



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105487/2022

**Held in Edinburgh on 26, 27, 28 and 29 September 2023 and Member's
Meeting on 2 October 2023**

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Employment Judge M Sutherland

Member M McAllister

Member P McColl

Maxine Taylor

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**Claimant
Represented by
Ms Yvette Craig**

15 **West Lothian Women's Aid**

**Respondent
Represented by
Ms S Robertson,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaint of direct disability
discrimination does not succeed and is dismissed.

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REASONS

Introduction

1. The Claimant had presented a complaint of direct disability discrimination which was resisted by the Respondent.
2. The Respondent was represented by a solicitor. Although not legally qualified, the Claimant was ably represented by her aunt.

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3. Case Management Preliminary Hearings had been held on 14 December 2022, and 15 February, 13 March and 18 May all 2023. At a Preliminary Hearing held on 13 March 2023 her complaints of detriment and dismissal by reason of protected disclosure which were dismissed on grounds of time bar.
- 5 At a Preliminary Hearing held on 19 June 2023 it was determined that her son qualified as disabled under the Equality Act 2010. A final hearing was then listed to determine all remaining issues including remedy.
4. The Claimant gave evidence on her own behalf. The Respondent called Adele Anderson and Illena Brown. Although referred to in the proposed witness timetable agreed by the parties, following discussion the Claimant elected not to call Michelle Struth and Louise Patterson and the Respondent elected not to call Lyn Macdonald. (The Claimant initially sought to rely Louise Patterson and Michelle Struth as comparators who had taken time off for domestic emergencies but had not been dismissed. It was however agreed between
- 10 the parties that such time off was allowed as a matter of practice and further that the comparators were not in their probationary period.)
- 15 5. Parties lodged a joint bundle of documents to which additional documents were added during the hearing.
6. Parties had agreed the following list of issues to be determined –
- 20 a. Did the Respondent subject the Claimant to less favourable treatment by dismissing her?
- b. Was the Claimant treated less favourably than real or hypothetical comparators?
- c. If so, was the treatment because of the Claimant's son's disability?
- 25 d. If so, what compensation should be awarded?
7. The following individuals are referred to by their initials in this judgment -

Initials	Name	Job Title
AA	Adele Anderson	Deputy Manager

CM	Cath Magee	CYP Worker
IB	Illena Brown	Manager
JO	Jane O'Donnell	Chair of the Board
LM	Lyn MacDonald	Board Member

Findings in fact

8. The Tribunal makes the following findings in fact:
- 5 9. The Respondent is a charity (number SC046887) providing information, support and safe temporary accommodation to women, children and young people who have experienced domestic abuse. A number of the service users including the children have mental health conditions.
- 10 10. The Respondent employs around 11 staff including IB, the Manager (now Chief Executive), AA, the deputy manager, Women's Workers and two Children and Young Persons ('CYP') Workers. A CYP Worker provides practical and emotional support to children and young people who have experienced domestic abuse.
- 15 11. In October 2021 the Claimant was offered the role of CYP Worker with the Respondent subject to references. During the recruitment exercise it was noted that the Claimant had significant absence during her prior employment. The Claimant explained that she had a period of 35 days of absence in February 2021 due to her autistic son not coping well with the lockdown. Following receipt of this explanation the offer of employment was confirmed.
- 20 12. The Claimant commenced employment with the Respondent on 6 December 2021. IB, Manager was appointed as her supervisor and line manager. Her role was subject to a 6-month probationary period to be assessed upon her ability to perform the duties of the role. The Claimant worked four days a week (Tuesday to Friday).

