EMPLOYMENT TRIBUNALS

Claimant: Mrs J Draus

Respondent: First Call Contract Services Limited

Heard at: London South (in person) **On:** 4, 5, 6, 7 September 2023

Before: Employment Judge B Smith (sitting with members)
Ms Foster-Norman
Mr Hutchings

Representation
Claimant: Ms Hampshire (Counsel)
Respondent: Not represented

JUDGMENT having been sent to the parties on 12 September 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

Introduction

1. The claimant was employed by the respondent, a recruitment company, as an Accounts Manager from 26 February 2018 until 18 December 2020. She was responsible for managing the Integrated Service Solutions Ltd ('ISS' account) and was primarily based at the ISS offices in Teynham, Kent. The claimant's case is about whether her dismissal by the respondent on the grounds of capability, namely ill health/long term absence, was unfair, and whether the respondent unlawfully discriminated against the claimant in her dismissal, arising from a disability, and also whether the claimant's dismissal amounted to indirect sex discrimination if the respondent had a provision, criterion or practice of requiring all employees in the claimant's role of accounts manager to work full time, and or that they do not work from home and must be on site.

2. The claimant's health condition, and alleged disability, arose from the deterioration in her mental state following a miscarriage and the death of her husband in November and December 2019 respectively, leaving the claimant as the sole carer of her young son.

3. The respondent denies the claims. It says that the dismissal for capability was fair and accused the claimant of not properly engaging with them and not providing a sufficiently clear return to work date. It denies discriminating against the claimant, generally.

4. The claimant brings claims of:

    (i) Unfair dismissal;
    (ii) Discrimination arising from disability, contrary to section 15 of the Equality Act 2010; and
    (iii) Indirect sex discrimination, contrary to section 19 of the Equality Act 2010.

<u>Procedure, documents, and evidence heard</u>

5. The claimant was represented by solicitors and counsel and was represented by Ms Hampshire (Counsel) at the final hearing. The respondent was represented at all material times by Holly Blue Employment Law. The respondent did not attend the final hearing and was not represented. The respondent's application to postpone the final hearing dated 4 September 2023 was refused on 5 September 2023 and oral reasons were given during the hearing on 5 September 2023. The respondent's application for reconsideration of that decision dated 5 September 2023 was refused on 6 September 2023. Oral reasons for that decision were given during the hearing. Written reasons for both decisions are provided in **Appendix A**, below.

6. Out of an abundance of fairness to the respondent, the claimant's evidence did not start until 10:00am on Wednesday 6 September 2023. By email sent at 16:00 from the respondent's representative on 5 September 2023 it was clear that the respondent would not be attending the hearing or seeking to call any witnesses. It would also not be represented. We were satisfied that

the respondent was aware of the hearing, had been given a reasonable opportunity to prepare for and be represented and attend the hearing, and it was in the interests of justice to continue in its absence. There was no particular reason for the respondent's absence we were aware of other than the points made in support of the postponement application. We found that there was no good reason for the respondent's absence.

7. The claimant gave evidence under oath. No witnesses attended for the respondent and no witness statements were served on behalf of the respondent.

8. The claimant's witness statement was not served until Sunday 3 September 2023 and it was signed 4 September 2023 (and provided to the Tribunal on that date), contrary to the Tribunal's more recent order that witness statements be exchanged on 2 August 2023. However, we find that the respondent did have sufficient time to consider that document (the claimant's evidence not starting until 10am on 6 September 2023), taking into account that few matters included in it were not already known to the respondent via the pleadings or documentary evidence exchanged no later than 16 August 2023 (and in many cases significantly before that).

9. The list of issues was set by order of EJ Clarke dated 19 April 2022 (see Bundle A at p97, and **Appendix B,** below). This is reproduced in our conclusions on the issues below. No dispute as to the list of issues arose and it was adopted by the Tribunal at the final hearing. No clear legitimate aim was pleaded by the respondent in respect of the indirect sex discrimination claim.

10. We considered a Final Hearing Bundle ('A') of 578 pages and a Disability Bundle ('B') of 529 pages. In accordance with the usual practice of the Employment Tribunals, and as indicated during the hearing, we considered the witness statement of the claimant and those documents our attention was drawn to during the hearing. The claimant's counsel provided a skeleton argument on liability dated 1 September 2023 and written submissions dated 5 September. We took these into account in making our decision. No written submissions on liability were made by the respondent.

11. A strike out application by the claimant dated 4 September 2023 was not pursued during the hearing.

Relevant Law

12. We have applied the relevant sections of the Employment Rights Act 1996 ('ERA 1996') and Equality Act 2010 ('EQA 2010') and taken into account the statutes cases referred to in the claimant's skeleton argument. In particular, we have applied sections 94, 95, and 98 of the ERA 1996 and sections 6, 15, 19, 39, 136, 212, and schedule 1, paragraphs 2 and 5 of the EQA 2010. These informed the phrasing of the list of issues and our conclusions below.

13. In summary, a dismissal will be unfair unless it is for one of the admissible reasons specified in s.98 ERA 1996. These reasons include capability which includes health. If the dismissal is proved to be for one of those reasons then the determination of the question of whether the dismissal is fair or unfair, having regard to the reasons shown by the employer, depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably as in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with the substantial merits of the case. The Tribunal must not substitute its own opinion about whether or not an employee should have been dismissed and must recognise that there will be a band of reasonable responses on the part of the employer. A dismissal should not be held to be unfair unless it falls outside of that range.

14. Long-term illness dismissals are highly specific to their circumstances, but the basic question to be determined is whether, in all the circumstances, the employer can be expected to wait any longer, and, if so, how much longer: Spencer v Paragon Wallpapers Ltd [1977] ICR 301, 307 B-D.

15. Applying Merseyside v Taylor [1975] ICR 185, an employer is under a duty to consider whether there is any suitable alternative employment before taking the decision to dismiss the employee, though they are not duty bound to create a role where none exists. It was held in East Lindsey District

Council v Daubney [1977] ICR 566, 572 that '*unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position… discussion and consultation will often bring to light facts and circumstances of which the employers were unaware*'. First West Yorkshire v Haugh [2008] IRLR 182 ¶40-41¨confirms the expectation that an employer will take reasonable steps to consult the employee and ascertain by means of appropriate medical evidence the nature and prognosis of the condition, and to consider alternative employment. Applying Mitchell v Arkwood Plastics (Engineering) Ltd [1993] ICR 471, 473B, the obligation to remain in contact with an employee on long term sick leave is the employer's.

16. The key questions include whether or not the employer could be expected to wait any longer for the situation to improve, the extent of consultation with the employee before making the decision, and the steps taken to discover the true medical potion. Underlying those key questions is that a reasonable procedure should be followed by the employer. The Tribunal should consider the fairness of the entirety of the process.

17. Summarising section 15 EQA 2010, a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer shows that they did not know, and could not reasonably have been expected to know, that the employee had a disability.

18. Summarising section 6 EQA 2010, a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-today activities. Under section 212 EQA 2010 substantial means more than minor or trivial. Under paragraph 5 of Schedule 1 EQA 2010 an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-today-activities if measures are being taken to correct it, and, but for that, it would be likely to have that effect.

Long term is defined in schedule 1 paragraph 2 as lasting for at least 12 months, is likely to last for a at least 12 months, or is likely to last for the rest of the life of the person affected. The relevant time to be considered is at the time of the discriminatory act.

19. Summarising section 19 EQA 2010 (indirect discrimination), a person discriminates against another if they apply a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic. This includes disability. A PCP is discriminatory in these circumstances set out in section 19(2) EQA 2010, namely:

    (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
    (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
    (c) it puts, or would put, B at that disadvantage, and
    (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

20. Under section 39(2)(c) EQA 2010 an employer must not discriminate against a person by dismissing them.

21. A PCP is unlikely to be considered proportionate if there is a way of achieving the aim which imposes less detriment: Chief Constable of West Yorkshire Police v Homer [2012] ICR 704. Pendleton v Derbyshire County Council [2016] IRLR 580 demonstrates that, generally, a one-off incident will not qualify. However, a practice does not need to arise often to qualify as a PCP. Dobson v North Cumbria Integrated Care NHS Trust [2021] ICR ¶46-48 is authority for the '*childcare disparity*' and that '*the fact that women bear the greater burden of child care responsibilities than men and that this can limit their ability to work certain hours*' is a matter of judicial notice such that '*a tribunal must take it into account if relevant*'.

