# EMPLOYMENT TRIBUNALS

**Claimant:** P

**Respondent:** Q

**Heard at:** Newcastle Employment Tribunal
**On:** 28, 29, 30 November and 1, 2 and 19 December 2022
**Before:** Employment Judge Jeram, Mr R Dawson, Mr S Moules

**Representation:**
Claimant: Ms M Martin of Counsel
Respondent: Ms D Henning, solicitor

**JUDGMENT** having been sent to the parties on 14 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

The Tribunal regrets the length of time it has taken to provide written reasons, due to workload and time pressures on the Tribunal's time, and it apologises to the parties for the delay in their provision.

1. By a claim presented on date the claimant complained of unfair dismissal, wrongful dismissal, a failure to make reasonable adjustments, and breach of contract. Her complaint of indirect disability discrimination was dismissed on withdrawal by the claimant.

**Evidence**

2. The Tribunal heard from the following witnesses: The claimant gave evidence in support of her claim, and called a witness AB, her line manager, in support of her claim. The respondent called Laura Denham, Customer Insight Lead, Nicholas Pearson, Head of Operations of sister company

Callisto and Mark Maguire who at the relevant time held the role of Strategic Relationship Manager of Callisto.

3. The Tribunal had regard to:
   a. The witness statements of the witnesses above;
   b. An agreed list of issues;
   c. An agreed bundle comprising of 880 pages;
   d. The parties' written closing submissions.

**Issues**

4. The issues were discussed at the outset of the hearing and identified as follows.

Unfair Dismissal

5. What were the facts known or beliefs held that led to the claimant's dismissal? Do those facts amount to a potentially fair reason within the meaning of s.98(2) ERA 1996?
6. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
   a. there were reasonable grounds for that belief;
   b. at the time the belief was formed the respondent had carried out a reasonable investigation;
   c. the respondent otherwise acted in a procedurally fair manner;
   d. dismissal was within the range of reasonable responses.
7. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Disability

9. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? *The relevant time is: 28.7.21 – 13.8.21.* The Tribunal will decide:
   a. Did s/he have a physical or mental impairment: *stress anxiety and depression*?
   b. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
   c. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
   d. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

e. Were the effects of the impairment long-term? The Tribunal will decide:
   i. did they last at least 12 months, or were they likely to last at least 12 months?
   ii. if not, were they likely to recur?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

11. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs: *The policy of arranging disciplinary hearings at the earliest opportunity.*

12. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that *she was mentally unprepared to attend the hearing*?

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

14. What steps could have been taken to avoid the disadvantage? The claimant suggests: *Postponing the hearing on 13 August 2021 until 17 August 2021*

15. Was it reasonable for the respondent to have to take those steps and when?

16. Did the respondent fail to take those steps?

Wrongful Dismissal

17. The claimant's notice period was: *3 months*.

18. The claimant was not paid for that notice period.

19. Did the claimant do something so serious that the respondent was entitled to dismiss without notice? The repudiatory breach relied upon by the respondent is individually or cumulatively :
   *a. Failure to act and manage the performance of the subcontractors which has resulted in large financial losses to the business*
   *b. Failure to follow procedure. Failure to follow the workflow/work process designed by the claimant and Louise Patton in October 2020 to ensure the correct data is received and analysed in order for appropriate and proper financial penalties applied to subcontractor*
   *c. Loss in trust and confidence between the employer and the employee*

Breach of Contract / Bonus

20. What is the contractual term?
21. Was it breached?

**Credibility**

22. Understanding the facts, and their significance, required the Tribunal to understand a significant amount of information of a technical nature; unfortunately, in this regard, we found the claimant's evidence to be unhelpful to the point of being obfuscatory. Her evidence was inconsistent and often deflecting focus and blame; we found her to be an unreliable witness of fact.

23. Although AB was, at the relevant time, the claimant's line manager and therefore well placed to give the Tribunal an overview of her Contracts Team and the events we were required to consider, we derived little assistance from her. Although she was confident and articulate, she was notably selective in the evidence she chose to give. Where she claimed in her oral evidence to have made contemporaneous notes, there were none disclosed or referred to in her witness statement. Where she had produced contemporaneous notes, they contained information contrary to her oral evidence. We found her evidence to be unreliable and partisan.

24. The Tribunal was impressed with all the respondent's witnesses, who we found to be reliable witnesses of fact. We were particularly impressed with the evidence of NP who we found to be a compelling, thoughtful and concise witness of fact.

**Findings of Fact**

25. The claimant was employed as a Subcontractor manager from 8.8.17 until her dismissal, effective on 19 August 2021, latterly earning £38,970pa.

26. The respondent is a utility data service for the energy and water sectors. Its customers include utility companies that require engineers to install, check and fix meters at the premises of the customers of the client. The respondent engages meter workers, engineers and auditors directly as well as via subcontractors in order to carry out the work required by its customers.

27. The claimant's role was to manage relationships between the respondent and its subcontractors and ensure that the subcontractors complied with their Service Level Agreements. Managing the performance of subcontractors includes ensuring that correct penalties incurred by the respondent as a result of the subcontractor failing to meet their Service Level Agreements are passed to each subcontractor accurately and promptly.

28. The claimant's role sat within the Contracts Team in the Installation Services Division. There was a gap in time since the departure of the last Subcontractor Manager left employment. The claimant was line managed by AB, Head of Contracts. Also in the contracts team was a Customer Journey Lead, a role occupied by Brian Thompson until at least end October 2020, followed by Karl Ford, who was employed from January 2021 to April 2021. From June 2021, Laura Denham, already part of the team, assisted in the role, alongside her usual tasks.

29. AB was line managed by Nick Griffiths ('NG'), Director of Installations Division. Other teams in the same Division were the Planning and Performance team. The head of the Planning and Performance team was Louise Middleton until March 2021, then Laurie Topping. They line managed the role of analyst which, at the relevant time, was occupied by Gemma Halliwell.

Bonus scheme

30. A term of the claimants contract of employment was as follows:
*'Bonus Scheme. The bonus scheme will run annually from 1st April 2017 in line with the company's financial year. Details of the scheme will be provided separately and at the same time your objectives are agreed. Your maximum bonus opportunity will be 10% of your basic salary (pro rata). The company reserves the right to amend or withdraw the bonus scheme at any time at its discretion'.*

31. On 22 November 2017, the claimant agreed her objective so the 2018 pay review and appraisal process. Objective 3 read as follows*: "have regime of annual and monthly performance reviews in place for all subcontractors with clear records kept, to communicate key performance metrics and results to enable them to achieve KPIs and optimise business performance... and ongoing monitoring of performance".*

Disciplinary Procedure

32. The respondent's Disciplinary procedure states as follows:

> *'Disciplinary Procedure and Rules*
> *The procedure is designed to heAB and encourage employees to achieve and maintain standards of conduct with job performance . Records of warnings will be kept on employees files. . .*
> *. . .*
> *an employee will have the right to be accompanied or represented by a work colleague or trade union representative during any interview in the disciplinary process, after the initial investigation. . . .*
> *Disciplinary Hearing*
> *If an employee fails to improve after an oral or written warning or is involved in sufficiently serious misconduct, then it may be appropriate to hold a disciplinary hearing.*

*Where the facts have not already been established an investigation will be conducted, in which case the person carrying out the investigation will not be a member of the disciplinary panel. The employee will be advised of their right to be accompanied by a trade union representative or a work colleague during an interview forming part of the investigation*

*...*

*Where the Line Manager considers that there is a case to answer a hearing comprising of two managers will be arranged at the earliest opportunity. '*

General Standards of Service and Data Operators

33. Energy supplier clients of the respondent conduct themselves in accordance with General Standards of Service (GSOS) that are agreed by them, with their customers. Those terms may include, for example, compensation for late or missed appointments with an engineer for failure to achieve their customer service standard. Compensation paid or payable by an energy supplier to a customer for a breach of its GSOS terms as a result of the respondent's default is dealt with differently, depending on the type of energy client.

34. Relevant to our findings, the energy supplier clients of the respondent fall into two categories; those who are meter operators and those who are not. Those who are meter operators are capable of identifying from their own meter data, circumstances in which a GSOS penalty charge has been incurred, and whether it is to be borne internally, or by the respondent. If it believes that the compensation for breach of the GSOS is to be borne by the respondent, it is able to deduct from its own contractual payments to the respondent, the appropriate amount of penalty charges before payment of its own invoice to the respondent. The consequence to the respondent is that it bears the cost of all penalty charges deducted by its meter operator client until such time as it identifies whether, and to what extent, those charges are to passed through to its subcontractors. EDF Energy is one example of a data operator client.

35. Those clients who are not meter operators are reliant upon the respondent to identify when the supplier's GSOS have been breached, before it can pay the customer compensation. Bulb Energy is an example of this type of client.

36. Broadly speaking, penalty charges are borne by the respondent if, for example, the defaulting engineer is engaged directly by the respondent. If, however, the defaulting engineer is engaged by a subcontractor that penalty charge, together with an administration charge, is passed to the subcontractor. Those charges are called *'pass through costs'*.

37. There are other circumstances, however, when the penalty is not passed through to the subcontractor who ultimately attended to carry out the work. Examples might when the planned subcontractor cannot attend the job, because of adverse traffic conditions, and so another subcontractor is engaged by the respondent to complete the work on a '*jeopardy manage'* basis. Plainly, in those circumstances it would be inappropriate to charge the subcontractor who carried out the work.

38. It was the claimant's responsibility to receive data about penalty costs incurred by the respondent, identify whether the penalty was to be borne by the respondent and, if not, submit them to the relevant subcontractor, review the penalty with them and send to them a finalised invoice.

39. In unchallenged evidence, MM described the obligation on the respondent was to apply penalties to its subcontractors on a monthly basis.

40. We accept the unchallenged evidence of both NP and MM that the longer the respondent delays in applying the penalties to its subcontractors, the greater the commercial risk of them not being paid.

41. Concern about management of pass-through costs had been the subject of discussions at Senior Leadership Level in late 2020 and again by May 2021. The claimant attended two meetings, with colleagues from her own, Contracts team and those from the Performance and Planning team to discuss how to address those concerns, in September 2020 and October 2020.

42. Later, in May 2021, AB again raised with the Contracts Team the continued concern expressed by the SLT in the previous year. AB had asked the claimant to populate a table of data.