13. On 7 December 2021 the Claimant completed a health questionnaire in which she advised that she had not attended work due to stress arising from her son not coping during covid.
14. From 6 December until 25 January 2022 the Respondent undertook an induction (“onboarding”) process to introduce her to the operations of the charity and her role. The Claimant’s induction supervisor was AA, Deputy Manager because IB, her line manager, was absent from work. The Claimant received introductory training from AA and from IB, Manager in a number of areas including on Triangle/myStar (a tool for measuring and supporting change in a social care context) and Oasis (a case management system). The Claimant found the training on Triangle/myStar and Oasis to be inadequate.
15. The Claimant was issued with a contract of employment which she signed on 21 January 2022. It confirmed that her continued employment was contingent upon her satisfactory conduct and performance during the probationary period. It advised that there would be a review of her performance at minimum intervals of 1, 3 and 6 months or more frequently as required. The supervision meetings did not happen at those specific intervals.
16. The Claimant’s contract stated that the capability and disciplinary procedures contained in the staff handbook formed part of her contract. During her induction the Claimant was provided with access to the staff handbook. The handbook provided that the employer had the right not to apply their full capability and disciplinary procedures during a probationary period.
17. The respondent operated a practice whereby staff could either keep a written log of all additional unplanned overtime worked and use this time to attend personal appointments and domestic emergencies including time off at short notice to attend to an issue arising in respect of a child. Alternatively the practice was that staff would not log this time and would instead seek and be granted time off for personal appointments and domestic emergencies. The Respondent also operated a practice whereby staff would record planned

overtime which would be paid or for which TOIL (time off in lieu) would be granted.

- 5 18. IB, Manager also had an autistic son and from time-to-time she required time off to attend to domestic issues arising from his care. This was known to the Claimant. Over the course of her employment IB and the Claimant had several informal conversations together about the fact that they were single parents both of whom had autistic teenage sons.
19. On 30 December 2021 IB held a supervision meeting with the Claimant at which her performance was considered very good.
- 10 20. On 18 January 2021 IB asked the Claimant to complete NSPCC safeguarding and child protection training.
21. On 25 January 2022, following conclusion of the induction (“onboarding”) process, the Claimant was allocated her own case load. The Claimant was still receiving training and she found it difficult to accommodate a full case load. She worked late to trying to keep her case notes up to date. She was expected to attend child protection meetings in circumstances where she felt she had not been properly trained.
- 15 22. On 11 February 2022 IB held a supervision meeting with the Claimant. Her performance was again considered very good. It was noted that the Claimant still required to complete NSPCC training which was to be undertaken before the next review.
- 20 23. On 28 February 2022 AA raised an issue with the Claimant regarding her contact/ notetaking in respect of a particular service user. On 4 April 2022 AA raised an issue regarding the Claimant’s contact/ notetaking regarding CYP 40589 (mother 4474).
- 25 24. IB did not have any concerns regarding the Claimant’s performance until April 2022. On 8 April 2022 IB raised an issue with the Claimant that she was not completing initial assessment stars within 3 weeks per their Quality Standards and that her support hours were low.

25. On 19 April 2022 IB emailed the Claimant and the other CYP asking them to ensure that there were Stars and action plans in place for every child in their casework allocation within the next 2 weeks. IB had included the other CYP to avoid the Claimant feeling singled out.
- 5 26. On 20 April 2022 IB held a training meeting with the Claimant to go over their Quality Standards and myStar (care planning tool). At that meeting they also discussed some of the issues due to be discussed at her probation meeting.
27. On 22 April 2022 IB held a probation review meeting with the Claimant. According to her contract the meeting should have taken place around 6
10 March. This was a lengthy meeting that lasted around 2.5 hours. In that meeting IB asked the Claimant to liaise with her over any health concerns which may impact her performance and/or attendance at work so they can consider what can reasonably be done to support her (IB noted that the Claimant had questioned her decision to give up university); IB raised
15 performance concerns regarding the Claimant's care planning (myStar) and case note recording (Oasis), that some client were not being seen and that there was poor paperwork for other clients, and that she has fallen below the required standards in relation to some essential components of the role; particular concerns were raised in relation to 4474 (child 40589) (that this was
20 a priority but there has been no input since she was passed to her on 23 February); IB confirmed that following the training on 20 April the Claimant knew what was expected of her including following the guidance in their Quality Standards, ensuring the CYP were consistently supported and logging all entries in Oasis including all attempts to engage; IB explained that the
25 organisation is dependent upon external funding which is contingent upon external audits of their Quality Standards; it was noted that the Claimant required to progress the NSPCC training within 2 weeks. The Claimant's probationary period was extended from 6 to 9 months which IB noted would entail closer performance management. The Claimant's understanding was
30 that she had until the next review (due 6 June) to show the required improvement in her performance.