22. We were also referred to and took into account Mercia Rubber Mouldings v Lingwood [1974] ICR 256 257; Nagarajan v London Regional Transport [2000] 1 AC 501, 504A, 513A; R (Elias) v Secretary of State for Defence

[2006] 1 WLR 3213 ¶151; J v DLA Piper UK [2010] ICR 1052 1071A; and DWP v Boyers [2022] EAT 76.

23. We were also referred to and took into account to the following materials:

Equality Act Guidance:

D3: '*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern*'.

EHCR Employment Statutory Code of Practice (Equality Act 2010 Code of Guidance):

5.14: '*It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person"*.

5.15*: 'An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially'.*

Findings of fact

24. We accept the claimant's evidence, generally. This is because there is no clear other evidence, written or oral, which undermines it. It is also supported, generally, by the documentary evidence, in particular the claimant's contemporary correspondence and the medical records. There was also no other clear reason to doubt the veracity of the claimant's evidence. We did consider the available documentary evidence to the extent that it could have undermined the claimant's case, but did not find that it did so.

25. We find that the documents in the bundle are true copies of the original documents. We adopt the names used in the claimant's case list and confirm the events claimant's chronology as findings of fact. This is because they are supported by the documentary evidence in the bundle, in particular those references used by the claimant in the chronology document. These facts are set out in **Appendix C**. This provides the basic framework of the factual position. References to '*The Exeter*' are to the claimant's medical insurer.

26. Additional factual findings are as follows.

27. The claimant was employed by the respondent, a recruitment company, as an Accounts Manager from 26 February 2018 until 18 December 2020. The respondent is a large employer, employing in the region of 1,000 staff including both permanent and temporary employees. This is because of the oral evidence of the claimant. It is also consistent with the respondent's profits in the year end 2019 which were pleaded by the claimant and not disputed in the grounds of response, and has not been challenged or undermined by any evidence of the respondent. It is not suggested by the respondent, for example, that they are a very small organisation which lacks resources. It is not the exact number of employees that is the essential finding here, but the relative size of the respondent is relevant.

28. The respondent refused the claimant's flexible working request dated 25 June 2019 ('earlier flexible working request') in part on the basis that it did not permit working from home.

29. The tasks undertaken by the claimant were at various times undertaken by at least 3 other named individuals, although they had, to a degree, different job titles. During Covid-19, at least some of those tasks were undertaken whilst working from home. Some of the claimant's tasks could be undertaken from home, such as when she caught up on outstanding tasks as unpaid overtime. Although some of the claimant's role did require an individual to be on site, such as to check that agency workers were present at the start of the shift, that check could and was done by individuals other than the claimant at times. These included senior temp workers who were paid an additional amount for that duty. Should an agency worker not attend,

the claimant could then make alternative arrangements. The claimant sometimes undertook her role from the Ashford office. These findings are supported by the claimant's oral evidence and are not clearly undermined by the documentary evidence.

30. The claimant was responsible for managing the Integrated Service Solutions Ltd ('ISS') account and was primarily based at the ISS offices in Teynham, Kent. ISS did not require the claimant's role to be carried out on a full time or on-site basis, rather, her working conditions were set by the respondent. This is supported by the claimant's oral evidence.

31. The claimant's health condition, and alleged disability, arose from the deterioration in her mental state following a miscarriage and the death of her husband in November and December 2019 respectively, leaving the claimant as the sole carer of her young son. This is supported by the claimant's evidence, corroborated by the medical evidence.

32. For a significant period of time, more fully set out in the chronology, the claimant was signed off as unfit to work by her GP. This is supported by the documentary evidence. The claimant was not paid by the respondent during her period of sick leave, other than her entitlement to 28 weeks statutory sick pay. This is because of the claimant's oral evidence on this point.

33. It is important to consider the fit note dated 28 July 2020. Contrary to the respondent's interpretation of this document, we do not consider that it says that the claimant was fit to return to work. It simply states that she may be fit to work taking account of following advice: a phased return to work, altered hours, amended duties, and '*please'* consider a referral to occupational health. It is therefore in some ways ambiguous, but we find that the correct interpretation is that the claimant may be fit to work subject to a referral to occupation health and appropriate adjustments being put in place, such as a phased return etc.

34. We find that the claimant was seeking input from occupational health. This is because it was supported by the GP note dated 28 July 2020. Also, the claimant and her GP requested that the respondent arrange an occupational health review on 30 June 2020, 18 August 2020, and 11 December 2020. No such review was ever arranged.

35. We find that the claimant suffered from a mental impairment, namely anxiety, depression and stress, during the relevant period and at the relevant time, and that it was likely to last at least 12 months.

36. We find as a matter of fact that the claimant was very clear with the respondent about the substantial adverse affect her mental ill health was having on her ability to carry out day-to-day tasks, and that her mental ill health was having these effects, as follows:

    a. on 16 January 2020, the claimant informed the respondent she did not feel strong enough to come back to normal life;

    b. on 25 February 2020 the claimant informed the respondent she was taking '*strong medication to help [her] deal with the situation*' and '*generally [was] not in the best condition*';

    c. on 30 April 2020 the claimant informed the respondent that she was '*unable to function normally and return to work*';

    d. on 2 October 2020 the claimant informed the respondent that '*since the tragic and unexpected death of my husband I am unable to accept reality and get back to normal. Even typing up this letter caused me a lot of stress. It took a couple of days for me and I was forced to take sedatives … Doctors call this 'complicated grief'. My usual day to day duties, responsibilities, even simple things like dressing up, cleaning house, having bath are a challenging for me*';

    e. on 11 November 2020 the claimant wrote a letter to the respondent stating that she was '*not mentally ready … to leave my son with a stranger for such a long hours. Each of time when I am away from him I am paralysed by fear that I will not see him anymore … my mood remains low*';

    f. by 18 November 2020 the respondent had received the claimant's GP records. These included the claimant's requests for sick notes, including:

i. a request of 29 July 2020, which stated '*I do not feel fit to work, normal life, going out, driving, meeting up. I feel safe only in my house … I am paralysed by fear*'; and

ii. a request of 28 September 2020, which stated '*simple things like dressing up or cleaning are a challenge*'.

37. The dismissal letter of 7 December 2020 states '*it is wholly accepted that you have been significantly impacted by grief* '.

38. The claimant was ultimately dismissed by letter dated 7 December 2020. Mr Makelow wrote to the claimant stating *'your employment with [the respondent] should be terminated on grounds of ill-health. The reason for this decisions is that you remain unable to provide a definitive return to work date … having considered both the medical evidence and your written submissions carefully, including the possibility of reasonable adjustment, the company cannot continue to employ you… I am of the firm belief that … it would not be realistic to consider an actual return to work for you until March 2021 and even this is not definitive in view of the fact your flexible working request may not be accepted'*. The effective date of dismissal was 18 December 2020.

39. We find that the respondent's rejection of the possibility of reasonable adjustments included, as a possible reasonable adjustment, working from home, this having been raised by the claimant in her letter dated 11 November 2020.

40. Whilst the claimant was on absence due to her health at least two individuals covered her role, an Accounts Manager and a Senior Accounts Manager. This is supported by her evidence. These individuals, at least at some times, worked from home and on the basis of a job-share. At least some of this was during the Covid-19 pandemic.

41. The claimant appealed the dismissal and this was refused on 8 February 2021. The claimant's request for the notes to be amended to properly to reflect the evidence of her genuine intention to return to work in a short period of time was not carried out.

42. Importantly, in response to the respondent's correspondence before she was dismissed, the claimant indicated in writing, dated 28 September 2020, that she would seek to return on a part time and flexible basis (15-20 hours a week) and that a realistic return date was January 2021. We find that the claimant genuinely intended to return to work in January 2021. This is also because she had indicated this privately to a childcare provider on 24 November 2020. The claimant's oral evidence as to her intention and desire to return to work shortly after she was ultimately dismissed is supported by this correspondence.