43. In an email dated 25 May 2021, in reply to AB, the claimant she stated there was no reporting in place for pass through costs for EDF. She stated there *were "minimal volumes due to our control scheduling jeopardy management"* and that the *"cost of efforts taken would probably outweigh the cost benefit".* She was aware that GSOS would be a particular subject of discussion at SLT level and provided what she described as a timeline. For Bulb, the claimant reproduced emails sent to her by analyst GH in the Performance and Planning section, concluding that she could ask Gemma again if she can produce a *"backdated view and then ongoing"*. In relation to EDF, the claimant stated that she had been advised by another that GH proactively charges for GSOS penalties, but *"that was different for EDF"* which required a *"line by line mitigation"*. She reproduced emails between GH and Andy in October 2020, concluding that she *"didn't see anything further and understood [the building of a model to provide data] was still in development".*

June 2021 call

44. On 1 June 2021, when AB was on leave, the claimant was contacted by Gary Findlay ('GF'), Commercial Director, who sought details of subcontractor pass through costs by midday the following day. The following morning, NG emailed the claimant notifying her that the information was required for a detailed review of the lack of profitability in the EDF contract. He asked the claimant to send what information she did have, confirm the information that the claimant did not have, and the timescales in which she could obtain it. He added that he assumed that she would at least have the GSOS information.

45. In her response to GF on 2 June, the claimant explained that with respect to the client Bulb*, 'there have been minimal volumes applied due to our control of scheduling and jeopardy management for the subcontractors'*. She explained that a process had been agreed to report who a job had originally been allocated to, rather than who a job had been changed to and that *'on further review of this earlier this year, this was in development but had not taken place due to other priorities'.*

46. In respect of EDF, she explained that the process was different, and that it required *'line by line mitigation'* of the jobs. This was a reference to the fact that reconciling which subcontractor is to charged the pass through costs in respect of EDF penalties is a relatively more arduous task than in respect of non-meter operator clients. The claimant said she had asked LD's predecessor and GH to produce a model but that she understood this did not progress '*so it is now under review to see if we can run a manual report until this reporting can be developed'.*

47. She said that another person was able to share details of non-chargeable jobs in respect of Bulb until April and that LD had been able to run a report to provide *'a view for EDF across the period'.*

48. GF emailed the claimant informing her that he had tried to call her, stating that he did not agree with agree with the numbers provided, or the explanation as to why charges were not being passed to subcontractors *adding 'my initial reaction is that we aren't willing to have the conversations with [the subcontractors] or we haven't been following previously agreed processes or compliance. The latter is further evidenced by how difficult it is to get the information I had assumed that this information was part of standard monthly reporting for each subcontractor to monitor performance unless I am missing something?'* He said his '*gut feel is that this has cost us a six figure sum but I need to tables to confirm, please'.*

Sick Leave

49. On 3 June 2021 the claimant went on sick leave and on 8 June 2021 she submitted a fit note for 3 weeks, citing '*stress at work'*. This was the first day of sick leave. The fit note was later extended from 28 June 2021 until 2 August 2021, on the same basis.

50. Between 11 June 2021 and 23 July 2021, the claimant received seven welfare calls from AB. In each of these calls, AB informed the claimant that there was an ongoing review of the financial performance of the subcontractors, with a specific focus on EDF, and what elements were being recovered from contractors. The claimant was informed of the months that were being reviewed, the attempts being made to recover backdated penalty charges and when, and in respect of which period, and which energy providers, appliable charges had been finalised.

51. Between 11 June 2021 and 25 June 2021, the claimant continued to work on pass through costs, despite being on sick leave. AB's own welfare notes describe the claimant as '*clearing the backlog'* and *'getting all records up to date'.* We reject AB's oral evidence that all the claimant was doing was a carrying out a handover of work.

52. On 18 June 2021 the claimant was assessed by Occupational Health and a report produced on the same day.

53. The OH nurse reported that the claimant had been diagnosed with breast cancer in 2015 and that her last check-up was in October 2020 and that there had been no recurrence since. The report stated that the claimant had advised of significant social stressors since the diagnosis, including bereavement of her mother and caring for her unwell father.

54. The nurse reported that the claimant had been asked *"to provide information and data about possible significant financial discrepancy involving subcontractors and financial penalties. Denise said this information requested was not readily available in the format requested and she had not been asked for this detail before".* The report continued: *"she felt sick a couple of days prior to a call with senior management. [The claimant] said things reached a head on Thursday 3 June 2021 at that last discussion with the senior manager when she was aware that she was very stressed and disengaging".* The report stated that the claimant was not being medically treated by her GP for anxiety symptoms.

55. The claimant reported that she continued to work from home, *'albeit in a reduced capacity'.*

56. The report cited the contents of the referral form, which was not made available to the Tribunal. The Tribunal might ordinarily expect the line manager to have been the author of the form and, indeed, that would be

consistent with a reading of the report; AB denies completing the information. In any event, the report states that the claimant *"reported to line management last year and early this year"* the claimant suffered stress as a result of workload, and that *"the situation appeared to have been resolved from February onwards*". The form identified the poor working relationship with a colleague who had since moved but it was nevertheless suggested *"this might still have an impact on her".* We understand this to be a reference to the claimant's relationship with Louise Middleton.

57. The report stated that the claimant described a prolonged period of various stress related factors since before and continuing through her employment, including the diagnosis of breast cancer, but in general she was coping with these. *"This recent event of increase in unexpected pressure and worry heightened her emotional responses and resulted in an acute stress reaction.".*

58. In response the question as to whether the claimant was likely to be considered as a disabled person within the meaning of the Equality Act 2010, the report noted that the claimant was automatically to be considered as disabled by reason of the diagnosis of cancer.

59. In response to the question "*in your opinion, is the member of staff able to attend meetings with management including disciplinary meetings?"* the report stated *"I am of the opinion that Denise is fit to attend all meetings with management and I have encouraged her to attend these to discuss and resolve the current issue. I do advise consideration and accommodation of her stress and anxiety and advise local support measures for such meetings".*

60. On 25 June 2021, being the date on which the next welfare call after the OH report was received, AB relayed the advice from HR that the claimant should not carry out any work from home whilst on sick leave.

Investigation meeting

61. On 23 June 2021, the claimant attended an investigation meeting with David Wynn ('DW'). She was unaccompanied. He told her that he was investigating a *"a concern around the financial penalties received from our clients are not being passed on to subcontractors".* The claimant confirmed she was subcontractor manager responsible for ensuring subcontractors meeting the contractual responsibility and monitoring their performance. She stated she was responsible for assigning penalties when a client such as EDF submits financial penalties to the respondent *"as long as I have the data available".* The claimant confirmed *"the issue is and always has been getting the data reporting . . the data doesn't flow in any obvious way . . I did my best to pull it all together*". She told DW that since LD had been recruited and AB had kept advised of the progress being made in the weekly

welfare calls, she had now become aware *'there could be more to reclaim'.* She said GF held the erroneous view that penalties were part of the standard monthly reporting, albeit she monitored subcontractors' performance with monthly "*technical*" calls.

62. Later that day the claimant sent DW 28 emails containing information she believed was relevant to the investigation. They were sent without explanation as to their significance to the investigation.

63. DW interviewed AB, the claimant's line manager. AB informed DW that she was unclear how the claimant performance managed her subcontractors or how she applied financial penalties to them. She acknowledged that EDF and GSOS was the main area of concern and said that historically *"we have struggled to get the right information we need"*. She accepted that whilst information comes in daily from the Planning and Performance team, the data was *"not split by MDS and subcontractor".* She recognised that LD who had recently been acting into the role of Customer Insight Lead *"can give greater insight into what [the claimant] is looking for".*

64. DW interviewed Louise Middleton ('LM'), previously Head of Planning and Performance. LM informed DW that the claimant received daily information about subcontractor performance. She confirmed that, subsequent to numerous meetings at SLT level on how to manage the passthrough costs, two meetings took place in September 2020 and October 2020. At the latter meeting, it was agreed that GH would send a weekly GSOS report to the claimant, which commenced immediately thereafter; she said that was the totality of the involvement of her team. LM clarified that her team had nothing to do with EDF GSOS reporting, since the data was supplied directly to AB's team *"and they own it. They analyse the data and they mitigate what will or will not be paid"*. She told DW that she would send over the process maps that the claimant had herself drawn up after the meetings in 2020, to illustrate her point.

65. Two process , or workflow, maps were provided by LM. One was in relation to Bulb Energy. It showed that the workflow coordinator, GH in the Performance and Planning team, would send a weekly data extract to the Subcontractor Manager on day 1. The Subcontractor Manager is required to forward that data to the subcontractor on the same day, and if not immediately agreed, review the penalty with the subcontractor. Any adjusted invoice is to be sent to the subcontractor on day 4.

66. The second process map was in relation to EDF Energy. That required the Customer Journey Lead, who sits in AB's Contracts team, to provide a monthly data extract by day 5. The Subcontractor Manager is required to forward that data to the subcontractor on the same day, and if not

immediately agreed, review the penalty with the subcontractor. Any adjusted invoice is to be sent to the subcontractor on day 16.

67. Laurie Topping ('LT'), current Head of Planning and Performance was interviewed. She confirmed that she sat on the call with the claimant in which the claimant documented the EDF/GSOS process and which LT told the claimant she should own. She stated that her understanding was not that EDF data wasn't readily available, but that she was told by AB that the respondent could be challenged by subcontractors about jobs being jeopardy managed. She stated that EDF sends the data to AB's team, the data is validated by the Journey Insight Lead in AB's team, stating that *"Brian used to produce this weekly, then Karl and now [LD]*" and *"all that sits with the subcontractors manager who sits in [AB's] team"*. She denied the suggestion that the data is not readily available or easily accessible adding *"the data is there, it has been produced in the past, it just hasn't been used".* She said she had not been notified since the call in October 2020 that the data had not been produced.

68. DW interviewed Nick Griffiths ('NG'), Director of Installation Services. NG stated that he expected the claimant to be having a continuous dialogue with her subcontractors, pulling them up on poor performance and informing them of any pass-through penalties. He said he expected the claimant to be in possession of passthrough costs and which subcontractor should be charged *"if not her then [AB]"*. When asked, he said he was unsure whether this type of financial information was reported to more senior levels.

69. DW interviewed Gary Finlay, Commercial Director of Water. GF said it was the claimant's role to know what the respondent should be paying to the subcontractors and if there were any financial penalties to be applied. He said his issue was that he did not know how much was applicable to subcontractors in penalties, since the claimant was unable to share that information, giving rise to a concern that penalties that have been applied to the respondent may not have been passed on to subcontractors. He said the amount of penalties in issue was "*not little money either"* and that he found it hard to believe that the respondent was responsible for a hundred percent of those penalties. He confirmed it would be difficult to place a financial figure on the problem, but offered what he himself described a crude calculation, based on subcontractors carrying out 20% of the work, without specifying a date range, stating it was closer to £100k than £1k.