28. IB made notes during the course of that meeting on the probationary form which she intended to tidy up afterwards. Around end April/ start May 2022 IB experienced significant domestic issues caring for her own autistic son and she required 5 separate days of compassionate leave. Accordingly the notes of the meeting of 22 April were not tidied up until Thursday 5 May and Friday 6 May 2022.
29. On Tuesday 3 May 2022 the Claimant was on annual leave. On Wednesday 4 May a complaint was received from a support worker regarding the failure to provide support to child 40589 (mother 4474). IB regarded that complaint as a very serious issue. On Wednesday 4 May IB held a meeting with the Claimant to discuss this performance concern noting this had already been raised at her probationary review on 22 April. IB advised her that the failure to provide support was unacceptable. The Claimant sought to explain that she had experienced difficulty securing a translator. IB told her the client would be transferred to CM, the other CYP worker. IB advised that she would need to conduct an audit of her files with a view to ensuring that there were no other practice concerns. The Claimant felt that she was given “a real dressing down” about not engaging with this client and found the meeting to be quite hostile.
30. From 4 to 11 May, IB conducted an audit of the Claimant’s casework files which she summarised into a table that noted: the child’s reference number and age; the date of the support meetings; and whether myStar was completed. In respect of a significant number of the children IB noted that there was insufficient support. IB considered that the findings of the audit raised serious concerns regarding the Claimant’s performance which required an explanation.
31. On Friday 6 May 2022 the Claimant received a call from the school to advise that her son was sick and was becoming agitated. The Claimant advised AA that her son was sick, that she needed to collect him from school, and that she would work from home. AA authorised this and advised her she would update IB as her line manager. AA then emailed IB to update her.

32. On Monday 9 May 2022 (which was the Claimant's day off) IB sent to the Claimant a record of the probationary review meeting of 22 April and asked her to review this by the end of the week. In that email IB described the meeting held on Wednesday 4 May regarding the concern raised regarding child 40589 (mother 4474). IB noted that unfortunately the Claimant was unable to give any satisfactory explanation as to why there had been no input from her since she was passed to her on 23 February 2022; that she was concerned that this issue was raised at her probationary review on 22 April; and she reminded her that she is on probation and should this pattern of performance continue she runs the risk of not being confirmed in post. IB provided a detailed log of her casework allocation for her to action including linking her into each case note entry on Oasis. The Claimant understood that she was at risk of being dismissed for poor performance but she thought she had until June 2022 to improve.
33. On Wednesday 11 May 2022 IB arranged a meeting with the Claimant on 12 May (the following day) for the stated purpose of discussing how she was managing this week. The real purpose of the meeting was for IB to raise her significant concerns regarding the Claimant's performance in light of the audit and to seek an explanation from her. IB considered that there was a material possibility that the Claimant would be dismissed at that meeting. She did not consider it necessary to follow a formal procedure because she was still on probation.
34. Between 11pm on 11 May and 0:45am on 12 May the Claimant made a number of entries on Oasis with a view to bringing her casework up-to-date. On the morning of Thursday 12 May IB updated the audit of her case work in light of these entries. IB also assigned a new service user to the Claimant.
35. In afternoon of Thursday 12 May IB met with the Claimant. The meeting lasted around 35 minutes. She raised her concerns regarding the Claimant's performance in respect of each client with reference to the audit she had conducted. The Claimant could not see the audit document but IB provided a summary of her concerns in relation to each client. She sought comment and

an explanation from the Claimant on the issues she had identified. She asked her what she had been doing with her time. She noted that the Claimant had taken time off on Friday and asked her if she had worked from home. The Claimant was surprised by the tenor of the meeting because this was not its stated purpose (which was to discuss how she was managing that week). She felt unable to respond to the allegations of poor performance without having the chance to read the case files and to check her diary. IB was dissatisfied by the Claimant's response which she considered to be unconcerned. IB felt that there had been a change in her attitude and that the Claimant had become disinterested in the role. At the end of the meeting she advised the Claimant that she was being dismissed.

