable duration. The claimant was often tearful during the process. She sought medical help a a result of what happened and was reduced to taking anti-anti-depressant medication for the first time. We have found that the discrimination and victimisation was serious, deliberate, and at times callous. The realisation of this is bound to have had a significant impact on her feelings and psychological state. We would add that this is a single award which takes into account all of the claims.

60. In terms of the financial loss, we are satisfied that losses which could be connected to the discrimination and/or victimisation continued until the end of the year, 2021. From 12th February to 28th June 2021, we award at the full rate of the claimant's net pay with the respondent. We were not attracted by the suggestion that the claimant should have found work within a few months. She was in a difficult position searching for work. She had been dismissed, she had mental health conditions, and was bringing a claim against her previous employer. She was only able to take on work on the basis of 4 days a week, and at home. In the light of all that had happened, we find this was reasonable.

61. From 28th June onwards, we award damages calculated by reference to the difference between her rate of pay for Age UK (her new employment) and what the claimant had been paid by the respondent. We saw no prospect that the respondent would ever had reduced her hours. It had made this perfectly plain. We were not attracted to the suggestion that ongoing losses should be calculated on the basis of 80% of the wage the claimant had been paid with the respondent.

62. We have concluded that losses are too remote once after 31st December 2021. There are a number of contingencies which begin to take effect at that stage which make it impossible to extend the period of damages. It is possible that she would have been properly dismissed by the respondent. She may have been unable to work due to ill health.

63. Finally, we have awarded an uplift in respect of breaches of the ACAS code of practice. We accept that there is some overlap between this and the other awards we have made. However, the extent by which the respondent fell short of what is required by the Code was egregious. Setting aside the specific paragraphs which we identified, one must also look at the overall ethos of the Code, which requires employer to treat employees with fairness and transparency. The respondent not only failed in large part to follow its own procedure, but also sought to manipulate it own policy in order to discriminate against the claimant on the grounds of her disability. In particular I refer to clause F2 [104], the use of which even Mr Moss himself agreed had been unfair.

64. Had it not been for the overlap already mentioned, the uplift would have been 25%. Taking matters in the round, the uplift is 10%.

65. Looking then at the figures, the financial loss up to 28th June 2021 is £345.46 x 19.29 weeks = £6,663.92.

66. Losses from 28th June to 31st December 2021 are £99.25 x 26.57 weeks = £2,637.07.

67. Total financial losses are £9301. Uplift by 10% = £10,231.10. interest on this is £1547.28. This gives a total of **£11,778.38**.

68. Injury to feelings awarded at £18,000. Uplift by 10% = £19,800. Interest is £3810.09. The total award for injury to feeling is £23,610.09.

69. Therefore the total award to the claimant is **£35,388.47.** The amount in excess of £30,000 should be grossed up because the claimant is liable to pay tax on that proportion of the award. The total is therefore **£36,735.59.**

_____

Employment Judge R Wood

Date: 6th July 2023

Sent to the parties on: 7 July 2023

For the Tribunal Office