70. DW concluded that there was a case to answer that the claimant had not correctly managed the performance of subcontracts by failing to attribute the correct financial penalties to them, causing the respondent to be the main bearer of penalties applied by the client. DW stated that the estimated figure was between £100k and £350k.

71. On 19 July 2021, the claimant was sent an invitation to a disciplinary hearing to take place on 29 July 2021. The allegation was described as follows:
*Negligence – failure to act and manage the performance of the subcontractors which has resulted in large financial losses for the business;*
*Failure to follow procedure – failure to follow the workflow/work process designed by yourself and Louise Patton ensuring the correct data is received, analysed with the proper financial penalties applied*
*Loss of trust and confidence*

72. She was told that the conduct alleged of her potentially amounted to gross misconduct and warned that dismissal was a possible sanction. She was notified of a right to be accompanied and informed that the letter contained evidence; it did not include the documents the claimant had sent to DW. The claimant was informed that she could submit any documentary evidence she wished, and confirm whether she sought to call any witnesses.

73. On Tuesday 27 July, the respondent wrote to the claimant stating that, due to unforeseen circumstances, the planned disciplinary officer would not be able to conduct the disciplinary hearing on Thursday 29 July, and that it was necessary to reschedule the hearing for the following day, Friday 30 July 2021.

74. On Wednesday 28 July 2021, the claimant emailed Dean Bailey of HR stating that her father had been admitted to Accident & Emergency department and that he was in a critical condition. She added that she had reviewed the documents *"only briefly and I cannot see being able to focus on preparation of this hearing until next week at the earliest, when I hope my dad's condition has stabilised. I would therefore request rescheduled hearing date no earlier than two weeks from the start of next week. To enable me to do this preparation, I would be grateful if you could supply me with the following information in the meantime…"*. She sought 4 policies from the respondent, including the disciplinary and grievance procedures. '*No earlier than two weeks from the start of next week'* would be Monday 16 August 2021.

75. Later the same day, Dean Bailey responded to the claimant, stating that length of time sought was not reasonable, but that the respondent was prepared to postpone the disciplinary hearing to Thursday, 5 August 2021, which would give the claimant with sufficient time to review the supporting documents in advance of the hearing. He provided the respondent's policies, including the disciplinary and grievance procedures, to the claimant.

76. On 30 July 2021, the claimant obtained a further fit note that, as before, cited work stress is a reason for the claimant's unfitness to work and which for the first-time added comment that the claimant was '*not fit to attend work meetings for the duration of the sick note'.* The period covered by the fit note was 30 July 2021 to 31 August 2021.

77. On Monday 2 August 2021, AB requested, on the claimant's behalf, a further postponement. On Wednesday 4 August, the respondent postponed the disciplinary hearing once more, until 2pm Friday 13 August 2021.

78. On Monday 9 August, the claimant sent a lengthy email to NP, to inform him that she did not feel sufficiently well to undertake the preparation for the disciplinary hearing, or to attend it, and that while she recognised that Occupational Health had deemed her fit to attend the hearing, this was before the claimant had been informed of an investigation. She advised that although she had been verbally informed she could provide a written statement for the disciplinary hearing or send a representative in her absence, she wished to attend the hearing in person on a face-to-face basis. She sought further information: full details of the '*large financial losses to the business',* proof that reports had been provided to her on a monthly basis since October 2020, and all evidence sent to DW. Finally, she stated she intended to submit a grievance, setting out a number of points she intended to raise and stating that she had collated information in the form of '*an evidence-based matrix'* in which she had detailed *'over 50 non-compliance points and concerns'* about the disciplinary investigation.

79. NP responded the same day. He informed the claimant that any concerns about the disciplinary process could be raised at the disciplinary hearing. He confirmed that it remained open to the claimant to provide a written statement or send a colleague or trade union representative in lieu. Furthermore, if further investigation was required before making a final decision, he assured the claimant that he would arrange this.

80. On the same day again, 9 August 2021, the claimant submitted a three-page letter to notify the respondent of her formal grievance; attached that document was a '*14-page 52-point evidence-based matrix'.* It was sent to NG, who replied on 12 August after his return from leave, stating that the contents had been carefully reviewed and the disciplinary hearing was the correct forum in which to raise her concerns, since it related to the investigation and disciplinary proceedings.

Disciplinary Hearing

81. The disciplinary hearing proceeded on Friday 13 August 2021. The claimant attended, accompanied by Gayle Pells (Contract Manager) as her representative, in her lay capacity, albeit she is an experienced union representative, and AB as her witness. She was reminded of her ability to

take regular breaks. The claimant read out an opening statement in which she contended that *"everyone involved in the process"* had colluded her into railroading her into attending the hearing. She said she was under intolerable pressure and that she was a scapegoat.

82. The claimant said that it was unacceptable that only 2 of the 28 emails she sent to DW during the investigation stage were to be found in the disciplinary pack.

83. The claimant called her witness, AB. AB said she had not produced a witness statement, but had *"been called to give an overview of the work she has been completing in [the claimant's] absence into potential recharges to subcontracts for the first six months of the year and that the main focus was the EDF contract".*

84. AB claimed that the EDF information was not "*freely available*" and that the system does not record whether the contractor at the end of the day was instructed on a '*jeopardy manage'* basis. AB confirmed that EDF sends its data to her team. She said that LD had been going through the respondent's system, line by line, to see where the penalties could be applied. She said LD had discovered further charges for *'fail to attends'* thereby increasing the amount available to recover. She said that working with LD, no final figure had yet been reached for pass through costs in relation to EDF or Bulb but for two other clients, for the first six months of 2021, they were totalled around £16,400, and after the subcontractors had challenged some of the costs, were in the region of £11,500. When asked to explain why the data was accessible now, AB replied that it was the way the systems were set up and how reporting came out of the respondent's systems. She said that there had been lots of discussions around retrieval of the data and that '*people had found it onerous and difficult to identify'.* She said that small amounts had been passed through to subcontractors, *'but general feedback was small amounts and took too long so [it was] not viable'.* She said LD had been able to retrieve information because of her skill set, but that she couldn't answer in respect of Bulb.

85. The claimant accepted that her role was to manage the performance of subcontractors and that this was a fundamental responsibility. She accepted she drew up the workflow charts in and around the meetings that took place in September and October 2020. She said she could not provide NP with information she received form the Customer Journey Lead (in respect of EDF) because she was not provided with any data. She explained that this was because she did not receive anything from GH and that the failure to produce reports was hers. She disputed GH's assertion contained in an email that it was the claimant's responsibility. When asked why there was no evidence of any attempt to chase or improve reporting in the 5 month gap between January 2021 and June 2021 (when GF had

requested information) and whether she had discussed this with AB, the claimant stated *'there just didn't' seem to be any reporting we could get on the subject'.* that there '*always seemed to be other priorities'*. She later stated that she *'probably did'* discuss reporting challenges to AB and that AB was aware that she had not been making progress. She accepted that how she was managing subcontractors and what penalties had been passed through to subcontractors was important information, but that she did not have it to hand when GF asked for it because *'I don't have visibility of this information in this format'* adding that the *'the nub of the matter is GF didn't fully understand the end-to-end invoicing process and all of the detail'*. The claimant was reminded that she informed DW that she only learned of an additional source of information which LD utilised to reclaim further penalties based on '*failures to attend'*, during a welfare call with AB. She was asked whether she had ever requested that information to engaged someone to access that information, to which she responded that she was not a data analyst, *'so no'*. She disagreed that it was part of her role to have identified this source of information at an earlier stage because, she said, she was not responsible for accurate data '*I take action on receipt of the reporting. It would seem to me [that] the reporting had been flawed from the inception and those who are responsible didn't know that'*. She said she challenged '*back'* to ask what controls did '*they'* have in place to ensure that the reporting was adequate and fit for purpose. When asked by NP whether it was her expectation that jeopardy management will occur in the reporting before she receives it, the claimant answered, that it was not a process that she was responsible for and '*it was not a process I was outlining'.* When asked to comment on LM's evidence to DW that all the data was provided to her, in accordance with the workflow process maps that the claimant designed, the claimant stated '*the reporting was never received'.* When challenged, she accepted that reporting was received but only until November 2020.

86. In her closing submissions, the claimant accepts that there was no evidence before NP of any efforts to chase or escalate the data in the period end January to early June 2021.

87. NP asked the claimant why there was no activity for a 5-month period after a call to GH when on her own account she knew the reporting for EDF was not fit for purpose. How the claimant replied, is a matter of dispute between the parties. According to the respondent's notes of the meeting, the claimant stated that the reason was pressure of work due to managing 10 different contracts; both parties agree that the claimant stated that there always seemed to be other priorities.

88. We note that in neither party's version of the notes of the hearing, did the claimant suggest to NP, as she had in her email to AB, that she was of the view that *'the cost of effort would probably outweigh the cost benefits'*.

89. NP concluded his questions and turned to the claimant's grievance. He confirmed he had read the contents of her grievance and the claimant was asked if there was anything else to add. She said that it was comprehensive and had nothing further to add but nevertheless sought to address it point by point adding *'as I spent two hours of my time on your questions it now seems you do not have time to review this for me'*. She was halted, several times, it being explained to her that the process was not adding value to the exercise; when asked for any additional information, she said she had nothing further to add.

90. After the disciplinary hearing, the HR representative emailed DW to raise a query from the claimant, namely that she had submitted information to him that had not formed part of the investigation pack. DW responded that the documents provided by the claimant did not have any material impact on the findings of the investigation and were not relevant to the questions posed. NP reviewed the documents.

91. NP also reviewed the grievance and, having taken advice from HR, determined that there was nothing in the grievance that required resolution outside the disciplinary process.

Disciplinary outcome

92. On 19 August 2021, the disciplinary meeting reconvened so that NP could verbally communicate his decision. The claimant was provided with written confirmation on the same date.

93. The claimant was informed that NP had independently reviewed the documents the claimant had sent to DW and did not feel they provided mitigation.

94. He found that a core responsibility of her role, specifically managing the performance of subcontractors and that applying the correct recharges to subcontractors was a fundamental aspect of that responsibility. He found that the claimant was solely responsible for this and that she had failed to fulfil that responsibility by ensuring that relevant recharges/penalties were correctly applied.

95. The claimant had failed to identify to him steps she had taken to obtain the data by working with GH, or seeking an alternative solution, or escalating the problem.