36. Immediately after the dismissal meeting IB sent an email to JO, Chair of the Board stating that "unfortunately a new member of staff's employment was terminated by myself today due to a pattern of poor conduct in that she was consistently not undertaking the job we employed her to do (work to support children and young people who are experiencing domestic abuse). She had been employed for 5 months and this was raised as a significant concern with her at the 3-month probationary review with no improvement to date so she was becoming a liability".

37. On 18 May 2022 IB wrote to the Claimant to confirm the decision to dismiss. In the letter she stated "as explained, I have undertaken a review of your induction programme, including learning and development opportunities alongside a detailed review of your records of work with children. Despite substantial practice concerns being raised as part of your initial probationary review on 22.4.22 you failed to improve your work to the required standards over recent weeks. You also gave no satisfactory explanation for your continued poor practice, specifically a lack of work with the children and young people you were employed to support." She was advised of her right of appeal to JO, Chair.

38. On 23 May 2022 the Claimant submitted a letter setting out in the detail the grounds of her appeal. She described a failure to receive training and support

5 which explained the issues with her performance. She described IB's treatment of her during her probation as unapproachable and intimidating. She described a failure to make reasonable adjustments in respect of her mental health. She said that it was her belief that the reason for her dismissal was something else namely that she was trying to put the other staff in their place (she noted that IB had dismissed her predecessor); that IB had just announced that there were going to be redundancies; she stated that "I absolutely believe that the real reason for my dismissal is nothing to do with what she states...I believe the real reason for my dismissal is that she realised the impact she was having on my mental health condition and this may lead to absence, or that I may at times require to deal with issues regarding my disabled son, which may also lead to absence, or thirdly she used me as a tool to threaten the already upset workforce with regards to her announcement about redundancies"; she raised issues with procedural unfairness namely that she was given no warning of the risk of dismissal, no notice of the meeting ("I was called in to the office in a sneaky manner by her under what was a totally false pretence") and no right to representation in breach of the ACAS guidance. She also enclosed a subject access request with her appeal.

20 39. On 30 May 2022 JO, Chair wrote to IB setting out a list of questions pertaining to the Claimant's allegations. IB provided a detailed response to these questions on 6 June 2022. IB confirmed that the Claimant had mentioned her autistic son prior to her appointment and also at the probationary review on 22 April 2022. IB also complied a detailed description of the training provided with reference to their training records.

40. The Claimant was unable to attend the appeal hearing arranged before JO, Chair on 28 June 2022. On 24 June the Claimant was offered to have her appeal heard by an independent HR professional which the Claimant declined seeking instead an appeal with a board member.

30 41. On 5 July 2022 the Claimant's appeal was heard before LM, Board Member who was supported by an external HR provider. The Claimant attended with

her Aunt, Yvette Craig (who was also her representative at the tribunal hearing). IB did not participate in the appeal hearing. The Claimant felt that the appeal was impartial, thorough and fair.

5 42. On 25 July 2023 LM, Board Member provided the Claimant with a written outcome of her appeal. She partially upheld the allegation that there had been a lack of training and noted that the onboarding could have been more formal and thorough. She did not uphold the allegation that there had been an excessive workload. She did not uphold the allegation that there was a failure to provide reasonable adjustments in relation to her mental health. She did not uphold the allegation that there was a link between her taking time off to care for her son and the decision to dismiss. She partially upheld the allegation that the dismissal process was not handled appropriately and caused her upset and distress. She partially upheld the allegation that the conversation regarding the client could have been better handled. She concluded that re-instatement was not appropriate.

10 43. The Claimant was very upset by her dismissal on 12 May 2022. There was unfortunately a death in the Claimant's family on 26 May 2022. The Claimant experienced particularly low mood and anxiety towards the end of May 2022 and was prescribed anti-depressant medication. The Claimant was declared unfit to work by her GP by reason of her mental health in the period 30 May to 3 September 2022. The Claimant had previously experienced issues with her mental health a number of years ago.