43. Early conciliation started on 15 February 2021 and ended on 9 March 2021; the claim was presented on 7 April 2021. The claim was amended by consent on 5 May 2021 and the grounds of resistance, amended, were dated 10 May 2022.

Conclusions

Unfair dismissal

What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence), alternatively some other substantial reason both of which are potentially fair reasons.

44. We find that the reason, or alternatively the principal reason, for dismissal was capability (long term absence). This is because it is supported by the content of the dismissal latter. Also, both parties agree that the claimant was dismissed because of this reason. This is a potentially fair reason.

If the reason was capability, 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:

> ***The respondent genuinely believed the claimant was no longer capable of performing their duties***

45. We did not find that the respondent genuinely believed that the claimant was no longer capable of performing her duties. This is because there was no clear oral evidence to support the beliefs behind the decisions made, such as from a decision maker, and the documentary evidence is insufficient for us to make such a finding. It is also unclear what the

evidential grounds for such a belief would be in the absence of clear medical evidence or an occupational health assessment. Also, the dismissal letter states that the reason for dismissal was that the claimant was unable to provide a return to work date, which is not the same as her no longer being capable of performance. We do not consider that this was, however, the respondent's genuine belief because it was undermined by the claimant's own correspondence which demonstrated a clear intention and desire for a return to work on date in January 2021. We do not consider that the lack of an exact date was sufficient for the respondent to genuinely believe that she would not return to work in that context.

The respondent adequately consulted the claimant

46. We do not find that the respondent adequately consulted the claimant. This is because the respondent went directly to a dismissal outcome without clear notice to the claimant of this possibility. The implicit reading of a warning the respondent seeks to achieve by arguing that its correspondence to the claimant contained a warning is not a proper reading of those documents. Ultimately, no absence review meeting was carried out by the respondent. It was not the claimant's fault that no absence review meeting was carried out. In those circumstances the consultation carried out was inadequate.

The respondent carried out a reasonable investigation, including finding out about the up to date medical position

47. We do not find that the respondent carried out a reasonable investigation. Also, the respondent did not find out the up to date medical position. This is because the respondent relied almost entirely on GP sick notes which did not contain sufficient information or analysis for it to reach the conclusions that it did. The respondent failed to refer the claimant to occupational health despite this being specifically requested by her GP and the claimant. The receipt of the claimant's medical records was insufficient in the circumstances because these did not contain enough information to support the conclusion's reached by the respondent. In particular, at the time of dismissal, the respondent was not fully aware of the claimant's up to date medical position, no sufficient recent assessment having been carried out.

Whether the respondent could reasonably be expected to wait longer before dismissing the claimant

48. We find that the respondent could reasonably have been expected to wait longer before dismissing the claimant. This is because although the claimant had been absent for nearly a year, she was not in receipt of wages, she had given a sufficiently clear indicative return date, and she was actively seeking to discuss reasonable steps with the respondent such as a phased return, reduced hours, some working from home, or an alternative role. It is relevant that the respondent had been able to cope for a significant period of time with other staff covering her duties and has not clearly evidenced that temporary cover was impractical. Also, the claimant's medical insurer considered her to be fit to work as of February 2021, although on an unspecified basis, and this is broadly consistent with the claimant's documented intentions. The claimant's intentions are supported by her having made child care arrangements to facilitate a return to work (before the dismissal), to return very shortly after she was dismissed, and in other correspondence.

Dismissal was within the range of reasonable responses.

49. We do not find that dismissal was within the range of reasonable responses. This is for the above reasons, and the fact that other options were open to the respondent such as looking at a phased return, reduced hours, permitting working from home, providing support and assessment by occupational health, or by providing the claimant with an alternative role. Equally, they could have carried out a fair procedure by giving an express warning of the potential for dismissal, and or sought an up to date medical assessment by use of occupational health facilities.

50. For the above reasons, the respondent did not act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

51. We also find that the respondent failed to adequately or reasonably remedy its failings through the appeal procedure. In particular, the claimant's request for the notes to be amended to properly reflect the evidence of her genuine intention to return to work in a short period of time was not carried out or, on the evidence, properly taken into account by the respondent.

If the reason was some other substantial reason capable of justifying dismissal, namely the claimant's long term absence, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

52. We did not find that there was evidence to clearly support some other substantial reason such as the claimant's long term absence. To the extent that the claimant's long term absence was the reason for dismissal, the respondent did not act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. This is for the same reasons as above. We did not consider that the respondents pleaded and evidenced case on this ground (some other substantial reason) amounted to a material difference compared to dismissal based on capability, although we did consider it separately.

53. For those reasons, the unfair dismissal claim succeeds.

Indirect discrimination

A 'PCP' is a provision, criterion or practice. Did the respondent have the following PCP's?

- ***A requirement that all employees in the claimant's role of accounts manager work full-time.***
- ***A requirement that all employees in the claimant's role of accounts manager do not work from home but must be on-site.***

54. We found that the respondent did have these PCPs. The respondent had a PCP to work full time because the it refused the claimant's earlier flexible working request in 2019 and also is inherent in the dismissal letter, in so far as it suggested that it could not accommodate reasonable adjustments. The respondent had the PCP that the claimant could not work from home for the same reason. Also, it was the respondent's pleaded case that the role could not be done from home, and this was indicated in the respondent's refusal of the claimant's earlier flexible working request. We considered that these two events (the refusal of the flexible working request in 2019 and the dismissal) were sufficient, in the circumstances, to find that the respondent was applying these PCPs. This is not inconsistent with our findings elsewhere about other employees working from home or on a job-share basis because these were arrangements put in place during Covid-19, and in response to the claimant's absence.

Did the respondent apply the PCP to the claimant?

55. We found that it did. This is because the respondent refused the claimant's earlier flexible working request and denied, or effectively denied, reduced hours and working from home as reasonable adjustments in its dismissal letter.

Did the respondent apply the PCP to men or would it have done so?

56. We find that it did. This is because there is no reason to find that it would have treated men any differently and the respondent's correspondence and wider evidence does not indicate a gender-specific application of the PCP.

Did the PCP put persons with whom the claimant shares the characteristic of 'women' at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, ie. 'men' in that women are more likely to require flexible working conditions including working from home and amended or flexible house as they are more likely to have childcare responsibilities?

57. We find that it did. This is because we take judicial notice of the fact that it would (in accordance with *Dobson*, above), and in fact did, put the claimant at a disadvantage from a childcare perspective and this is more likely to affect women.

Did the PCP put the claimant at that disadvantage?

58. We find that, on the claimant's evidence, this PCP did in fact put the claimant at that disadvantage. The application of the PCPs adversely affected the claimant both when the earlier flexible working request was refused and in so far as it affected her dismissal.

Was the PCP a proportionate means of achieving a legitimate aim? No such legitimate aim was pleaded by the respondent.

The Tribunal will decide, in particular, was the PCP an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; how should the needs of the claimant and the respondent be balanced?

59. We did not find that the PCP was a proportionate means of achieving a legitimate aim. No such legitimate aim was identified by the respondent. If

even if we took this as business needs, this was not a requirement of ISS, the claimant sometimes undertook her role from the Ashford office, and there was no clear reason why that work could not be done from home, in part because the only onsite requirement was sometimes done by others ie. checking in agency workers. There was also nothing inherent in the role which required it to be full time and the role was undertaken effectively as a job share in the claimant's absence. Something less discriminatory could have been done instead, namely permitting some flexible working and some working from home. Also, the respondent did permit at least some working from home during Covid-19. There is no sufficient clear or compelling reason or evidence to balance this in favour of the respondent.

60. For those reasons, the indirect discrimination claim succeeds.

Disability

Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about?

The Tribunal will decide:

- ***(i) Did she have a mental impairment: the claimant says her impairment is anxiety, depression and stress?***
- ***(ii) Did it have a substantial adverse effect on her ability to carry out day-today activities?***
- ***(iii) If not did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?***
- ***(iv) 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?***
- ***(v) Were the effects of the impairment long-term? The Tribunal will decide did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?***

61. We find that the claimant did have such a disability and the above requirements of section 6 EQA 2010 are fulfilled at the relevant time. This is because the claimant's oral evidence, supported by the medical records, indicates that points (i) and (ii) are met. The claimant was suffering from

anxiety, depression, and stress, and these had a substantial adverse effect on her ability to carry out day-to-day activities. These included personal care, not being present with her son, being able to work, leaving the house, socialising, and domestic cleaning, and as included in our other findings of fact. The adverse effects were significant and in no way trivial.

