EMPLOYMENT TRIBUNALS

Claimant: **Ms A Williams**

Respondent: **The Dragon Barmouth Ltd**

Heard at: **Mold** **On:** **14, 15, 16, 17 and 18 August 2023**

Before: **Employment Judge Leith**
Ms C Peel
Ms C Edwards

Representation
Claimant: In person
Respondent: Mr Fakunle (Litigation Consultation

JUDGMENT having been sent to the parties on 22 August 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

Claims and issues

1. The Claimant claims unfair dismissal, disability discrimination, redundancy payment, and failure to pay accrued but untaken annual leave.

2. Preliminary Hearings had previously taken place before EJ Webb and EJ Moore. We discussed the issues with the parties at the start. These were essentially as set out by EJ Moore in her CMO of 8 August 2023, with some slight amendments. In particular, the Respondent conceded that the Claimant was disabled by means of her mental impairment of stress manifesting as anxiety, depression and psychosis, so disability was no longer in dispute. The list of issues as amended is set out below:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that

happened before 23 March 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 It is agreed that the Claimant was dismissed. What was the reason or principal reason for dismissal? The Respondent says the reason was capability. The Claimant says she was dismissed because of her disability and / or that there was a redundancy situation.

2.2 Was it a potentially fair reason?

2.3 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

2.4 If the reason or principal reason for dismissal was redundancy 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:

2.4.1 The Respondent adequately warned and consulted the Claimant;

2.4.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.4.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

2.4.4 Dismissal was within the range of reasonable responses.

2.5 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:

2.5.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.5.2 The Respondent adequately consulted the Claimant;

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

2.5.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.5.5 Dismissal was within the range of reasonable responses. The Claimant contends that part time working should have been discussed and offered and further that she should have been given the opportunity to apply for the three positions advertised in May 2022.

3. Remedy for unfair dismissal

3.1 Does the Claimant wish to be reinstated to their previous employment?

3.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

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

3.6.1 What financial losses has the dismissal caused the Claimant?

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

3.6.3 If not, for what period of loss should the Claimant be compensated?

3.6.4 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?

3.6.5 If so, should the Claimant's compensation be reduced? By how much?

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

3.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it by failing to consider the grounds of appeal?

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

3.6.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? The conduct relied upon by the Respondent is the failure of the Claimant to engage or communicate with the Respondent regarding necessary support.

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

3.6.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

3.7 What basic award is payable to the Claimant, if any?

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

4. Redundancy Payment

4.1 Is the Claimant entitled to a redundancy payment?

4.2 Was the dismissal wholly or mainly attributable to—

4.3 (b) the fact that the requirements of that business—

4.4 (i) for employees to carry out work of a particular kind, or

4.5 (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

4.6 have ceased or diminished or are expected to cease or diminish.

5. Disability

5.1 The Respondent accepts the Claimant is disabled by reason of PTSD, and stress manifesting as anxiety, depression and psychosis.

6. Direct disability discrimination (Equality Act 2010 section 13)

6.1 Did the Respondent do the following things:

6.1.1 On 15 October 2021 tell the Claimant she could leave quietly with mental health issues and no damage to her reputation (para 6 ET1)

6.1.2 In October 2021 fail to take the Claimant's health and safety concerns seriously on the basis of her mental health and an assumption she was overreacting (paras 6 & 7 ET1 and paras 15.3.1 F&BP's);

6.1.3 On or around 13 November 2021 insist that the Claimant attend a welfare meeting (para 9 ET1 and paras 1.2, 1.3 of F&BP's);

6.1.4 Between 13 – 30 November 2021 require the Claimant to reply to 25 questions. The nature of the questions were discriminatory in that they required the Claimant to explain the cause of her mental health issues and how she would be in the future;(para 9 ET1 and paras 1.4 F&BP's)

6.1.5 Failed to provide HR support as opposed to EAP referral (paras 9, 10 and 13 ET1 and 15.5 F&BP's);[1]

6.1.6 Dismiss the Claimant on 25 March 2022; (para 13, 14 ET1, paras 2.4 and 2.5 F&BP's)

6.1.7 Refuse to allow the Claimant to speak to the insurance company or investigate whether the Claimant would be covered by insurance. This claim is unclear. I have recorded it as described by the Claimant. The Claimant contends that she should have been allowed to speak to the insurance company to find out if she was an insured person or if a claim could be made on behalf of the Respondent to compensate the Claimant for her mental health injuries. She wanted to be able to approach the insurance company and to ask if there were any sections of the policy where she would be covered. She was prevented from doing so and maintains the reason is that the Respondent thought she was unstable and did not trust her to because of her disability. (paragraph 13 ET1 and para 1.6, 2.6 and 15.5 1.3 F&BP's).