96. He acknowledged that penalties charges had been passed through in respect of another client the previous year.

97. NP acknowledged that there had been historic issues obtaining the required data linked to GSOS. He found no evidence before him of any *'actions taken as part of [her] role or of a proactive nature, to obtain this data, or escalate the fact that the data has been unobtainable to any more senior manager during the period of January 2021 to June 2021 [when GF raised his concerns with her]'.*

98. He considered that that was a significant period of time during which there was a failure to manage the situation. He felt it pertinent to note in the outcome letter that had he seen evidence of productivity linked chasing the data and reporting are escalating this issue to GH line manager during this period (initially LM and subsequently LT) he may not have come to the same conclusion. He stated that he was '*at an absolute loss'* as to why the claimant had no stage formally raised her concerns with her own line manager, AB.

99. He concluded that, as a matter of logic, some of the penalties that the respondent incurred must be the responsibility of the subcontractors carrying out EDF work; in his oral evidence he stated that he found it '*unbelievably unlikely'* that all the penalties were properly borne by the respondent.

100. He stated that AB, with support from LD, had been able to, despite issues with the quality of data available, identify the correct financial penalties in a timely fashion. He reiterated that whilst during the disciplinary hearing there was no firm indication with regards to financial losses, because the work was still ongoing and the exact financial losses were yet to be finalised. He added that the extent of the financial loss had no bearing on his decision making, but noted that the loss was likely to be 'substantial' – although in his oral evidence he believed that the word 'significant' was more apposite. In his letter, as well as his oral evidence, NP confirmed that because the extent of the losses had yet to be finalised, they had not been factored into his decision making.

101. NP stated that his impression of the claimant's evidence was that the identification of the correct pass-through penalties in respect of GSOS EDF was an onerous task, and the failing was on the part of any number of others, that her role was to act as nothing other than a conduit, so that in the event that she did not receive the data, she could be guilty of no failing.

102. He added that the claimant had shown a complete lack of accountability or responsibility for the failings, or of the impact that they have had on the company throughout the entirely of the disciplinary process. He stated that it was this apparent lack of accountability, together with the negligence in her duties, that had amounted to a complete breakdown in trust and confidence in the claimant as an employee. In his evidence to the Tribunal,

NP expanded on this point, stating that the claimant's response to the allegations, exacerbated the matter; had the claimant demonstrated insight by accepting that she had a responsibility to ensure that the correct process was put in place and that she had made mistakes and how she could fix it, he may well have considered a sanction less than dismissal '*but she took no responsibility and I found that it was impossible to come back from the loss of trust at that point'*.

103. The claimant was informed that her contract of employment was terminated with effect on 18 August 2021.

104. The claimant was not provided with a separate written grievance outcome but was informed that the grievance was dismissed.

105. The claimant was given 5 days in which to appeal the decision.

106. After the meeting, NP recommended that AB was to be investigated for her own role in the matter. AB subsequently resigned from her post.

Letter of Appeal

107. On 27 August 2021, the claimant submitted a 16-page appeal against the decision to dismiss. She said the matter should have been treated as a capability issue and that the penalty was too harsh. She stated that she had been unfit to prepare for and attend the disciplinary hearing, as per her fit note, and that the respondent was in breach of the Equality Act by failing to give her more time to prepare and by subjecting her to an unrealistic workload. She said that there had been no rush to conclude the process, given that the extent of the losses had yet to be finalised. She provided details of the poor health of her father and that she was aggrieved about the respondent's failure to acknowledge that. She complained that there have been numerous delays all of which had been caused by the respondent. She complained that the investigating officer had little or no knowledge of the claimant or the procedures all the systems and that because AB was not under investigation, there was no need to exclude her from *'the disciplinary process'*. She identified that the respondent's policy was to require two managers at the disciplinary hearing. She identified that the grievance was relevant to the disciplinary hearing because it was relevant to whether the allegations were established at all her defence to those allegations and the unfairness of the process. She set out her rejection of each paragraph in the outcome letter. She stated that NP was wrong to suggest that the workflow process she created in October 2020 stated that her role was to '*receive and analyse the subcontractor data',* pointing out that according to the workflow process her role is simply to be provided with a data before sending it onto the subcontractor and that she could not be criticised for failing to apply penalties if she had not been provided with the correct data. She said she '*vehemently denied'* that she was responsible for

chasing data, and that even if she was, that was a matter that should have been dealt with informally outside of any conduct or performance management procedure.

108. On 19 August 2021, the claimant sent to NG an appeal against the dismissal of her grievance. She complained that the processes should have been dealt with separately. On 1 September 2021, Dean Bailey of HR emailed the claimant reminding her that she informed NP that she had nothing further to add to her grievance at the disciplinary hearing. She was informed that a separate grievance appeal hearing would not be conducted, and that her documents pertaining to the grievance would be forwarded to the manager dealing with her appeal against dismissal.

109. The claimant sent to Mark Maguire ('MM'), the appeal officer, a number of documents that she described as contemporaneous handwritten notes of team meetings and 1;1 with AB. Within them were notes of 3 team calls, one 1:1 call with AB and a third document, all of which mention GSOS to one extent or another.

110. On the same day, the claimant submitted an appeal against the grievance outcome. She stated that the failure to treat the grievance as a separate process was improper. She was informed on 1 September 2021 that, contrary to her request, the appeals in respect of her grievance and disciplinary would be considered together.

111. In advance of the appeal hearing, MM sent to the claimant her contract of employment and the 2018 appraisal scheme.

112. MM rescheduled the original appeal hearing which was due to take place on 8 September 2021, to enable him to review the information.

Appeal Hearing

113. The disciplinary appeal hearing took place on 22 September 2021, chaired by MM. The claimant was accompanied by Gayle Pells as her representative and AB as her witness.

114. The claimant's witness AB confirmed that it had taken LD approximately a week to pull together the GSOS data in relation to two clients. She stated that on current figures and after negotiation with subcontractors, the passthrough costs over the six-month period January to June 2021 appeared to be in the region of £12,000. AB stated that the monies would be settled with a subcontractors '*when they have been agreed'.* AB said that the '*key thing'* was that '*we didn't have the reporting that allowed it to be slipped into subcontracts'*. MM asked about the handwritten notes which suggested that GSOS was mentioned in team meetings. AB said nothing had been formally recorded *'we might have something on email'*. AB stated

that it was a busy and difficult time in the Installations Directorate and that '*there was a lot going on basically'*. She said that she had escalated behaviour that the claimant had raised with her about LM to NG. When asked if she had escalated reporting concerns to NG, AB relied that she was aware, but that she couldn't recall the dates, a lot of it would have been done verbally and that she '*may have some notes'*. AB confirmed, as did the claimant, that no discussion had taken place about obtaining information from the Data Reconciliation Team, from where LD had obtained information to assist her.

115. The claimant maintained that it was GH's responsibility to provide data to her and that this had not been done since October 2020. She said that LM knew that GH was not producing the data and that she had had problems in her relationship with LM. Neither the claimant nor AB could explain why LD's ability to carry out this work had not been explored previously given that she was in the same directorate.

116. MM said he had seen the handwritten notes which suggested that in February, March and May 2021, there was mention of GSOS in team meetings and in her 1:1s with AB and that they did not necessarily appear contemporaneous. The claimant said that the majority of documents had time stamps of when they were scanned, but that she found a large file of documents that she had not had time to scan. She said she did not submit them to NP at the disciplinary hearing because she did not believe the disciplinary hearing was about whether she had escalated concerns to LM and if LM was aware.

117. MM asked the claimant about her priorities as a Subcontractor Manager. The claimant replied that it would be advantageous to have time lime reporting, '*but I could only do this if I was provided with reports'.* She said that the *'original reporting'* only disclosed '*negligible amounts'* that could have been applied.

118. The claimant denied that her allegation that the respondent had breached the Equality Act was because she had a disability, but it was a reference to her being unfit to attend the disciplinary as cited in her GP fit note. The claimant said that the point she was making about a breach of the respondent's own procedure was that her own line manager did not believe that there was a case to answer.

119. The claimant maintained the respondent had received no evidence to substantiate the suggestion that the respondent had lost financially since the pass-through charges would be completed on a backdated basis.

120. MM asked the claimant, without any apparent clear comprehensible response, to address the findings made by NP that there was an apparent

lack of accountability and lack of escalation. He said that more might be expected of someone on a management contract and on a bonus scheme. The claimant said she did not realise that she was on a bonus scheme and had not received a bonus.

121. The claimant maintained that she was yet to receive evidence of losses; MM reminded the claimant that NP had not taken into account the size of the losses incurred as part of his decision, but that on a subjective view, the figures that AB quoted, and that were yet to be recovered, could be described as significant. The claimant confirmed that the recovery of backdated pass-through costs should be taken into account as a mitigating factor.

122. In an attempt to summarise the various things, the claimant was saying to him, MM stated that he believed the claimant to be saying that there were issues with reporting, that she had escalated them, others in Planning and Performance were responsible for the production of the data she had no responsibility other than to raise it initially and then it was over to them to follow this through. Further, that she had chased it with her manager and others, and that she was working as a team to get the correct calculation. The claimant confirmed that that was her position.

123. Later that afternoon MM delivered his decision. Although he had concerns about the authenticity of the handwritten notes submitted to him by the claimant, MM stated he was satisfied that GSOS penalties had been discussed in meetings in the period January to June 2021, but he was not satisfied that as someone with responsibility to ensure subcontractors operated in a compliant manner, that the claimant did enough to ensure that GSOS penalties were correctly applied, and that her conduct fell a long way short of the standard expected from someone in a managerial position. He added that the fact that correct reporting on GSOS was put together in a week during the claimant's absence was evidence that if she had exhibited the degree of skill and care expected to coordinate resources that the financial losses to MDS could have been corrected much earlier. He found that the claimant was aware that it was her responsibility to ensure that the performance of the subcontractors was effectively managed with charges being correctly applied and that her efforts to deflect responsibility to the Performance and Planning team for her own failings represented an abrogation of her responsibilities.

124. He upheld the decision to dismiss.

**The Law – Unfair Dismissal**

Unfair dismissal

125. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial

reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

126. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA.

127. s.98(4) requires the Tribunal to consider whether the employer acted fairly or unfairly in treating that reason as a sufficient reason to dismiss. Although it is often the case that substantive and procedural aspects of the dismissal are more conveniently addressed separately, the touchstone test is that at s.98(4) and the statutory test does not make any such distinction. The burden is neutral, and the reasonableness of the response is by reference to the objective standard of the hypothetical reasonable employer: Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 at 47.

128. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of British Home Stores v Burchell [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions: (i) Did the employer carry out a reasonable investigation? (ii) Did the employer believe that the employee was guilty of the conduct complained of? (iii) Did the employer have reasonable grounds for that belief?

129. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: Sainsbury plc v Hitt [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

130. Whether or not a procedural defect is sufficient to undermine the fairness of the dismissal as a whole, is a question for the tribunal. Not every error will do so. It is crucial to assess the gravity of any procedural defect and consider its impact on the fairness of the decision as a whole – Pillar v NHS 24 UKEAT/0005/16/JW [2017] All ER (D) 173 (Apr).

131. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT.

132. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. That said, The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Where

an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see Sandwell & West Birmingham Hospitals NHS Trust v Westwood (UKEAT/0032/09/LA) [2009] and Eastland Homes Partnership Ltd v Cunningham (EAT/0272/13). This means asking two questions: (1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and (2) Did the employer act reasonably in characterising the conduct as gross misconduct?

133. In Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854 it was held that where dismissal is for gross misconduct, the tribunal has to be satisfied that the employer acted reasonably both in characterising the conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment.

134. The tribunal must have regard to the appeal process when considering the unfair dismissal claim. It should examine the fairness of the disciplinary process as a whole and each case will depend on its own facts – Taylor v OCS Group Ltd [2006] ICR 1602, [2006] IRLR 613.

135. Section 207(2) Trade Union & Labour Relations (Consolidation) Act 1992 provides that any provision of a specified ACAS Code of Practice which appears to the tribunal to be "relevant to any question arising in the proceedings shall be taken into account in determining the question." In relation to complaints of unfair dismissal by reason of conduct the relevant Code is the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

Wrongful Dismissal

136. In a claim of wrongful dismissal, it is for an employer to establish that the employee was guilty of conduct that fundamentally breached his contract of employment, entitling it to dismiss the employee summarily. The employer is entitled to dismiss where the employee has committed an act of gross misconduct. In Neary v Dean of Westminster IRLR [1999] 288 (para 22), Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing.

137. We are required to make our own findings of fact: Boardman v Nugent Care Society [2013] ICR 927. Our findings are substantially based on the claimant's own evidence, save where we indicate otherwise below.

Disability

138. Section 6(1) of the Equality Act 2010 provides that a person (P) has a disability if-
    a. P has a physical or mental impairment, and
    b. the impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities.

139. Section 212(1) provides that an effect is substantial if it is more than minor or trivial.

140. Paragraph 2(1) of Schedule 1 of the Act sets out the definition of 'long-term' in this context. It provides that the effect of an impairment is long-term if-
    i. it has lasted for at least 12 months
    ii. it is likely to last for at least 12 months,
    iii. it is likely to last for the rest of the life of the person affected

141. Thus, whether the effect of an impairment is long-term may be determined retrospectively, or prospectively; : Patel v Oldham Metropolitan Borough Council [2010] IRLR 280 EAT.

142. In determining whether a person is disabled for the purposes of the EqA 2010, the Tribunal is required to take account of the Guidance on matters to be taken into account in determine questions relating to the definition of disability ('the Guidance') as the Tribunal thinks fit – Schedule 1 paragraph 12 of the Act.

143. In determining a question as to whether a person meets the definition of disability, it is important to consider the things that a person cannot do, or can only do with difficulty: para B9 of the Guidance.

144. It is not necessary for the effect to be the same throughout the period which is being considered, in relation to determining whether the 'long term' element of the definition is met. The effect may change over the period, or even disappear temporarily: para C7 of the Guidance.

145. The word 'likely' should be interpreted as meaning that 'it could well happen': SCA Packaging Ltd v Boyle [2009] ICR 1056, now adopted at paragraph C4 of the Guidance.

146. In most cases, if not all cases falling within paragraph 2(1)(b) of Schedule 1 it will be necessary for a diagnosis to be given in order to obtain a prognosis of the likely duration of the effects of an impairment: Patel v Metropolitan BC [2010] IRLR 280.

147. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything that occurs after will not be relevant in assessing the

likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (such as general state of health or age): McDougall v Richmond Adult Community College [2008] ICR 431 and paragraph C4 of the Guidance.

Reasonable Adjustments

148. We have had regard to the provisions of s.20 and 21 of the Equality Act 2010 as well as the correct approach to their interpretation as set out in Environment Agency v Rowan [2008] IRLR 20 EAT.

Burden Of Proof – Equality Act

149. Section 136(2) EqA 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. However, section 136(3) provides that subsection (2) does not apply if A shows that A did not contravene the provision.

150. Project Management Institute v Latif [2007] IRLR 579, the EAT considered the application of section 136 in the context of reasonable adjustments. The burden does not shift at all in respect of the 'PCP' or 'substantial disadvantage'. Those are aspects of the complaint and issues of fact which a Claimant must establish in every case.

Breach of Contract – Bonus claim

151. Clark v BET plc and anor [1997] IRLR 348, QBD in which the High Court found that despite the contract referring to a bonus as discretionary, the employer was under an obligation to exercise that discretion in good faith and as a result the claimant was contractually entitle4d to participate in a bonus scheme;

152. Horkulak v Cantor Fitzgerald [2005] ICR 402. The Court of Appeal held that, even though the employee's contractual clause suggested that his bonus entitlement was purely discretionary, since it was part of his remuneration structure and was designed to motivate and reward him, it was necessarily to have been read as a contractual benefit as opposed to a mere declaration of the employer's right to pay a bonus if it wished. He was entitled to recover damages as a reflection of the value of his likely entitlement but for his dismissal.

**Unfair Dismissal - Discussion and conclusions**

153. We are satisfied that the facts known and the beliefs held by NP when deciding to dismiss and of MM in deciding to uphold the decision, were that the claimant had failed to carry out a core aspect of her role in managing the performance of the subcontractors by failing to ensure that they were

accurately and promptly invoiced for penalty costs incurred by the respondent; that there were penalties for the claimant to recover throughout a period of time that he reasonably considered to be of significant length and during which the claimant had taken no discernible action to obtain the data to enable her to do so, seek an alternative solution, or to escalate the problem. Furthermore, that in seeking to deflect blame, she had in her own response to the allegations, undermined the trust he had in the claimant to carry out her role. We are satisfied that that was a reason relating to the claimant's conduct.

154. The claimant accepts, in her closing submissions, that NP's beliefs were genuine and that they were capable of amounting to conduct. In any event, we ourselves are satisfied that the respondent genuinely believed in the misconduct it found and has discharged its burden of establishing that the reason for the dismissal related to the claimant's conduct.

155. We turn to the question of whether the reasons for the decision were arrived at on reasonable grounds after a reasonable investigation.

156. The claimant accepted at the investigation and disciplinary meetings that it was her responsibility to ensure that subcontractors met their contractual obligations and to monitor their performance and that it was her responsibility to ensure that penalties were assigned accurately and promptly. The only dispute was whether the claimant was responsible for ensuring that she received the data, or whether she was entitled to apply only those penalties in respect of which she passively received the relevant data. The claimant held the role of subcontractor manager. We consider it well within the respondent's remit to reasonably conclude that she held the responsibility to ensure that she received the appropriate data, and that, in the event of difficulty, it was her responsibility to ensure that the problem was escalated. Our conclusion on this point is fortified by the claimant's own concession, made only in her closing submissions, that it was her role to obtain the data to allow her to apply the correct pass-through costs, alternatively to escalate the matter in the event of difficulty.

157. It was reasonably open to NP to conclude that there were penalty charges that the claimant had failed to promptly apply to subcontractors, and that she failed to escalate any problems that she had in receiving the correct data. At the disciplinary hearing, the claimant's own witness, AB, informed NP that, in respect of two particular clients, she and LD had identified some £16,400 of unclaimed penalty charges in respect of two clients in the first 6 months of 2021. The claimant informed NP that she had not received any data in respect of EDF for the same period and as she accepted in her closing submissions, nor had she placed before NP any evidence of any efforts to chase or escalate the lack of data in the period end January to early June 2021.

158. It was reasonably open to NP, and to MM on appeal, to conclude that the claimant's response to the allegations lacked any or any sufficient demonstration of accountability. The claimant's evidence at the disciplinary hearing was to the effect that the alleged problems gathering data was a responsibility to be lain at the door of any number of her colleagues; she did not at any stage accept that, as Subcontracts Manager, the responsibility fell to her to ensure that she received the necessary data to enable her to carry out a core aspect of her role, or to escalate the problem in the event that her efforts proved futile. The lack of acceptance was compounded by her approach at the appeal stage, where she maintained her '*vehement'* denial that she was responsible for chasing data, and that any shortcomings on her part should have been dealt with via an informal procedure. She maintained at the appeal hearing her assertion that the responsibility for the provision of data lay with GH, thereby denying the evidence of both LM and LT, as well as we note in respect of EDF, rejecting the implication of the contents of her own workflow process map. At the appeal hearing, she maintained only that it would have been '*advantageous'* to have received the correct data, but that she could only do this if she *'was provided with the reports'*. The claimant produced handwritten notes to MM because, we understand her to say, she had only, latterly, appreciated that the dearth of evidence about her own efforts to escalate any difficulties she had was a matter for concern to the respondent. Those handwritten notes that were placed before MM identify that GSOS was either mentioned or discussed, but nowhere in those notes is there evidence of the claimant identifying the steps that she took to ensure she could carry out her role, the problems she encountered, or a request for support or assistance from LM. Nor did the claimant identify to MM how those notes did disclose actions that she took, and verbally she was maintaining to MM that the extent of her responsibility was to apply only the data that she received. AB had not, as the claimant's own witness, adduced oral or documentary evidence of the claimant raising any problems with her, and this, despite the claimant being on notice that her own lack of action was of significant concern to NP. The claimant did not seek to criticise AB for knowing, but failing, to act on any concerns that the claimant raised with her, rather, she confirmed to MM that her defence was that she was working '*as a team'* to obtain the correct calculations.

159. We find that it was reasonably open to both NP and MM to conclude that the claimant's approach to the disciplinary charges was to minimise her role and the effects of her inaction as that that was unacceptable for someone holding a managerial post, such that it caused a loss of trust and confidence in her continued employment.