62. It is not necessary to consider points (iii) and (iv), above, in those circumstances.

63. We find that, on the claimant's oral evidence, the effects were long term because at the time of the dismissal she had suffered the mental impairment for nearly 12 months, and that it was likely to continue for at least 12 months at the relevant time. This is supported by the claimant's evidence and medical records. It is also independently supported by her expert report, although this was not determinative of our conclusion and absent that report we would have reached the same conclusion.

Discrimination arising from disability

Did the respondent treat the claimant unfavourably by dismissing the claimant?

64. We find that it did. It is not in dispute that she was dismissed and this is inherently unfavourable treatment.

Did the following things arise in consequence of the claimant's disability: the claimant's sickness absence between about January 2020 and 18 December 2020?

65. We find that it did. This is clear from the dismissal letter and overall circumstances of the case, including the evidence of the claimant and medical evidence, including the GP's notes. There is no sensible suggestion that her sickness absence was not a consequence of her disability.

Was the treatment unfavourable because of those things, ie. did the respondent dismiss the claimant because of that sickness absence?

66. We find that it did. This is because of the content of the dismissal letter. It can also be inferred from the chronology of events, namely the dismissal following the long period of sickness absence and absence of other reason for the dismissal.

Was the treatment a proportionate means of achieving a legitimate aim? The respondent says its dismissal of the claimant after a long period of absence was proportionate in that it was appropriate and necessary in order to meet the requirements of the respondent's business, and the welfare of individuals employed by the respondent.

The tribunal will decide in particular: was the treatment an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; how should the needs of the claimant and respondent be balanced.

67. We did not find that the treatment was a proportionate means of achieving a legitimate aim. This is because it was not a requirement of the relevant client of the respondent (ISS), and less discriminatory means could have been used, such as a phased return, shorter hours, working from home, or an alternative role. Also, there was no sufficient clear evidence of a detrimental effect on the respondent from the claimant's absence or on its other employees who were deployed to cover her role. The balance of needs is in favour of the claimant in these circumstances.

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

68. We found that the respondent did know, alternatively could reasonably have been expected to know, that the claimant had the disability. This is because it was aware of her condition from GP sick notes and her correspondence. This would be the case after around three months of absence, and at the very latest significantly before the time of dismissal following receipt of her GP records.

69. For those reasons, the discrimination arising from disability claim succeeds.

70. It is for the above reasons that the unanimous judgment of the Tribunal that:

(i) The claim for unfair dismissal is well-founded and is upheld.

(ii) The claim for indirect sex discrimination is well-founded and is upheld. The respondent contravened section 19 of the Equality Act 2010.

(iii) The claim for discrimination arising from disability is well-founded and is upheld. The respondent contravened section 15 Equality Act 2010. The claimant's dismissal was discrimination arising from disability.

Remedy

71. Following a contravention of Part 5 of the ERA 1996 a declaration to that effect can be made by the Tribunal and a payment of compensation ordered. This should put the employee in the position they would have been had the discrimination not occurred subject to a causal link between the loss and the discrimination. Compensation can also include for injured feelings. We were referred to Base Childrenswear Ltd v Otshudi [2019] 2 WLUK 722 in which a one-off act of discrimination by dismissal form a job which meant a lot to the claimant was considered to merit a middle-band award. The middle *Vento* band for cases brought between 6 April 2021 and 5 April 2022 is £9,100 - £27,400. Interest on discrimination awards is awarded at 8% per year. Interest on injury to feelings awards is from the date of the discriminatory act to the date of calculation. Interest on other sums runs from the mid-point to the date of calculation. The first £30,000 of payment in respect of termination of someone's employment is exempt from tax, and there must not be double compensation when a claimant succeeds on unfair dismissal and a discrimination dismissal claim.

72. Our findings on remedy, including those below, are supported by the claimant's own evidence and the documentary evidence in the bundles. For this part of the claim we also took into account a remedy bundle of 35 pages, 'Bundle C'. The claimant has opted to be compensated on a discriminatory basis (as opposed to just in relation to the unfair dismissal claim), and we find that is the appropriate approach to take in her circumstances.

73. We were satisfied that the claimant took reasonable steps to mitigate her losses by finding alternative work. This is because she did find alternative work during the relevant periods. We did not find that the evidence demonstrated that there was a chance that the claimant's employment with the respondent would have ended in any event. This is because of her documented intention to return to work and the fact that she was well enough to undertake alternative work within a reasonable period of time taking into account all of the claimant's circumstances, bearing in mind the time required to apply for a new role.

74. The respondent must pay to the claimant compensation of £72,948.30. This figure includes interest and grossing up. It is calculated as follows:

    a. Net past losses plus interest - £18,647.64;
    b. Future losses - £11,288.16;
    c. Injury to feelings plus interest - £36,535.89;
    d. Total - £66,471.69;
    e. Total after grossing up - £72,948.30.

75. The respondent must also pay an additional compensatory sum of £250 to the claimant for loss of statutory rights. These calculations are explained as follows.

Past pecuniary loss

76. We find that the claimant had two years continuous service at the date of her dismissal and was aged 37. Her gross weekly pay was £519.23 and her net weekly pay was £423.08. Her gross pensionable weekly pay was £399.23 and the respondent's weekly pension contribution was £11.98. We accept the claimant's position that she could have returned to work from 15 January 2021 at 25 hours a week because this is consistent with our findings of fact, above. The claimant did find work at alternative employment on 15 November 2021 on a full time contract, and we accept that the only reason for the delay was the time it would take her to find another job. We calculate her losses as follows:

Period 1 (25 hours a week) = (423.08/45 x 25) x 34 weeks = £7,991.50
Period 2 (full time) = 423.08 x 103 weeks = £43,577.24
Total past loss of income = £51,568.75

Period 1 (25 hours a week) = (11.98/45 x 25) x 34 weeks = £226.29
Period 2 (full time) = 11.98 x 103 weeks = £1,233.94
Total past loss of pension = £1,460.23

77. From this we set-off payments received during the relevant period from the insurer:

Set-off sum (1): *the Exeter* payments = 2 x 656.62 = £1,313.24

78. We find that the claimant had additional employment from 15 November 2021 to 26 June 2022. Her total net pay during that employment was £15,530.79.

Set-off sum (2): '*2gether*' = £15,530.79

79. The claimant had two periods of employment at a further employer between 3 October 2022 and 24 February 2023. Her net pay in this employment was £5,070.96. The second period was between 20 March 2023 and 16 June 2023. Her net pay in this employment was £5,582.08.

Set-off sum (3): '*City Group 1'* = £5,070.96
Set-off sum (4): '*City Group 2'* = 6,160 – 393.20 = £5,582.08

80. The claimant also received £7,973.75 by way of universal credit. The recoupment regulations do not apply to this particular type of award.

Set-off sum (5): '*universal credit'* = £7,973.75

<u>Total Past income to set off = £35,470.82</u>

81. The claimant also received the following pension payments during these periods:
    a. £452.47;
    b. £24.72; and
    c. £265.01

Total Past loss = lost earnings + pension = 51,568.75 + 1,460.23= £53,028.98

Total set off loss = earnings + pension = 35,470.82 + 452.57 + 24.72 + 265.01 = £36,213.12

<u>Net Past Loss = £16,815.86</u>

<u>Future pecuniary loss</u>

82. We find on the evidence that that the claimant will incur future losses equivalent to six months' full time work. This takes into account her past employment history after her dismissal. We also take into account the inherent difficulties someone who has been dismissed for reasons of a disability will have in obtaining future work.