6.1.8 Refuse to discuss funding with the Claimant or provide reassurance. This claim is unclear. I have recorded it as described by the Claimant. The Claimant says she should have been provided with reassurance that she would not need to generate the same level of income if funding was available and also that the Respondent withheld funding information from her to prevent her

[1] The Claimant says this is also direct discrimination in that it was done deliberately and with intent so as to set her on a dismissal path because of her disability. She also advances it as a reasonable adjustment claim, see below. [EJ Moore's footnote]

from applying for the alternative positions advertised in May 2022 as they did not want to her apply for those roles because of her disability.(paragraphs 13 ET1 and para 2.5 and 2.6 F&BP's).

6.1.9 Fail to consider the Claimant for alternative roles (March – May 2022).(paragraphs 13 and 16 ET1 and 15.4.B, B.3F&BP's).

6.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant has not named anyone in particular who she says was treated better than she was.

6.3 If so, was it because of disability?

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

7.1 Did the Respondent treat the Claimant unfavourably by:

7.1.1 On 21 October 2021 subject the Claimant to a two hour meeting where she was questioned closely and belittled her concerns (paragraph 7 of ET1 and paragraphs 15.4 A.5 of F&BP's)

7.1.2 Place the Claimant in a capability procedure; (para 13 ET1)

7.1.3 Failed to give the Claimant time and enough information following the medical capability meeting to consider her position regarding the part time work offer[2] and how this would impact on her finances (para 2.5 F&BP's);

7.1.4 On 25 March 2022 dismissed the Claimant (para 14 ET1 and 2.5, B.1, B.2;

[2] The Claimant's ET1 says she "was asked" about part time work at the medical capability meeting, it is unclear if she is claiming she was actually offered part time work. [EJ Moore's footnote]

7.1.5 Refuse to consider a psychiatric report concerning a diagnosis of PTSD (para 2.5 F&BP's);

7.1.6 Failed to provide HR support as opposed to EAP referral (paras 9, 10 and 13 ET1 and 15.5 F&BP's);

7.1.7 At the appeal hearing on 20 April 2022, refuse to discuss the Claimant's appeal points and asked the Claimant about matters she had not prepared to discuss (paragraph 15 ET1);

7.1.8 Failed to address appeal points in the outcome letter (3 May 2022) (para 15 ET1).

7.2 Did the following things arise in consequence of the Claimant's disability:

7.2.1 An inability to withstand detailed questioning at lengthy meetings;

7.2.2 The Claimant's sickness absence;

7.2.3 A need for additional time and support to process and consider information provided at meetings;

7.2.4 A difficulty in building relationships of trust.

7.3 Was the unfavourable treatment because of any of those things?

7.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

7.4.1 Engaging the Claimant in discussions to develop an appropriate response to enable a return to work;

7.4.2 Running an efficient service and requirements of the business.

7.5 The Tribunal will decide in particular:

7.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2 could something less discriminatory have been done instead;

7.5.3 how should the needs of the Claimant and the Respondent be balanced?

7.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

8.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

8.2.1 Non provision of HR Services to support staff instead offering an EAP programme;

8.2.2 A policy of not audio recording formal meetings;

8.2.3 A requirement to sustain regular attendance at work.

8.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

8.4 The Claimant struggled to build relationships of trust;;

8.5 Stress means the Claimant has difficulty in recalling details at meetings;

8.6 The impairment of psychosis meant the Claimant had a fear of returning to work in the same situation;

8.7 The Claimant's disability meant she was unable to sustain regular attendance at work.

8.8 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

8.9 What steps could have been taken to avoid the disadvantage? The Respondent submits no duty arose as the medical advice was the Claimant would not be fit to return for 3-6 months as such the duty is not engaged. The Claimant suggests:

8.9.1 Provide the Claimant with additional resources to properly undertake her role (cleaner, admin, financial framework, IT, Security Sort outs, systems and

procedures, clarity on role, volunteer co-ordinate, H&S lead trustee and training;

8.9.2 Provide the Claimant with HR support instead of EAP support;

8.9.3 Allow the Claimant to discuss the Respondent's insurance with the insurance company;

8.9.4 Provide the Claimant information about funding and budgets and provided a structured update /information about what arrangements had bene put in place during the Claimant's absence so she could be assured she was not returning to the same situation that led to her absence;