160. We turn to NP's observation that the inaction of the claimant caused the respondent significant losses. We accept his evidence that the extent of any losses was not a factor in his decision to dismiss the claimant, not least

because we found him to be a compelling witness. There was evidence before him that, to date, the respondent's investigation had identified that the claimant had failed to pass through penalties over a period of 6 months amounting to approximately £16,400, which after challenge by the subcontractors led to £11,500 being recovered. That was relevant evidence for him to have regard to because, first, it was evidence that, had the claimant acted in the manner expected of her, the personnel and data resources were to be found within the respondent to enable the claimant to carry out her role, and secondly, had the information before him been that the claimant's inaction had led to no losses, or only minimal losses, then plainly that would have been a relevant factor in the claimant's mitigation. We consider unattractive the claimant's argument that because the respondent identified the claimant's failing, investigated it and took steps to mitigate its immediate losses, the respondent cannot prove that the claimant's inaction caused the respondent any losses at all. The penalties in respect of Bulb and EDF had yet to be identified for the same period and NP considered it '*unbelievably unlikely'* that all penalties in the 5-month period were the respondent's to properly bear. It was reasonably open to NP to view the immediate losses recouped by the respondent as '*significant'*.

161. We turn to the alleged deficiencies in the respondent's procedure.

162. The claimant contends that GH should have been interviewed. We cannot find that the omission was one which fell outside the band of reasonable responses. It was for the claimant to answer an allegation that she had failed to promptly and accurately pass-through penalties to the subcontractors, or explain why she had not. NP had before him two witness statements, from LM and LT, to say that the GH had provided the data, insofar as it was required of her, since the meeting in October 2020 and furthermore, that it had not been brought to their attention that she had not. That was met with a bare denial by the claimant, and no evidence at all at either the disciplinary stage, or the appeal stage, of request, much less omission or refusal, on the part of GH to supply the relevant information. That bare denial was consistent with her case that she bore no responsibility to obtain the data, only to apply the data that she was provided with. He also had before him the claimant's own workflow process that indicated that the claimant was to obtain data from the Customer Insight Lead, a member of her own team, in respect of EDF penalty costs.

163. The claimant contends that DW disregarded the 28 emails the claimant sent to him after her investigation meeting, as irrelevant when the claimant believed they '*plainly were'* and furthermore, that NP had not taken those documents into account. We are concerned with the fairness of the dismissal. DW did consider those emails to be irrelevant, but the claimant knew that the investigation pack provided to her did not include all 28 emails

she sent to DW; she was informed that she was able to submit was given an opportunity to submit any documents she believed were relevant, and she had the opportunity to discuss their contents, had she believed their contents to assist her, at the disciplinary hearing; she did not do so. In any event, when the matter was raised with him, NP obtained the documents from DW and reviewed them. He took them into account, before drawing his conclusion. He did not disregard the documents; he considered them to be evidence of the claimant doing her job. In order to understand the assertion, when pressed in closing submissions, the claimant contended that there were only 2 emails of relevance, pages 204 and 224. Neither was put by the claimant to MM on appeal. For our own part, page 204 is not evidence of the claimant escalating a problem she had to AB; it is an email responding to AB after she had been notified that pass-through costs had once again been raised as a point of concern by the SLT. Page 224 was a document that NP had regard to, because it informed his view as to the end date of the period over which he concluded that the claimant failed to act.

164. The respondent's disciplinary policy provides for the line manager to decide whether there is a case to answer and, furthermore, that a disciplinary hearing should be conducted by two managers. Neither provision was applied by the respondent in the claimant's case. There was a procedural defect in that it was DW who decided there was a case to answer, not AB and only one manager heard the disciplinary proceedings at each stage. The question for the Tribunal is to assess the gravity of those procedural defects and assess their impact on the fairness of the dismissal as a whole.

165. We accept the respondent's submission that it would have been wholly inappropriate for AB to determine whether there was a case to answer in a matter where her own conduct was, or might have been, in issue. The claimant does not take issue with the impartiality of DW and in those circumstances, we are unable to identify any prejudice to the fairness of the procedure that the investigation by someone other than her line manager.

166. The disciplinary hearing nor the appeal hearing was conducted by two managers, as the respondent's policy stipulates. Other than to point to the procedural error, no evidence was heard, nor submissions made as to why that failing impacted on the fairness of the claimant's dismissal; we cannot identify any, or any significant, prejudice to the overall fairness of the process.

167. The claimant contends that a third provision of the disciplinary policy was breached; she claims the policy conferred upon her a right to be accompanied at the investigation meeting. We are not persuaded that the policy is properly interpreted as giving the claimant that right. It is clear that the respondent's procedure, consistent with an employee's statutory right,

provides the right to be accompanied *'during any interview in the disciplinary process, after the initial investigation'.*

168. The latter provision states: '*Where the facts have not already been established an investigation will be conducted, in which case the person carrying out the investigation will not be a member of the disciplinary panel. The employee will be advised of their right to be accompanied by a trade union representative or a work colleague during an interview forming part of the investigation.*

169. The provision is somewhat ambiguous, capable of being interpreted as either a right to be informed, during an investigation interview, of the right to be accompanied at a subsequent disciplinary hearing, or alternatively, as the claimant suggests, conferring upon an employee a right to be accompanied at the investigation interview itself. If this were the correct interpretation, it would have the effect of qualifying the earlier provision and, in particular, we consider that if the policy intended to extend an employee's statutory rights, it would have been made plain. We are not satisfied that the policy confers a right to be accompanied at the investigation stage and that therefore there has been a breach of this provision. In any event, the claimant did not identify how this alleged breach of the respondent's own policy impacted on the fairness of the procedure; we are unable to identify such prejudice as would be sufficient to undermine the overall fairness of the dismissal.

170. The claimant contends that it was unfair to hold the disciplinary hearing at a time when her GP had not only certified her as unfit to attend work meeting until 31 August 2021. The hearing was conducted on Friday 13 August 2021 and the claimant sought an adjournment of the disciplinary hearing until the week commencing 16 August 2021, which was a date that fell within the period of the fit note. Furthermore, in the context of her reasonable adjustments claim, she positively avers that she would have been fit by Tuesday 17 August 2021, four days after the date that the disciplinary hearing was conducted, there having been no material change in circumstances in the intervening days that the Tribunal was informed of, and which is still a date that falls within the period covered by the fit note. We note that the claimant was given the opportunity to make written submissions, or to have a representative attend to speak on her behalf, but that her expressed preference was to attend in person. We also have regard to the fact that the claimant's claimed inability to adequately prepare for the disciplinary hearing is somewhat undermined by her submission of a 14-page 52-point evidence-based matrix which, on her own case, related to the disciplinary proceedings. Conversely, Occupational Health had not only advised on 18 June that the claimant was fit to attend a disciplinary hearing, but positively encouraged her engagement. Finally, when considering fairness, the disciplinary process must be examined as a whole

and it forms no part of the claimant's case that she was unfit to attend the appeal hearing, which took place on 22 September 2021, long after the expiry of the GP fit note. We are unable to conclude that the decision to proceed with the disciplinary hearing on 13 August 2021 was one that undermines the fairness of the procedure.

171. We turn to the clarity of the allegations against the claimant. The claimant submits that the failure to frame the allegation by specific reference to EDF / GSOS penalties during a specified timeline is troublesome. We are satisfied that the allegation was framed so as to discuss the claimant's management of all penalties to be passed through to the subcontractor. The reference in the outcome letter to a lack of escalation about the challenges that the claimant encountered during the 5-month period in 2021 was a finding that underpinned the broader allegation that the claimant had failed in her duty to apply pass through penalties, and it was made in response to the claimant's claim that the quality of the data presented her with challenges; it was not the allegation itself. Furthermore, we are somewhat surprised by the implicit suggestion that the claimant was unaware that EDF charges were of particular concern to the claimant; she discussed that concern, and the ongoing investigation into that during welfare calls with AB, shall called AB as a witness to give evidence about the progress of that investigation; she admitted at the disciplinary hearing that she had committed to the workflow plan in respect of EDF; she was questioned about her ability to retrieve information from the Customer Journey Lead in accordance with that workflow plan.

172. The claimant contends that the respondent failed to follow the ACAS Code of Practice so as to render the dismissal unfair, in the following specific ways, all of which we reject for the reasons set out below:
    a. Paragraph 4 in that the investigating officer failed to carry out any necessary investigation so as to establish '*whether or not'* the respondent had suffered financial loss. The claimant's own inaction led to an immediate loss that the respondent took steps to recover and in any event, it was not a factor in the decision to dismiss;
    b. Paragraph 11 in that a disciplinary hearing should be held without unreasonable delay, because the disciplinary hearing was not postponed until 17 August 2021. This is a repeat of the contradictory position taken by the claimant during the disciplinary process. The disciplinary hearing was postponed twice at the claimant request and ultimately, conducted 4 days before she wished. We do not understand how the claimant complains of unreasonable delay before us on the one hand, whilst also alleging that she required further time;
    c. Paragraph 40 of the Code in relation to grievance procedures, that the outcome of a grievance should be communicated in writing. The claimant informed the respondent that her lengthy grievance was about the disciplinary procedure. She informed the respondent that

she was aware that the two processes could be dealt with concurrently. She was informed, verbally, that nothing in her grievance affected the respondent's view of the process, or the outcome of the disciplinary process; she may have wished for the respondent to respond to her efforts, line by line, but we cannot see, nor was it explained to us, how the lack of a written rejection of her grievance affected the fairness of her dismissal.

d. Paragraph 42 of the Code in relation to grievance procedures, in that the claimant was not '*permitted'* to appeal the outcome of the grievance. She was permitted, and did, appeal the outcome of the disciplinary proceedings, which was the subject matter of her grievance. In any event, she did submit a grievance appeal, and it was considered by MM. We cannot see, and it was not explained to us, how the respondent's decision to deal with the two processes concurrently affected the fairness of her dismissal.

173. We turn to the reasonableness of the decision to dismiss. The question for the Tribunal is whether the respondent, by the objective standards of the hypothetical reasonable employer, acted reasonably in deciding to dismiss. The claimant held the post of Subcontracts Manager. A core responsibility was to ensure that penalty charges incurred by the respondent accurately identified and were promptly passed on to the subcontractors. Failure to do so in the case of either a data operator, or a non-data operator affects the respondent's cash flow, its ability to monitor the performance of its subcontractors, as well as its ability to enforce delayed penalties. The claimant was alert to the concerns of the SLT by late 2020 in respect of pass-through costs. The respondent was alerted to the claimant's conduct, not because the claimant reported any challenges in obtaining data that she claimed to encounter, but because she could not satisfactorily respond to a direct request for information from the Commercial Director. The omissions were not over a short period. On the claimant's own evidence, she knew there were concerns at SLT level by end 2020, she had committed to a workflow process. The data and, insofar as it was necessary, the personnel, were available within the respondent to enable her to apply the penalties. In the period end January to early June, the claimant was unable to adduce evidence of any steps she took to obtain data and personnel resources so as to carry out her role in respect of EDF or escalate that inability so as to ensure that she was provided with the data. Her explanation at the appeal stage for adducing the handwritten documents recording instances when GSOS had been discussed was that she had not appreciated her own inaction would be the subject of enquiry, much less concern about the effectiveness with which she carried out her role. We are satisfied that that conduct, looked at objectively, was capable of amounting to gross misconduct, and furthermore, the respondent acted act reasonably in characterising the conduct as gross misconduct. Given the claimant's failure to appreciate the seriousness of her own inaction, coupled

with her denial that core responsibilities were hers to comply with, we are satisfied that the respondent acted reasonably in deciding that dismissal was the appropriate punishment.