Future loss of income = 26 x 423.08 = £11,000.08
Future loss of pension contributions = 26 x 11.08 = £288.08

<u>Total Future Loss = £11,288.16</u>

Vento award for injury to feelings

83. We make an award to injury to feelings of £30,000. This is just above the top of the middle of the *Vento* bands for the relevant period. It takes into account the serious effect that the dismissal had on the claimant, particularly given the timing of her dismissal by reference to her husband's death and effect the acts of the respondent had on her. We considered that the combined effect of her disability and status as a single parent meant that she was vulnerable. We also take into account the fact that the respondent's actions were not just discrimination arising from disability, but also amounted to indirect sex discrimination, and the injury to feelings award must reflect both of these. It is therefore appropriate to go slightly above the middle *Vento* band to adequately reflect the injury to feelings caused overall.

Total injury to feelings award = £30,000

Interest

84. The effective date of termination was 18 December 2020. There were 994 days between this date at the date of the remedy hearing, ie. 7 September 2023. The mid-point is therefore 29 April 2022 ie. 497 days.

85. The interest on the past losses is £1,831.78.

Net Past losses + Interest = £18,647.64

86. Taking the effective date of dismissal (18 December 2020) as the start date, the interest on the claimant's injury to feelings award is £6,535.89.

Injury to feelings + interest = £36,535.89

Total award

87. The total award (including interest but before grossing-up) is:

Net Past Loss (+ interest):	**£18,647.64**
+ *Future Loss:*	**£11,288.16**
+ *Injury to Feelings (+ interest):*	**£36,535.89**
= Total	**£66,471.69**

Grossing-up:

88. The claimant is currently unemployed. Since 6 April 2023 she has received a total of £2004.73 in universal credit.

89. The current rates of tax are:

On income up to £12,570	0%
On income from £12,571 - £50,270	20%
On income from £50,271-£125,140	40%
On income over £125,140	45%

90. Our grossing up calculation is as follows:

Total Award before Grossing Up = £66,471.69
Universal Credit Received this tax year = £2004.73
Tax Free Sum (of Award) = £30,000
Taxable Award = £66,471.69 - £30,000 = £36,471.69

Income Tax Band	Tax Rate	Amount of Total Award falling within	Grossed-up Amount
Tax Free Sum (of Award)		£30,000	£30,000
Up to £12,570	0%	£10,565.27	£10,565.27
£12,570 - £50,270	20%	£25,906.42	£32,383.03
Total			**£72,948.30**

91. We also make additional award in respect of loss of statutory rights £250 to reflect this loss to the complainant, which would otherwise not be reflected in the compensation to be ordered.

Employment Judge Barry Smith
28 September 2023

Appendix A – Written reasons on postponement

92. The respondent applied by email dated 4 September 2023 sent at 8:18 from its appointed representative Holly Blue Employment Law to postpone the full merits hearing listed to take place between 4 and 8 September 2023. This stated that the individual representative, Ms Kaur (solicitor) was experiencing medical symptoms that prevented her from attending. The email stated that medical evidence from her GP would be forthcoming. It asserted that her treatment has led to significant side effects rendering her incapable of participating in the tribunal proceedings, including remotely. The respondent had stood down its witnesses temporarily. It is unclear when this took place. The identity and number of respondent witnesses is unknown. It also asserted that obtaining alternative legal representation at this late stage would be challenging, would place their client at a disadvantage, and a fair hearing could not take place.

93. The claimant duly attended on 4 September 2023 and indicated that the application was opposed and that they also would seek a strike out of the response. In light of the fact that that application was not on notice, and the respondent was not present or represented on that date, directions were made for both applications to be determined at 11am on 5 September 2023. The respondent's representative was notified of this by email sent at 11:50 on 4 September 2023 which means that they were given sufficient notice. The orders included that evidence in support of any representative's availability, and to support the contention that alternative representation could not be found, be served by 9:30 am on 5 September 2023. At 17:44 on 4 September 2023 the respondent's representative sent to the claimant and Tribunal an email of further representations and also included a copy of a letter dated 4 September 2023 from a surgery at which Ms Kaur had attended on that day from an advanced nurse practitioner. This stated that '*This is to confirm that … Kaur attended the surgery today with symptoms of nausea, dizziness, headache which is causing cognitive impairment. We have diagnosed vertigo and she has medication to help with this, prescribed today. She is therefore unfit to attend the hearing scheduled for today*'. The picture includes a box of medication.

94. The Tribunal's orders of 4 September 2023 made it clear that it was considering starting the case as soon as possible during that week, noting that the claimant's cross-examination, which had previously been timetabled to be the at start of the case, was not estimated to last more than a day, and the case could commence on either 6, 7 or 8 September 2023 and continue part-heard. It was clear therefore that the unavailability of Ms Kaur, or any other alternative representative, on 4 or 5 September 2023 would not necessarily mean that the case could not go ahead.

95. The respondent's submissions of 17:44 on 4 September 2023 include that '*the respondent's representative has been dealing with illness but until recently it was fully expected that she would be able to continue working. However, last-minute submission of copious paperwork by the Claimant's representative, their lack of response to agree the Bundle back on 29 June 2023, the failure to exchange witness statements have all exacerbated her condition'*. It continues to make complaints about the documents, disclosure, and bundle pagination. However, it does indicate that a hard copy of the bundle was sent by the claimant's representative on 11 August 2023. It repeats that a postponement is necessary due to the declining health of the respondent's agent. It also states that '*the case is not prepared for a hearing due to the absence of exchanged witness statements'* and continues with a complaint about bundle preparation, including that an unagreed and excessive bundle was received by the respondent on 16 August 2023 and the respondent has not had sufficient time to review the materials.

96. We accept that the bundles in their final, or close to final form, were available to the parties on or before 16 August 2023.

97. It is right to note that the claimant did not serve their witness statement until the Sunday before the hearing. However, the likely fair remedy for this, had the respondent attended, would to have given them a further opportunity to prepare any cross-examination. Also, we accept the claimant's explanation that they had sought simultaneous exchange of witness statements on 9 August, 11 August, and 31 August 2023, and this was refused by the respondent.

98. No one from the respondent or the respondent's representative attended on 4 or 5 September 2023. We are satisfied from the correspondence that they were on notice of the applications to be determined and had sufficient time to attend, prepare, and arrange for representation and that it is in the interests of justice to proceed in the absence of the respondent. We have the benefit of written representations from the respondent on the application and they have been given an adequate opportunity to be represented at this hearing. No further request to postpone the determination of the applications has been made. It is at least implicit from the email at 17:44 on 4 September 2023 that the respondent and its representative did not intend to attend the hearing.

99. It should be recorded that the respondent's representative informed the Tribunal by email at 9:13 on 4 September 2023 that on that date, as a small practice, they did not have any other authorised representative available in the absence of Ms Kaur. No other evidence as to the nature of Holly Blue Employment Law, or the respondent itself, and its ability to represent itself, has been provided in support of the respondent's application. It is clear from the paperwork, however, that Ms Kaur is not the only individual to have worked on the case, because the named contact on the ET3 is another person, and subsequent correspondence from the respondent indicated that Ms Kaur had worked on the case since May 2023. The respondent is a recruitment company that operates in the area of logistics. The grounds of claim state that the respondent's gross profits in its year end 2019 were £9,311,005. This is not disputed in the grounds of response.

100. We have considered the overriding objective, the interests of justice, and balanced the prejudice to either party if the application to postpone is granted. The next available hearing date is in October 2024. It is also right to note that the facts which give rise to this case have caused and continue to cause considerable distress to the claimant.

101. We consider the concerns by the respondent in the application to difficulties with bundle preparation to be unmerited. Although large, we do not agree that the bundles are excessive. The respondent, a reasonably well-resourced company with representation from an employment practice and an employment solicitor, has had in our judgment sufficient time to prepare

since at least mid-August 2023. It is relevant that a considerable amount of the important documentation was already in the respondent's possession before that date. Also, it did not raise the prospect that it was not ready for a hearing with the Tribunal until it's written submissions at 17:44 on 4 September 2023. This is despite the implied duty on a representative to alert the Tribunal to difficulties with hearing preparation as and when appropriate, particularly if a hearing cannot be effective, and the Tribunal's order that trial readiness should be indicated by 24 August 2023. The respondent did not indicate the difficulties it asserts it had in accordance with that order. It did not indicate to the Tribunal in the week before the hearing that it was not ready, and yet now asserts that point in support of its application to postpone.