8.9.5 Provided the Claimant with regular updates whilst off sick such as minutes of meetings;

8.9.6 Provided the Claimant with information about part time working;

8.9.7 Provided the Claimant with information about the alternative roles including the three new roles advertised in May 2022 and informed the Claimant that the part time role offered at the medical capability meeting would have had increased pay;

8.9.8 Undertaken a stress risk assessment;

8.9.9 Permit the audio recording of meetings;

8.10 Was it reasonable for the Respondent to have to take those steps and when?

8.11 Did the Respondent fail to take those steps?

9. Remedy for discrimination

9.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the Claimant?

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

9.4 If not, for what period of loss should the Claimant be compensated?

9.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

9.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

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

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

9.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

9.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

9.11 By what proportion, up to 25%?

9.12 Should interest be awarded? How much?

10. **Holiday Pay (Working Time Regulations 1998)**

10.1 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

Procedure, documents and evidence heard

3. We heard evidence from the Claimant.

4. On behalf of the Respondent, we heard evidence from the following:
   4.1. Janice Horrocks, Chair of the Board of Trustees of the Respondent;
   4.2. Pamela Marshall, Vice Chair of Trustees;
   4.3. Kate Moyce, Trustee;
   4.4. Alan Vincent, former Vice Chair of Trustees.

5. We had a bundle of 528 pages. Two further documents were adduced at the start of the hearing; an extract from the Claimant's GP records and the constitution of the Respondent. There was no objection to either document being adduced, and we accepted both into evidence.

6. We agreed a timetable at the start of the hearing which was broadly in line with that set out by EJ Webb in his Case Management Order. We indicated that we would deal with liability (plus *Polkey*) in the first instance.

7. At the conclusion of the evidence, we had submissions from Mr Fakunle on behalf of Respondent, and from the Claimant.

Preliminary points

8. Before we turn to our factual findings, we think it is helpful that we make two general points:

    8.1. This is not a claim for personal injury. This Tribunal does not have jurisdiction to consider such claims (save where the personal injury is said to be caused by an act of discrimination, which is not the case here). It is therefore not the purpose of these proceedings to make findings on whether the Respondent negligently caused injury to the Claimant in the way that it dealt with the flooding situation, or in the way that it dealt with the various issues that arose around the Claimant's workload or the uncertainty about the future of the Respondent. While inevitably we have made findings about related matters, nothing we say constitutes a determination on whether the Respondent breached its duty of care to the Claimant such as to give rise to a claim in negligence.

    8.2. Ms Marshall, in her witness statement, suggested that if the proceedings concluded with what she described as a "financial settlement", that would put the theatre and community centre at risk of closure. In cross-examination, she was asked whether the Respondent had insurance. She said that it did (although she did not go into the detail of what would be covered by such insurance). We consider that Ms Marshall was overplaying the situation somewhat in terms of these proceedings being an existential threat to the Respondent. But in any event, we take no account of the comment. Neither impecuniosity nor charitable status are a shield to the application of employment law. We are not concerned with the broader impact on the Respondent of any decision we make; our task is to assess whether the Claimant's claims against the Respondent are well founded.

Factual findings

9. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

10. The Respondent operates a theatre and community centre in Barmouth. It is a charity. The charity is run by a board of Trustees.

11. The Claimant was employed at the theatre from 6 October 2003, as Manager. When the Claimant was initially employed, the Respondent was an unincorporated charity.

12. The Claimant was employed to work 30 hours per week. Where the Claimant was required to work more than 30 hours in any given week, for example when there were a number of events on, she would take time off in lieu. Initially the Claimant was employed on a fixed-term basis, but in around February 2008 the role became permanent. At that stage, the Claimant was issued with a more detailed written contract of employment. Her role as then described as Community Centre and Theatre Manager. The annual leave was stated to be 24 days per year plus bank holidays with effect from 2008. The annual leave ran from April to March. The contract provided that a payment would be made for holiday accrued but untaken at the date of termination of employment.

13. That contract indicated that the Respondent had a policy on health and safety, which set out that there was a Trustee with overall responsibility for Health and Safety matters.

14. At some point the Respondent was incorporated. There was no evidence before us regarding the date of incorporation, but it was common ground that it had occurred before Mr Vincent became a Trustee in July 2013.