174. But we remind ourselves that the touchstone test is that at s.98(4) which does not depend on the label attached to or characterisation of the conduct as gross misconduct, but 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. The claimant was given adequate information and time to prepare for the hearing; she was informed of and availed herself of the right to be accompanied; the hearing was adjourned twice at the claimant's request; NP took into account that there were historic difficulties in obtaining the data and that the claimant had applied some pass-through costs in the recent past. In the circumstances, we find that the procedure adopted, and the decision to dismiss was fair.

175. The claim for unfair dismissal fails.

**Wrongful dismissal – Discussion and Conclusions**

176. The claimant held the role of Subcontracts Manager, a core responsibility of which was to pass through penalty costs incurred by the respondent where appropriate, accurately and promptly to the relevant subcontractor. Doing so enabled her to carry out another core task of her role, that is to monitor the performance of subcontractors. The responsibility was hers alone and if she was unable to obtain the necessary data to carry out her role, it was her responsibility to escalate the problem to management.

177. We are satisfied of the following matters based on unchallenged evidence given by the respondent's witnesses: that the respondent had within it, the data and the personnel resources to ensure that the claimant could receive or obtain the necessary data to apply pass through costs accurately and promptly; that contracts with the subcontractors require penalties to be passed through to them on a monthly basis; that the commercial reality of a delay in the prompt application of penalty costs is that the respondent's bargaining position to recover historic penalties is compromised; that a failure to identify and apply pass through costs impacts on the respondent's ability to manage cash flow, identify whether a subcontractor is meeting its KPI and monitor performance and determine future viability of contracts.

178. On the claimant's own evidence, in both the disciplinary proceedings as well as in her evidence to the Tribunal, she only applied only those penalties she received information in respect of and maintained a denial that she bore any duty to seek or obtain any outstanding data.

179. The claimant was aware that the volume of pass-through costs had become a concern at SLT level by autumn of 2020, and she devised, and committed to, a workflow process so that those concerns could be addressed. The workflow required her to obtain data from GH in the Performance and Planning Team only in respect of non-meter operator clients, such as Bulb.

180. In an email dated 25 May 2021, the claimant informed AB in response to specific concerns again raised by the SLT that there were '*minimal volumes due to our control of scheduling and jeopardy management, and the cost of effort taken would probably outweigh the cost benefits'.* That was not her judgment to make and it formed no part of her case that she was permitted to allow penalties to go unclaimed.

181. In the first six months of 2021, the claimant had failed to pass through some £11,500 of penalties, and was unable to explain why LD had identified sources of data such as the '*failures to attend'* and the Bulb penalties remained unidentified.

182. In respect of EDF, the data was not to come from GF, but a member of her own team. We accept the evidence of LD that the task for identifying the correct subcontractor was more time-consuming and arduous than the case with non-meter operators, but it was not difficult. In January 2021 the claimant had a discussion with GH about building a data reporting model that would make it easier to identify the correct subcontractor to pass through costs to. We are satisfied that in that call, no further steps were required of GH and that more work was to be done within the claimant's team to identify what it required.

183. In respect of EDF, and on her own evidence to this Tribunal, the claimant believed on a date before 10 February 2021 that the EDF deficit in respect of penalties amounted to £120k, and that on 10 February 2021 she believed and stood a figure closer to £60k. Again, on her own evidence, at no stage during her employment does the claimant apply any EDF penalties to subcontractors. We find that it was most unlikely that those pass-through costs were properly to be wholly borne by the respondent and find that a significant proportion were likely to be properly borne by a subcontractor.

184. We find the claimant took no, although adequate, steps to ensure that the penalties were promptly and accurately identified and applied. In relation to her evidence that, in some way, the failing had been that of any number of others, we reject that suggestion; our impression of the claimant's evidence that the simple act of discussing pass through costs with someone, or any agreement to carry out a task by them, was sufficient to absolve her of her own responsibility. As for the specific suggestion that the claimant's own failing was caused by a failing on the part of GH, we reject that suggestion also. We reject it because the claimant did not produce a single document

to suggest that she was chasing GH for data that had not been provided. Instead, before us the Tribunal had evidence of a telephone call taking place in January 2021 between them and which GH agreed that the reporting given to the claimant did not provide a breakdown of which subcontractor was involved in which job at which stage. We accept the evidence in those emails that GH had left it to the claimant to discuss with her team what was required of the reporting modelling and to get back to GH; GH was not to take any further steps. We accept the contents of that email because we consider that have GH in some way been incorrect, we would have expected to see some contemporaneous documentary evidence of attempts to chase GH for outstanding data or complain about her omissions; on the claimant's own evidence she is a '*copious notetaker'*. On the contrary, there is evidence before us that both of GH's managers, LM and LT, informed DW that GH had been complying with the requirements of her, and furthermore, that nothing had been raised with them about any alleged non-compliance. In the email dated 25 May 2021 in which the claimant's was providing a formal response to AB in respect of the concerns again raised by the SLT, there is no suggestion that the claimant had chased GH in any specific way; when confronted by GF in early June 2021, the claimant's email to GH does not suggest, at all, that there had been an omission on GH's part.

185. We had before us copies of handwritten notes of Contract team meetings and 1:1 meetings at which the claimant contends that GSOS was mentioned or discussed. Aside from some concerns we shared with MM about how contemporaneous those documents were, we note that none of those notes demonstrate reporting to her line manager any specific problems about her ability to pass through costs; taken at face value, what they record are team discussions about GSOS, which in and of itself would not be unusual for the Contracts Teams, or an intention to discuss, or meet, or chase data. Had any of these entries recorded steps that the claimant had taken to discharge her personal duty, we would expect to see that clearly recorded in the claimant's own contemporaneous notes, and in AB's own notes; none were produced either at the appeal hearing – when AB was still in employment and still had access to all her notes - or before us. Our concerns were implied by a further inconsistency in the evidence; AB informed the Tribunal that she made notes – that she had not mentioned before or disclosed - about one matter contained in the handwritten notes – an allegation of bullying by a colleague, and yet on the claimant's evidence AB did not make any notes. The Tribunal had before it unsatisfactory evidence about circumstances that only the claimant and AB could, but do not, adequately explain.

186. We consider it telling that, even before us, the claimant maintained that she only bore a responsibility to apply any data that was provided to her, and not to chase, or escalate any problems; it was only at the stage of closing

submissions that she conceded, by her Counsel, that she did bear such a duty.

187. We are satisfied that the claimant was in fundamental breach of her contract of employment by failing to obtain data and apply accurate pass through costs accurately and promptly. We endorse and repeat NP's observation that the claimant, occupying a managerial role, behaved as a conduit through which those pass through costs that were provided for her.

188. When considering whether the conduct above, when objectively looked at, is so serious as to amount to a fundamental breach of contract, we find that the respondent has discharged the burden it bears in satisfying us that it is.

189. The wrongful dismissal claim fails.

**Disability and Reasonable Adjustments – Discussion and Conclusions**

190. It is for the claimant to establish that she suffered from a mental impairment, being stress, anxiety and depression and that the impairment amounted to a disability within the meaning of s.6 EqA 2010 at the relevant time i.e. the date of the alleged discrimination, being defined by the claimant as 28 July 2021 to 13 August 2021.

191. The claimant had no past medical history of mental impairment, and during her employment with the respondent, had not been diagnosed with any mental impairment, or been prescribed any medication of the same. The claimant says that she has not disclosed any medical records prior to June 2021 because there are no relevant documents to disclose prior to that date. The claimant had not taken any time off work during her employment with the respondent for sickness at all, until 3 June 2021, much less any stress related sickness.

192. On 18 June 2023 the Occupational Health nurse reported that the claimant was diagnosed with breast cancer in 2015, and that her last check-up took place in October 2020. She reported a number of significant social stressors since the diagnosis attributable to the ailing health of her father, and difficulties with a colleague.

193. The claimant submitted three fit notes in the relevant period from 8 June 2021 until 31 August 2021, each citing the reason for her unfitness to work as 'stress at work' (the last of which expressed a view that the claimant was unfit to attend meetings). The Occupational Health nurse confirmed in the report dated 18 June 2021 that the claimant was suffering an *'acute stress reaction'* but that she was not being medically treated for stress and the view was that she was '*generally coping'.*

194. On 23 November 2021, some three months after her dismissal, the claimant was diagnosed with depression and prescribed, for the first time, antidepressant medication.

195. The claimant in her impact statement and in her oral evidence contends that she suffered over a prolonged period from significant adverse effects of her impairment. She contends that in the period August 2017 until August 2021, she consistently suffered from the adverse effects on her day-to-day activities as set out in her impact statement, including such matters as lethargy, lack of interest in personal appearance and hygiene, cessation of exercise and socialising, loss of interest in past times, loss of appetite, increased alcohol consumption, impaired keeping of household tasks, reduced concentration. The statement contends that the claimant exhibited highly emotional, witnessed by '*my line manager, family/friends, medical professionals, including GP, nurse practitioner, and district nurses attending to dad and solicitor on occasion. This is highly unusual for me'.*

196. We first turn to the question whether the Claimant's ability to carry out normal day-to-day activities had been impaired. The claimant says that she has not disclosed any medical records prior to June 2021 because there are no relevant documents to disclose prior to that date. The claimant explains her historic lack of reporting to medical professionals as being attributable to her lack of awareness at the time of the effect of the impairment upon her. We find this explanation is problematic for the claimant's case and we are somewhat surprised by it, given the variety and extent of the effects described by her coupled with the fact that she was under medical treatment and/or supervision between October 2015 when she was diagnosed with breast cancer in October 2015, and October 2020, being the last check up, according to the Occupational Health report.