102. The respondent also makes a complaint that a schedule of loss was not provided until 31 August 2023. We consider that this should have little bearing on the application because we are not concerned with remedy at this stage and it is unclear what, if any, prejudice has been caused by this. Also, there has been sufficient time between then and the final hearing for this to be considered by the respondent.

103. We do not consider that the application, and evidence provided in support of it, supports the broad contention that the respondent cannot have a fair hearing. It has had sufficient time to prepare the case with the benefit of legal representation. It is not inevitable that a representative at the hearing itself is necessary for a fair hearing bearing in mind the Tribunal's long experience of self-represented parties.

104. We do not consider that the application squarely meets the requirements of the Presidential Guidance on postponements. This is because we have no clear evidence, only the unsupported assertion by an unnamed individual who wrote the representations by email, that '*our client cannot secure alternative representation at this late stage*'. In light of the Tribunal's willingness to consider postponing the claimant's evidence until, if necessary, Friday of this week and to continue part heard, the availability of the independent Bar to provide representation, as well as the large number of independent solicitors, solicitor agents, and non-legally qualified but experienced employment tribunal representatives, we cannot accept the

contention that this particular respondent, either through Holly Blue Employment Law or by other means, cannot secure an advocate. This is particularly the case because remote representation is now routine across many courts and Tribunals and therefore the pool of available advocates is significantly greater than it has been in the past. We have therefore taken into account the size of both the respondent and the respondent's preferred representative and do not find that this is a factor in favour of a postponement. It appears to us that the author (unknown) of the respondent's written submissions has at least some familiarity with the case.

105. We also consider that the medical evidence is insufficient to support the assertions made by the respondent. It makes no reference to when the symptoms began and the respondent accepts that their advocate had been unwell for at least a period of time. It is therefore unclear that this application has been made at the earliest reasonable opportunity. Moreover, the evidence only states that the advocate is unfit to attend on 4 September 2023. There is no evidenced prognosis, nor is it the case that there is clear evidence that she is unfit to attend later on in the week. There is no, or not sufficient, evidence to support the serious contention that the conduct of the claimant's solicitors has in any way caused or made worse Ms Kaur's medical position.

106. In those circumstances, there is no good reason in the interests of justice to postpone the hearing. A postponement would cause considerable prejudice to the claimant who has waited a long time for this hearing, and a further delay of over a year would be contrary to the interests of justice. Memories would fade further from the original events which were in late 2019 to 2020. This is particularly relevant because disability is in issue and therefore what the claimant was and was not able to do in 2020 is particularly relevant and important. This is not a case to be determined solely by reference to the documents. The claimant's oral evidence is of some importance.

107. We find that a fair hearing can take place, that the respondent is aware of the proceedings through its representative, and that no clear effort to secure alternative representation has been made. We do not also find that there is sufficient evidence, in the alternative, that the respondent's existing

representation, Holly Blue Employment Law, are unable to attend the remainder of the hearing for medical reasons, or their appointed advocate.

108. It is also the case that no-one from the respondent company has attended, or sought to attend, or provided an explanation why.

109. We do not consider that the need for a postponement arises from an act or omission of the claimant or Tribunal or that there are such circumstances which would otherwise justify a postponement at this late stage.

110. The respondent asked that we reconsider our decision by email sent at 16:00 on 5 September 2023. The power to reconsider decisions necessary in the interests of justice must be used cautiously. We consider that it is not in the interests of justice to reconsider the respondent's application to postpone, the respondent having been given ample opportunity to attend, appoint an advocate and submit written submissions and evidence (written submissions and evidence having already been submitted). The respondent also now seeks to rely on material which could and should have been submitted in accordance with the Tribunal's order of 4 September 23, and was not. Much of the material was in the hearing bundle, in any event, and thus is not new. In any event, the documents relating to the respondent's previous strike out application give no material support to the application to postpone. The prior conduct of the claimant alleged does not clearly support the need for a postponement. This is because any issues relating to bundles, pagination, disclosure and witness statements were more than capable of being resolved during the full merits hearing. They were not raised by the respondent as a bar to a fair hearing when they should have been if this argument was to have any merit. We are also concerned that the original application to postpone, based solely on the availability of an advocate has morphed into one also relating to whether or not the respondent is in fact ready for the hearing. We are quite satisfied that the respondent had been given ample time to prepare for the hearing, arrange for an alternative advocate to appear on its behalf, and can have a fair trial. It is a matter for the respondent whether it chooses to attend and no clear evidence has been provided that would satisfy us that it is not in a position to attend. In light of the correspondence there is not sufficient evidence that the respondent has been unable to find alternative representation. The

medical evidence provided only supported the unavailability of the preferred advocate on 4 September 2023.

111. Accordingly, there is no merit to the reconsideration application and it is dismissed. Although not determinative, the application to reconsider discloses no clear mistake of fact or law made by the Tribunal, any relevant new material, and in reality seeks to reargue the application on effectively the same grounds as before. It would not be in the interests of justice to reconsider our decision of 5 September 23 to refuse the respondent's postponement application.

Appendix B – List of Issues

CASE SUMMARY

46 The claimant was employed by the respondent, a recruitment company, as an Accounts Manager, from 26th February 2018 until 18th December 2020 and was responsible for managing the Integrated Service Solutions Ltd ('ISS') account and was primarily based at the ISS offices at London Road, Teynham, Kent, ME9 9PR. Early conciliation started on 15th February 2021 and ended on 9th March 2021 . The claim form was presented on 7th April 2021 .

47 The claim is about procedural and substantive unfair dismissal, discrimination arising from disability and indirect sex discrimination. The respondent's defence is that the claimant's employment reasonably terminated for capability and/or some other substantial reason with notice and following a fair and reasonable process. Discrimination (indirect or otherwise) is denied.

The Complaints

17. The claimant is making the following complaints:
17.1 Unfair dismissal;
17.2 Discrimination arising from disability, about the following:
Dismissal.
17.3 Indirect sex discrimination about the following:
Dismissal.

The Issues

18. The issues the Tribunal will decide are set out below.

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence), alternatively some other substantial reason both of which are potentially fair reasons.

1.2 If the reason was capability, 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:

1.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

1.2.2 The respondent adequately consulted the claimant;

1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

1.2.5 Dismissal was within the range of reasonable responses.

1.3 If the reason was some other substantial reason capable of justifying dismissal, namely the Claimant's long term absence, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

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

2.1.1 What financial losses has the dismissal caused the claimant?

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

2.1 .3 If not, for what period of loss should the claimant be compensated?

2.1.4 Is there a chance that the claimant would have been fairly dismissed
anyway if a fair procedure had been followed, or for some other reason?

2. .5 If so, should the claimant's compensation be reduced? By how much?

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

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

2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.1.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.1.11 Does the statutory cap of fifty-two weeks' pay or [E86,444] apply?

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

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

3. Indirect discrimination (Equality Act 2010 section 19)

3.1 A ‘PCP’ is a provision, criterion or practice. Did the respondent have the following PCP's?

3.1 .1 A requirement that all employees in the claimant's role of accounts manager work full-time

3.1.2 A requirement that all employees in the claimant's role of accounts manager do not work from home but must be on-site.

3.2 Did the respondent apply the PCP to the claimant?

3.3 Did the respondent apply the PCP to men or would it have done so?

3.4 Did the PCP put persons with whom the claimant shares the characteristic, of ‘women’ at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, ie. ‘men’, in that women are more likely to require flexible working conditions including working from home and amended or flexible hours as they are more likely to have childcare responsibilities?

3.5 Did the PCP put the claimant at that disadvantage?

3.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent will particularise what its legitimate aim was in its amended response.

3.7 The Tribunal will decide in particular:

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

3.7.2 could something less discriminatory have been done instead;

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

4. Disability

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

4.1 .1 Did she have a mental impairment: The Claimant says her impairment is anxiety, depression and stress?

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

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

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

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

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

5.1 Did the respondent treat the claimant unfavourably by: dismissing the claimant

5.2 Did the following things arise in consequence of the claimant's disability: the claimant's sickness absence between about January 2020 and 18th December 2020?

5.3 Was the treatment unfavourable because of those things. i.e. Did the respondent dismiss the claimant because of that sickness absence?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent will particularise what its legitimate aim was in its amended response.