15. In 2016, the Claimant was given a new draft contract of employment. The Claimant made some comments on the draft contract and passed it back to the Trustees. The 2016 contract was never updated or returned to the Claimant. A job description was prepared at the same time, although it was not given to the Claimant.

16. The Respondent's financial position was somewhat precarious throughout the Claimant's employment. The Town Council contributed £4,500 towards the Respondent's running costs. The Claimant applied (successfully) for various pieces of grant funding for projects. In addition to the Claimant, the Respondent employed a part time Marketing & Admin Assistant, Bethan Gloster. The Respondent also had a cleaner and a maintenance person (although details of their employment were not in evidence before us).

17. In March 2019, the basement kitchen, lower foyer, boiler room and the Claimant's office of the Respondent's premises started flooding. The flooding continued into 2020. The kitchen was destroyed, there was no running water or drainage in the basement, and the bar had to be moved twice. Notwithstanding that, the theatre continued to operate throughout. The Claimant had to carry out extra work on top of her normal duties. This required her to work extra hours, for which she was paid overtime.

18. In early 2020, there had been some discussions within the Trustees about the management of the theatre. A Trustee named Malcolm Murgatroyd proposed installing a General Manager to whom both the Claimant and Ms Gloster would answer. His proposal was that the role of General Manager would be held by a Director/Trustee, and that it would be a voluntary position He set out his proposal in an email dated 19 February 2020. In it he said this:

> "…I like the idea of splitting AW's workload as she is clearly under stress and I suspect that she is not coping at all well. She herself gave me this idea when she mentioned that she needed two of her and she also stated she felt sometimes the job was making her feel ill. This is a classic stress symptom and think we are all feeling fragmented in our plans and operations of the theatre…"

19. He also noted in his email that the theatre may have to close down within the next year.

20. Mr Murgatroyd's proposal was referred to as the "two-tier plan". The two-tier plan email was sent to the Claimant.

21. The chairman at the time, Ed Penney, then had to step back for a period due to ill health, and the COVID-19 pandemic took hold. The Claimant was furloughed from the start of April 2020. She was paid her full pay during furlough.

22. The Claimant returned from furlough on 1 September 2020. At that stage, the Respondent had around £11,000 in the bank, which would only have covered their running costs until around that November. The Claimant made an application for a Cultural Recovery Fund grant, which was successful.

23. At the same time, the Claimant herself was struggling financially. Her son had turned 18, so she no longer received the benefits and tax credits she had previously received. She wished to increase her hours of work for the Respondent.

24. On 23 October 2020, Simon Wolfers (who at that point was assisting the Respondent with building maintenance) messaged the Claimant to explain that water was starting to come into the kitchen. The Claimant was concerned that this meant that the flooding problems were going to start again. At that point, the Claimant was dealing with the impact of an evolving set of COVID-19 restrictions. She was also concerned that the two-tier plan was being implemented or had been implemented without her knowledge. Mr Vincent assured her that that was not the case.

25. On 30 November 2020, the Claimant was signed off work by reason of ill health. The reason given for the absence on her fit note was work related stress. The Claimant was put back on furlough and continued to be paid full pay.

26. The Claimant was referred by her GP to a counsellor via Parabl Talking Therapies. She was then referred to RCS, an in-work support service. RCS referred her to a clinical Psychologist, Cathy Wood, and an HR expert, Sue Wilmore. However, she was unable to gain support from Sue Wilmore, as Ms Wilmore had previously had professional contact with the Respondent's Board of Trustees.

27. The Claimant saw Dr Wood on 8 occasions, with the first being on 16 February 2021. By letter dated 23 March 2022, Dr Wood opined that the Claimant had sufficient symptoms to fit the criteria for PTSD (although she had not had a formal assessment). The Claimant's evidence, which we accept, was that she had been told by Dr Wood that she had PTSD by 19 March 2021.

28. The Claimant continued to be signed off work, with fit notes continuing to give the reason for absence as "work related stress".

29. On 11 March 2021, the Claimant emailed Mr Vincent and Sandra Prior (who was then the Respondent's Treasurer). She explained that she had spoken to her doctor, and they had discussed options for a phased return to work. That meeting took place on 19 March 2021. Mr Vincent wrote to the Claimant on 30 March 2021 confirming what had been discussed. He noted that the Respondent was open to a phased return to work and explained that a Leah Watkins had been engaged to provide the Respondent with HR support.

30. The Claimant continued to be unwell following the 19 March meeting. She engaged with Leah Watkins. On 15 July, she emailed Ms Watkins confirming that her GP's diagnosis was "a one-off episode of reactive psychosis due to work related issues". Mr Vincent's evidence, which we accept, was that Ms Watkins never passed this information on to him.