197. We have already expressed our concerns about the reliability of the claimant's evidence and we are unable to find, with any degree of confidence, that the claimant suffered so many significant and prolonged adverse effects without noticing them, or without once raising them with her medical professionals, particularly at time when for much of the time she claims she was affected, she was already undergoing medical treatment. That is not to say that the Tribunal disregards what other evidence it does have before it, in the form of the Occupational Health report and the contents of the GP fit notes. It is uncontroversial that the claimant felt a significant amount of stress as a result of other factors, in particular the ailing health of her father, as well as the commencement of the investigation into the pass-through costs. But we are unpersuaded that they, properly, amount to more than what might be described as a reaction to adverse life events, and in that regard, the description of an '*acute stress reaction'* is consistent. There is no other source of reliable evidence upon which we

are able to find that the claimant had an impairment at the relevant time that caused the claimant to suffer substantial, adverse effects on her day-to-day activities for a period of 12 months or more. For the avoidance of doubt, we consider nothing in our findings are affected had the relevant period been defined as some longer period, such as 31 August 2021.

198. We turn to the claimant's alternative case, i.e., that at the relevant time, the adverse effects were likely to last 12 months or more. The question is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts.

199. There is no evidence before us of a diagnosis of stress, anxiety and depression at the relevant time, and we cannot have regard to the subsequent diagnosis of depression made in November 2021: McDougall, paragraph C4 of the Guidance. The lack of a diagnosis is not necessarily fatal to the claimant's claim, but we are unable to identify why the set of facts before us might be construed as an exception to the usual position set out in Patel. Having regard to what reliable evidence there is before us of the effects of any impairment, we have evidence the claimant's unfitness to attend work including the underlying stress reaction that caused that absence. The claimant had enjoyed an immaculate attendance record historically and we are not satisfied on the evidence before us that that was an adverse effect that was likely, in the sense that it could well happen, last 12 months or more.

200. There is nothing in the claimant's medical records that were disclosed that suggest that the episode of depression in November 2021 was a recurrence of an earlier event, and nor does the claimant advance her case on this basis.

201. Had we found that the claimant did in fact meet the definition of disability, we would have in any event dismissed her claims for two reasons that can be simply and shortly expressed.

202. First, whilst it was agreed that the respondent had a policy of arranging disciplinary hearings at the earliest opportunity – that is confirmed in the respondent's disciplinary policy – the policy was not in fact applied in the claimant's case; the disciplinary hearing was adjourned 3 times, the last two occasions at the claimant's own request: from 29 July to 30 July, then again to 5 August, and finally to 13 August 2021.

203. Second, we are not satisfied that the claimant was in fact put to the substantial disadvantage claimed i.e. that she was mentally unprepared for the hearing. First, the claimant's case was based on an adjustment from 13

August 2021 to 17 August 2021, when, she contends, she would have been adequately mentally prepared. The claimant had in fact prepared, thoroughly, for her disciplinary hearing, including a lengthy grievance which on the claimant's own case was about the disciplinary proceedings themselves. We were not taken to any part of the disciplinary hearing when the claimant expressed difficulty continuing or availed herself of the breaks she was offered. There was no evidence before us that the claimant was in fact suffering the substantial disadvantage claimed.

204. The Tribunal recognises the tension between the two sources of medical advice. The Occupational Health reported, at a time when the claimant was on sick leave, with work related stress, and when she was not being medically treated by her GP, that the claimant was not only fit to attend disciplinary proceedings but encouraged to do so. Approximately 6 weeks later the claimant adduced a fit note that stated that she was unfit to attend management meetings until end August 2021. The GP's comment is more recent, and we do not disregard it, but note that from a medical perspective, nothing had changed since the obtaining of the Occupational Health report; she was still not receiving any medical treatment other than being in receipt of fit notes. The Tribunal resolved the tension in the two sources in favour of the respondent because the claimant's case rested upon an adjournment until only a few later, and during which there was no change in circumstances identifiable by the Tribunal or identified to the Tribunal, and second, because the date sought by the claimant – and therefore the date on which she contended she would be mentally prepared to attend the disciplinary hearing - was still comfortably within the period covered by the fit note.

**Breach of Contract – Bonus Claim – Findings of Fact on liability, Discussion and Conclusions**

205. The respondent operated an annual bonus scheme. There were, at any one time, a number of different schemes in operation. The claimant was on a different bonus scheme than AB. Bonus schemes operated by the respondent were generally split profit generated by the relevant company, directorate of the company or other defined silo in any given year as measured against its service level agreements, and on the other the individual's performance. The performance of an individual is measured against their objectives, some or all of which will have a weight attached to them. Certain circumstances preclude payment to an individual altogether, irrespective of the financial performance of the relevant unit, and they include significant absenteeism, or where there is '*significant concern about performance*'. A bonus is not payable where an employee works for a part of year; they are required to have worked a full financial year in order to be

eligible. The respondent's financial year runs from April to the following March.

206. For the avoidance of doubt, we reject as irrelevant AB's evidence that she simply received the full extent of the bonus she was eligible for, each year, without any scrutiny of her performance. Aside from concerns about credibility, the fact that she was on a scheme which entitled her to receive a maximum of 15% of her salary as a member of management, simply underscores MM's evidence that the respondent operated a number of schemes, which varied in their structure.

207. It was for a manager to nominate an employee for consideration of a bonus. AB did not ever nominate the claimant for a bonus. Her nomination was to be ratified by a second person, usually director from HR, to identify that what was being suggested was correct, fair and consistent with others across the business. There was no evidence before us to suggest that that ever happened in the claimant's particular case.

208. We find that the wording of the clause at page 79 confers upon the claimant the right to participate in the bonus scheme, in such years as it operated, and on such terms as communicated to the employee each year. That the details of the scheme would be circulated once the claimant's objectives were agreed, we consider is consistent with the interpretation that the purpose of the scheme was to motivate and reward the claimant in respect of her endeavours to meet her objectives.

209. The claimant was therefore entitled to be considered for payment of a bonus. The right to payment and the level of payment under that scheme was discretionary. It was based broadly on financial performance for a part of the respondent company and individual performance but could be withheld in certain circumstances.

210. AB was the person who was required to exercise that discretion. She did not do so. The claimant was entitled to a bona fide and rational exercise by the employer of its discretion as to whether or not pay her a bonus and if so, in what sum. There is no evidence before us that the discretion was exercised by AB or any other person on behalf of the respondent, and therefore, the claimant succeeds in respect of her claim for a breach of the contractual term that the respondent exercises its discretion

**Damages for breach of contract – Findings of Fact on Remedy, Discussion and Conclusions**

211. The question before us, therefore was whether, on a genuine and rational exercise of the company's discretion, the claimant would have received a bonus and if so, in what sum. The burden of proving loss is on the claimant.

212. The remedy hearing consisted of submissions only; neither party called any witness evidence on the question of loss. In the process of making their submissions, both representatives took the Tribunal to documents that it had not been taken to before at the liability stage and not been put to either the claimant, AB or MM to comment on.

213. The claimant submitted that, notwithstanding our findings on the claim for wrongful dismissal, that the Tribunal should accept AB's evidence that she was '*entirely happy'* with the claimant's performance and to therefore award the claimant the full 10% of her salary by way of damages, alternatively that because AB received 7-12% of her pay by way of bonus, the Tribunal should pro rata the claimant's bonus.

214. The Tribunal rejects both arguments advanced by the claimant. First the test is an objective one; it is not based on AB's subjective belief, but what the claimant would have received on a genuine and rational exercise of its discretion and insofar as her opinion is relevant, for reasons we have already explained, we attach a limited amount of weight to her evidence.

215. We are not satisfied that the respondent would have exercised its discretion in favour of the claimant in her first year of employment: she commenced in September 2018, part way though the respondent's financial year and so was ineligible, in accordance with our findings above, for payment of a bonus in financial year 2018/2019.

216. Nor are we satisfied that the employer, in subsequent years and in possession of an accurate picture of the claimant's performance, would have exercised its discretion in her favour. We acknowledge that the claimant passed through some penalties to subcontractors in recent years, those in respect of which she passively received data that she was able to apply. The difficulty, however, of failing to obtain or chase for accurate data, and failing to apply them accurately and promptly, is that it impacts on the claimant's core responsibility, which is to monitor the performance of subcontractors. If she does not know which subcontractor was responsible for which job, and whether they did, or did not, incur a penalty by their failure to meet the GSOS standards of the client, she cannot properly monitor their performance. We have no reason to believe that the approach taken by the claimant related only to the latter part of her employment; in fact, on her own case, she never did pass through costs in respect of EDF.

217. We add a further reason why we were not satisfied that the claimant suffered a loss. At the remedies stage, both representatives took the Tribunal to documents that might have been relevant to the liabilities stage. It appears on the documentary evidence before us that the bonus scheme, as expressed in the claimant's contract was a new initiative, *'rolled out'* for

the first time in 2018. On 18 June 2018, in a letter addressed to the claimant, it appears that the claimant was informed that the Remuneration Committee had reviewed the pay review process, and recommended that the respondent manage performance reviews separately, but apply a *standard increase in pay* to all '*eligible'* employees, of which the claimant appears to be one. The claimant was informed that the Remuneration Committee had approved a 2% salary increase in the claimant's case, effective from 1 June 2019. She was informed that her salary increase was £776.00pa, taking her new salary to £39,574pa.

218. In a separate letter dated 4 Jun 2018, the claimant was informed that *'based on your overall rating received in your appraisal'* an award of 2.1% was to be applied to the claimant's salary, making the increase £798.00 and the new salary £38,798pa. The claimant was informed that her overall rating will have been discussed with her, and that she had the ability to appeal the rating.

219. We were taken to no document that explains the position in the financial year 2019/20, but in respect of the year 2020/21, we were taken to a letter to the claimant dated 28 May 2020 in which the impact of Covid on the respondent and its employees were set out, and the claimant was informed that the respondent had made the difficult decision to freeze pay, accordingly, the claimant would receive no pay increase.

220. On the evidence before us, it appears that the respondent amended the structure of its bonus scheme from that which was contained by the terms of the scheme – a separate bonus payment – to an increase in pay linked to performance. We were taken to no documentary or written evidence about the change or the claimant's response to them. There is no suggestion before us that respondent was not entitled to structure the incentive-based payment as it did, or that the claimant rejected the amendment by her words or by her conduct. On the evidence before us, the claimant appears to have received the increase in pay and continued to work for the respondent; we conclude that she affirmed, either by express consent or inference by her conduct, the variation to the bonus scheme.

221. Insofar as there is, therefore, evidence before us, we are satisfied that the claimant received performance related pay, in the (amended) form of an increase in pay and we are not satisfied that she has suffered any further loss.

222. The claim for bonus pay is not well founded.

Employment Judge Jeram

Date: 21 August 2023