5.5 The Tribunal will decide in particular:

(i) was the treatment an appropriate and reasonably necessary way to achieve those aims;
(ii) could something less discriminatory have been done instead;
(iii) how should the needs of the claimant and the respondent be balanced?

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

6. Remedy for discrimination

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

6.2 What financial losses has the discrimination caused the claimant?

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

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

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

6.8 Should interest be awarded? How much?

Appendix C – Cast List and Chronology

(i) Mr Ismail Mangov ('Mr Mangov'): a senior account manager for the respondent

(ii) Ms Anita Hughes ('Ms Hughes'): onsite area manager at the respondent

(iii) David Segest ('Mr Segest'): compliance director at the respondent

(iv) Daniel Manekelow ('Mr Mankelow'): operations director at the respondent

(v) Shawn Colbourne ('Mr Colbourne') worked at OMB Partnership Ltd

(vi) Integrated Care 24 ('IC24')

(vii) Holly Blue Employment Law ('Holly Blue'): the company that conducted the claimant's dismissal appeal hearing

Date	Event
28.02.2018	The claimant's employment at the respondent began.
10.05.2019	The claimant made a formal flexible working request to reduce her hours from 45 to 40 hours a week following her return from maternity leave on 1 July 2019.
14.06.2019	A meeting was held to discuss the claimant's flexible work request.
25.06.2019	Mr Segest wrote to the claimant to communicate that the respondent rejected her flexible working request.
26.06.2019	The claimant appealed the rejection and suggested a different flexible working pattern.
27.06.2019	Mr Segest wrote to the claimant stating he could not permit a return on the flexible basis requested, but an appeal hearing would be held on 4 July 2019.
03.07.2019	The claimant returned from maternity leave.
11.07.2019	The claimant's flexible working request appeal hearing.
19.07.2019	Mr Mankelow wrote to the claimant stating her appeal had been rejected. Mr Mankelow also stated that the 3 weeks the claimant required for an operation in in August had been taken from her annual leave allowance.
14.08.2019-15.08.2019	The claimant took annual leave for her operation.
19.08.2019-23.08.2019	The claimant took annual leave for her operation.
02.09.2019-04.09.2019	The claimant took annual leave for her operation.
05.11.2019	The claimant discovered she was pregnant.

15.11.2019	At an early pregnancy scan no foetal heartbeat could be detected.
17.11.2019	The claimant informed Mr Mangov of the pregnancy via phone call. During a scan at the hospital, the claimant was informed she had had a silent miscarriage. She opted for expectant management.
18.11.2019	The claimant emailed the respondent requesting time off work due to the miscarriage. She asked if the respondent provided compassionate leave.
19.11.2019	The claimant was referred for a private scan to confirm silent miscarriage.
17.11.2019	The respondent advised the claimant to use her annual leave to cover her absence from 18-26 November 2018 and thereafter to obtain a sick note if necessary.
25.11.2019	The claimant informs the respondent she has an appointment at the early pregnancy unit at the Hospital for an ultrasound.
28.11.2019	Fit note dated 28.11.2019 signed the claimant off work until 10 December 2019 (*'you are not fit to work').*
28.11.2019	The claimant attended A&E with heavy bleeding which was diagnosed as an ongoing miscarriage. She was admitted overnight.
29.11.2019	The claimant was discharged from the hospital.
02.12.2019	The claimant had a review ultrasound scan which revealed an incomplete miscarriage. She was booked for a rescan on 11 December 2019.
11.12.2019	The claimant had an appointment at the Early Pregnancy Unit. She was informed the expectant management was not progressing as hoped and she would need surgical management. This was booked for 13 December 2019. The claimant informed the respondent that completion of the treatment and recovery would take 3 weeks, and that a fit note had been requested from her GP to cover the period to 6 January 2020.
13.12.2019	The claimant's scheduled surgical management successfully took place.
20.12.2019	The claimant emailed Ms Hughes a fit note dated 11 December 2019 signing her off work until 25 December 2019 (*'you are not fit to work'*).
21.12.2019	The claimant's husband Sebastian was killed in a fatal road traffic accident. The claimant's mental state began to substantially deteriorate from this date.

24.12.2019	The claimant informed the respondent of her husband's death via text message.
02.01.2020	The claimant emailed Ms Hughes a fit note dated 24 December 2019 signing her off work until 6 January 2020 (*'you are not fit to work'*).
08.01.2020	The claimant was prescribed 14 days of Zopiclone (sleeping pill).
16.01.2020	The claimant informed Ms Hughes via email that she was unable to return to work, attaching a fit note dated 8 January 2020 signing her off until 2 February 2020 (*'you are not fit to work'*). Ms Hughes responded with her sympathies, stating *'you don't have to apologise for no contact I fully understand',* though she asked the claimant to call her she was ready.
31.01.2020	The claimant emailed Ms Hughes stating she was unable to return to work, that she had an appointment with her GP that day, and would provide an updated fit note when she received it.
03.02.2020	The claimant was prescribed Amitriptyline (for depression); prescription repeated 03.03.2020, sufficient for 3 months total.
12.02.2020	The claimant emailed Ms Hughes a fit note from her GP dated 31 January 2020, which signed The claimant off work until 1 March 2020 (*'you are not fit to work'*).
12.02.2020	Ms Hughes emailed the claimant asking the claimant to call her. No detail as to the reason for the call was provided.
15.02.2020	Ms Hughes emailed the claimant asking the claimant to call her. No detail as to the reason for the call was provided.
19.02.2020	Mr Colbourne from OMB partnership emailed Ms Hughes asking for all of the claimant's fit notes
21.02.2020	Ms Hughes wrote a letter dated 21 February 2020 stating *'I have made several attempts to contact you recently in order to arrange to meet with you on an informal basis to discuss your absence … given the time that has now passed and in the absence of any contact from you, it is pertinent that we now discuss your absence in order to determine your intentions in regard to your employment with us'*. Ms Hughes suggested a meeting on the morning of 26 February 2020, with herself, the claimant, and a third colleague as note taker. Ms Hughes stated that the claimant could be accompanied by a work colleague, if she wished, and asked for a response by the 26 February 2020.
24.02.2020	The claimant received Ms Hughes' letter dated 21 February 2020 when it was emailed to her by Mr Colbourne.
25.02.2020	The claimant emailed Mr Colbourne and Ms Hughes. She set out that she was on *'strong medication',* that she wanted to meet but was unable to make the 26 February 2020.

	By email, Ms Hughes stated *'we understand your situation'* and confirmed the respondent would await a response on Monday (2 March 2020).
04.03.2020	The claimant emailed Ms Hughes, attaching attached a fit note dated 2 March 2020 signing her off work until 31 March 2020 (*'you are not fit for work'*).
05.03.2020	Mr Colbourne emailed the claimant asking her to provide a date and time to meet with Ms Hughes.
12.03.2020	The claimant confirmed she was able to meet any time from 11 on 17, 18, or 19 March 2020.
13.03.2020	The claimant's absence review meeting ('ARM') was arranged for 18 March at Ashford International Hotel.
17.03.2020	The claimant emailed Ms Hughes *'further to our recent phone conversation'* to state that she had been advised to self-isolate for 14 days by IC24.
18.03.2020	Ms Hughes emailed the claimant proposing the ARM be rearranged for w/c 30 March 2020.
23.03.2020	The country entered a national lockdown due to coronavirus.
27.03.2020	The claimant emailed Ms Hughes to ask if the ARM w/c 30 March 2020 would still take place and how it would be approached given lockdown. She attached a fit note dated 27 March 2020 signing her off work until 30 April 2020 (*'you are not fit for work'*).
29.03.2020	Ms Hughes emailed the claimant stating she herself was self-isolating until 6 April 2020, but would be in touch *'next week … to confirm next steps to meet'.*
30.04.2020	The claimant emailed the respondent with a fit note dated 1 May 2020, signing her off work until 31 May 2020 (*'you are not fit for work'*).
01.05.2020	Ms Hughes emailed to extended her sympathies and asked the claimant to *'please call me'* when she had the strength.
06.05.2020	The claimant emailed Ms Hughes her 1 May 2020 sick note again.
05.06.2020	Ms Hughes emailed the claimant thanking her for providing a sick note dated 2 June 2020 signing her off work until 30 June 2020 (*'you are not fit for work'*). This sick note was sent on 4 June 2020.
09.06.2020	Mr Colbourne emailed the claimant a letter dated 9 June 2020, signed by Ms Hughes, drawing attention to the claimant' *'ongoing absence'* and asking permission to write to the claimant's doctor '*in order that we can obtain a qualified medical opinion as to your current state of health and future capabilities'.*
15.06.2020	The Exeter wrote to the GP asking for *'all medical notes',* for the claimant's Income Protection policy claims.