15 44. On 5 June 2022 the Claimant applied for roles as a Family Link Worker or a Pupil Support Worker with schools in West Lothian. On 13 June the Claimant applied to Edinburgh Napier University to study nursing. Towards the end of June the Claimant was advised that her application had been successful. The Claimant did not secure any work during the period between the termination of her employment and starting university on 1 September 2022.

20 45. The Claimant was in receipt of working tax credits during her employment and universal credit when she was not working.

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Observations on the evidence

46. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
47. The Respondent witnesses and the Claimant on the whole came across as generally credible and reliable in their testimony which was fair and measured, and consistent with the other evidence. There was little dispute on the relevant primary facts.
48. The Claimant led evidence that she had not been properly trained or given proper guidance (e.g. that IB had not forwarded to her the on-call guidance as promised; that staff in general needed myStar training) and that this lack of training/ guidance may have affected her performance. It was explained to the Claimant that the purpose of this hearing was to determine the reason for her dismissal and was not to determine whether her dismissal was fair as would be the case in a claim for unfair dismissal.
49. The Claimant led evidence that a description in the summary of training prepared during the appeal process was wrong (i.e. that the Child Protection Training was not general and instead had focused solely on disabled children). It was explained to the Claimant that whilst this may be relevant to the fairness of the disciplinary process it did not appear relevant to the reason for her dismissal.
50. The Respondent sought to lead evidence that after dismissal they established that she had not undertaken all the training she had been directed to undertake. It was explained to the Respondent that the purpose of this hearing was to determine the reason for her dismissal and this evidence was accordingly irrelevant.

Relevant Law

Direct Discrimination

51. Direct discrimination arises where a person is treated less favourably than other(s) because of a protected characteristic (Section 13 Equality Act 2010) including a disability. This includes associative discrimination where the treatment is because of someone's else's disability (*Coleman v Attridge Law C-303/06 [2008] IRLR 722*). For example, an employee is dismissed because they have taken time off to care for a disabled child or it is assumed that they will.
52. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.
53. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue. "It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why" (*Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*).

Less favourable treatment

54. The claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.
55. Under Section 23 EA 2010 there must be no material differences between the relevant circumstances of the Claimant and their comparator. The comparison must be like with like (*Shamoon*).

56. The Tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

The reason why

57. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In “reason why” cases the matter is dispositive upon determination of the alleged discriminator’s state of mind. In “criterion cases” there is no need to consider the alleged discriminator’s state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).

58. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering ‘but for’ the protected characteristic would the treatment have occurred (*Shamoon*).

Burden of Proof

59. Section 136(2) EA 2010 provides that “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions”.

60. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant

where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board* [2012] UKSC 37, SC).

- 5 61. The burden of proof is considered in two stages. If the claimant does not satisfy the burden of Stage 1 their claim will fail. If the respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935)

Stage 1 – prima facie case

- 10 62. It is for the claimant to prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic ('Stage 1' *prima facie case*).

- 15 63. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of "something more".

- 20 64. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.

- 25 65. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining

an order from the Tribunal” (*Efobi v Royal Mail Group* [2019] EWCA Civ 19, CA).

- 5 66. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the respondent’s explanation, or the absence of any such explanation (*Laing v Manchester City Council* [2006] ICR 1519, EAT and *Efobi*). (The respondent’s explanation for its conduct provides the reason why he has done what could be considered a discriminatory act.) “Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts” (*Madarassy*). “In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts” (*Igen v Wong* [2005] ICR 935; *Hewage*).
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Stage 2 – rebutting inference

67. If the claimant satisfies Stage 1, it is then for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic (Stage 2).
- 20 68. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing*). The treatment must be “in no sense whatsoever” because of the protected characteristic (*Barton v Investec* 2003 IRC 1205 EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).
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69. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