19.06.2020	The claimant emailed a completed consent form stating that she consented to the respondent writing to her GP and wished to see a copy of the report before it was provided to the respondent.
24.06.2020	Ms Hughes wrote to the GP asking for a response to 6 questions.
26.06.2020	The claimant requested a fit note. She stated: *'recent bereavement'.*
30.06.2020	The claimant provided the respondent with a sick note dated 30 June 2020, signing her off work until 31 July 2020 (*'you are not fit for work'*). The fit note stated *'will employer kindly refer for occupational health assessment'.*
20.07.2020	Mr Colbourne emailed the claimant asking if she had heard from her GP. The claimant confirmed she had not but would ask about the report Ms Hughes wrote to the GP asking for the report.
20.07.2020	Mr Colbourne wrote to the claimant asking if she had a fit note to cover her absence from 1 August onwards.
27.07.2020	The claimant requested a fit note. She stated: *'recent bereavement'.*
28.07.2020	Fit note dated 28 July 2020 signed the claimant off work for 4 weeks It stated *'you may be fit work taking account of the following advice: a phased return to work, altered hours, amended duties', and 'PLEASE CONSIDER REFERRAL TO OCCUPATIONAL HEALTH'.*
29.07.2020	The claimant requested a fit note, She stated *'I do not feel fit to work, normal life, going out, driving, meeting up. I feel safe only in my house … I am paralysed by fear'.*
18.08.2020	The claimant emailed Mr Colbourne with the fit note dated 28 July 2020. The claimant stated that she was *'not feeling well'*, and that the GP had informed her that the respondent should contact her about occupational health.
19.08.2020	Ms Colbourne replied asking whether the claimant felt unable to return to work even on the basis of amended duties.
03.08.2020	The claimant's GP responded to The Exeter's request, stating *'I feel psychological support and bereavement counselling from her employment would benefit and referral to occupational health'.*
31.08.2020	The claimant emailed Mr Colbourne a fit note dated 25 August 2020 signing her off work until 30 September 2020 (*'you are not fit for work'*).
	At some date between 25.08.2020 and 21.09.2020 the respondent made the claimant an offer for 'mutual settlement' which was *'a gesture of kindness to permit [the respondent] the ability not to exhaust essential internal processes in managing your absence from*

	work as I formed the opinion that your preference was for me not to invite you to attend any such mandatory requirements'. The claimant was upset at the content of this letter
21.09.2020	The claimant made a counter offer for mutual settlement.
28.09.2020	Mr Maneklow wrote to the claimant by letter dated 28 September 2020 rejecting the claimant's offer for mutual settlement. Mr Mankelow stated '*it is both appropriate and necessary for me to invite you to attend an absence review meeting in view of your long term absence … it is my understanding that you remain unwilling to work'.* Mr Mankelow asked the claimant to identify how many working hours she could undertake on a weekly basis and on what working days, stating 'o*nce received I will treat your information as a formal flexible working request… you will be invited to attend a meeting in which we discuss your specific requirements'* and asked the claimant to confirm attendance at an ARM by 2 October 2020.
28.09.2020	the claimant made a request for a sick note stating *'aside from my son I do not have any other motivation to get up from the bed. Simple things like dressing up or cleaning are challenge'.*
29.09.2020	Fit note dated 29 September 2020 signed the claimant off work until 31 October 2020 (*'you are not fit for work'*).
02.10.2020	The claimant wrote to Ms Mankelow disputing that she was unwilling to work and explaining the fit note which stated she may be fit to work was completed without a consultation between her and the doctor. She explained she was taking sedatives was unable to undertake day-to-day tasks, and asked that the ARM be postponed beyond 2 October 2020.
20.10.2020	The claimant made a self-referral for bereavement counselling and was provided with 10 sessions of clinical intervention with Kent Talking Therapies.
27.10.2020	Fit note dated 27 October 2020 signed the claimant off work until 30 November 2020 (*'you are not fit for work'*).
28.10.2020	The claimant was assessed by Insight healthcare (bereavement counselling) as having *'moderate symptoms of low mood, and moderate symptoms of anxiety'.*
11.11.2020	In accordance with the request in Mr Mankelow's letter dated 28 September 2020, the claimant wrote to Mr Maneklow setting out that to return she would require part time hours from 15-20 hours weekly (flexible on days) and a realistic return date was January 2021.
18.11.2020	The claimant's GP records were sent to the respondent without having first been sent to her

24.11.2020	The claimant contacted a childcare service stating *'I am returning to work from January 2021 and I want Gabriel to be ready for that'.*
27.11.2020	The claimant submitted an e-consultation with the GP stating *'I am paralysed by fear that I will die and will not see my son. I have already started bereavement counselling therapy and this is helpful. We set up a goal to help me return to work from New Year'.*
28.11.2020	Fit note dated 28 November 2020 signed the claimant off work until 31 December 2020 (*'you are not fit for work'*).
07.12.2020	Mr Makelow wrote to the claimant stating *'<u>your employment with [the respondent] should be terminated on grounds of ill-health</u>. The reason for this decisions is that you remain unable to provide a definitive return to work date … having considered both the medical evidence and your written submissions carefully, including the possibility of reasonable adjustment, the company cannot continue to employ you… I am of the firm belief that … it would not be realistic to consider an actual return to work for you until March 2020 and even this is not definitive in view of the fact your flexible working request may not be accepted'*. The claimant's dismissal was to be effective from 18 December 2020. The letter stated the claimant could appeal by 11 December 2020.
09.12.2020	The claimant was prescribed Protonic 0.1 Enstilar 50mg foam, and Dovonex.
10.12.2020	The claimant was prescribed Citalopram (20mg tablets daily).
11.12.2020	The claimant appealed her dismissal on the basis that the respondent had not consulted with her, had ignored that she had stated January 2021 as a realistic return date, and failed to obtain up-to-date evidence from the GP.
11.12.2020	Fit note dated 11.12.2020 and dated until 'indefinitely' stated *'you may be fit for work taking into account the following advice: a phased return to work, amended duties, altered hours, workplace adaptations… please may employer refer for occupational health assessment. Employee expressed interest to resume duties from 01/01/2021 with altered hours'*
16.12.2020	Mr Mankelow wrote to the claimant stating that Holly Blue would conduct the claimant's dismissal appeal hearing.
18.12.2020	The claimant's employment at the respondent ended.
07.01.2020	The claimant emailed Mr Colbourne asking why she was not paid for her annual leave or bank holidays in 2020.
19.01.2020	Mr Colbourne emailed the claimant stating that the Holly Blue emails kept bouncing back from the claimant's email. The claimant provided her phone number.

20.01.2021	Holly Blue texted the claimant arranging the appeal meeting on 27 January 2021 at 13:00 via zoom. The claimant confirmed she would be unaccompanied.
29.01.2021	Appeal meeting was held via telephone.
08.02.2021	Ms McDevitt of Holly Blue wrote to the claimant confirming that the claimant's appeal of her dismissal had been refused.
09.03.2021	Date of the claimant's ACAS early conciliation certificate.
07.04.2021	The claimant's ET1 and grounds of claim were issued .
05.05.2021	The claimant's most recent amended grounds of claim .
10.05.2022	The respondent's most recent amended grounds of resistance.
15.11.2021	Start of the claimant's fixed term employment at 2gether support solutions.
26.06.2022	End of the claimant's fixed term employment at 2gether support solutions.
20.03.2023	Start of the claimant's fixed term employment at City Security.
30.06.2023	End of the claimant's fixed term employment at City Security.