Submissions

70. Notwithstanding the burden of proof the Respondent agreed to give their submissions first to enable the Claimant to respond.
71. The Respondent made brief written and oral submissions which were in summary as follows –
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- a. IB did not know that the Claimant's son's autism qualified as disabled. IB gave evidence that autism affects people differently, sometimes in minor ways or sometimes in a substantial way.
 - b. The real comparators were not in the same circumstances as the Claimant because they were not on probation.
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 - c. The Claimant accepted that it is was merely her belief and suspicion that she was dismissed because she took time off to care for her disabled son. There was no reasonable basis upon which this could be inferred: IB took time off herself to care for her own disabled son; there were on-going performance issues identified since March 2022 which had resulted in her probationary period being extended; IB conducted an audit of her cases between 4 and 11 May; IB believed the audit showed that she was failing to adequately support her clients; IB believed the Claimant had failed to provide an adequate explanation at the meeting on 12 May. It was apparent that the reason for her dismissal was her poor performance.
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 - d. Since 5 June the Claimant has failed to mitigate her losses. Her decision to return to university rather than her dismissal caused her ongoing losses.
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- 25 72. The Claimant made brief written and oral submissions which were in summary as follows -

- a. IB knew that the Claimant's son had autism and that it was a long term condition. IB knew or should reasonably have know that its effects were substantial.
- b. The Claimant accepted that IB believed that there were issues with her performance but she did not have a reasonable basis for that belief since the issues could be explained by insufficient training and support and by having too much work.
- c. She was aware of the risk of dismissal for ongoing poor performance in April 2022 but she reasonably expected to be given 2 months (until the next review in June 2022) in which to improve
- d. No material event occurred in the period between the meeting of 4 May and her dismissal on 12 May apart from her having taken time off to care for her disabled son. She was given a new client on the morning of 12 May. There was no reason to dismiss her for poor performance then. She believed that the real reason was that she had taken time off on 6 May 2022 to care for her disabled son.
- e. The procedure adopted was wholly unfair. She was not warned of a risk of dismissal or told the purpose of the meeting, or advised of the right to be accompanied, or given a copy of the evidence.
- f. She would not have applied to university had she not been dismissed. She has suffered damage to her mental health and an injury to her feelings

Discussion and decision

73. Having regard to the findings in fact (summarised below) there was no reasonable basis upon which it could be inferred that the reason for the Claimant's dismissal was because of her son's disability.

74. The Respondent was aware that the Claimant had previously taken time off work to care for her autistic teenage son before they confirmed the offer of appointment. On 22 April 2022 IB raised issues with the Claimant's performance and extended her probationary period by 3 months. On 4 May
5 IB raised with the Claimant that a complaint had been received regarding her failure to provide support. The Claimant was advised this was unacceptable and that there would be an audit of her files to ensure that there were no other practice concerns. From 4 to 11 May IB conducted an audit of her files which she considered raised serious concerns regarding the Claimant's
10 performance.
75. On 6 May the Claimant took time off at short notice to collect her sick son from school and then proposed to work at home. Both the Claimant and IB had autistic teenage sons which they had discussed. Staff are permitted to take time off at short notice to attend to domestic emergencies including issues
15 arising in respect of a child. From time-to-time IB required to take time off at short notice to attend to her autistic son including end April/ early May.
76. On 9 May IB advised the Claimant that should the pattern of poor performance continue she runs the risk of not being confirmed in post. On 12 May IB met with the Claimant under the auspices of a support meeting. At that meeting IB
20 raised the concerns she had identified as a result of her audit and sought an explanation from the Claimant. IB asked her what she had been doing with her time including whether she had worked from home on 6 May. The Claimant felt unable to respond to the allegations because of the nature of the meeting. IB was dissatisfied by her response and dismissed her.
- 25 77. Having regard to the findings in facts there was a reasonable basis upon which to infer that the reason for the Claimant's dismissal was IB's finding of poor performance in light of her audit. That amounted to an adequate and cogent explanation of the decision to dismiss.

78. The Respondent did not dismiss the Claimant because of her son's disability and accordingly the complaint of direct discrimination is dismissed.

Employment Judge: M Sutherland
Date of Judgment: 23 October 2023
Entered in register: 24 October 2023
and copied to parties

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