31. The Claimant was referred by her GP to the Community Mental Health Team. She was assessed by a Community Psychiatric Nurse.

32. A phased return to work plan was agreed, based on advice from the Claimant's GP. The Claimant returned to work in the week commencing 26 July 2021, on a heavily reduced basis initially. She gradually increased her hours over the following weeks.

33. On 4 August 2021 the Claimant had a meeting with Mr Vincent. Mr Vincent agreed that the Claimant could carry over 15 days of annual leave from the previous leave year.

34. During the Claimant's absence and subsequent phased return to work, Bethan Gloster had been acting up as temporary manager. On 25 August 2021, Ms Gloster resigned from the Respondent.

35. In early September 2021, Alan Vincent indicated that he was going to step down as a Trustee. Two other Trustees indicated that they would also

resign. This threatened the viability of the Respondent. An article was published in the local newspaper, under the headline "Is it the last breath for Barmouth's Dragon". The article noted that the future of the Respondent was at risk if new trustees could not be found. The Claimant's evidence, which we accept, was that she found the situation very stressful.

36. As it transpired, three new Trustees were elected at the AGM on 27 September 2021 – Mrs Horrocks, Ms Marshall, and Suzie Robertson.

37. Mrs Horrocks' evidence was that she had a conversation with Mr Vincent at the end of the AGM about the role she was taking on.

38. On 4 October 2021, the Claimant met with the three new Trustees. The Claimant set out various concerns she had about health and safety issues, including that there needed to be a Lead Trustee for H&S. She also set out various other concerns she had and matters which she considered needed to be addressed. She took them on a tour of the theatre.

39. The three new Trustees also met with Alan Vincent, who provided a handover regarding what was happening within the Respondent at the time.

40. On 8 October 2021, a Management Committee meeting took place. Mrs Horrocks was elected as Chair, and Pamela Marshall was elected as Vice Chair.

41. A Board meeting took place on 11 October 2021. Mrs Horrocks asked for a volunteer to be the H&S Lead Trustee. None of the Trustees volunteered. Mrs Horrocks explained that she would take on the task of carrying out COVID risk assessments, although she did not feel able herself to take on the role of H&S Lead Trustee at that point.

42. On 12 October 2021, the Claimant spoke to her GP, who referred her to the Mental Health team. She was also given a fit note that said that she may be fit for work. The "advice" section of the fit note had the boxes for "amended duties" and "altered hours" ticked, and the comments said this:

> "full time hours but needs to be allowed to take annual leave at short notice, more time to complete certain duties, support with dealing with stressful issues, more IT support. Access to appropriate professional advice"

43. The Claimant emailed Mrs Horrocks about the health & safety issues. She explained the stress she was under in the following terms:

> "I suspect I am reacting to stress, reminded of past situations as they arise again in the present. I feel the weight of being responsible for users/customers and volunteers coming back into the building very strongly and often that I'm not coping, not getting to grips, becoming overwhelmed. In terms of the event coming up and day to day, being

on my own is very difficult. I hope you don't mind me sharing this with you but I think I need more support in that respect."

44. The Claimant also sent Mrs Horrocks a copy of her fit note. Mrs Horrocks arranged to meet the Claimant on 15 October 2021.

45. There was some discussion at that meeting about the Claimant leaving the Respondent's employment. The Claimant's evidence, in her witness statement, was that it was raised by Mrs Horrocks. Mrs Horrocks' evidence was that it was the Claimant who raised the possibility of leaving. The Claimant's evidence was that she had already been considering resigning prior to that meeting, and that her GP had advised her to consider resigning. Her evidence was that her GP's words to her were "get out, get better, simples". In the circumstances, we consider that it is more likely that it was the Claimant who first raised the possibility of resignation with Mrs Horrocks rather than the other way around.

46. The Claimant's evidence was that Mrs Horrocks told her that she could "leave quietly with mental health issues and no damage to her reputation". Mrs Horrocks denied that. Her evidence was that she explained to the Claimant that if she did decide to resign, she could stay in employment until she commenced a new job so as to maintain her income. Her evidence was that she also suggested to the Claimant that they could agree a form of communication that reduced her concerns that she would be "letting down the community" if she left the Respondent. She also reassured the Claimant that all of her health-related information would remain strictly confidential.

47. Mrs Horrocks had been a Mental Health Nurse prior to her retirement. Her evidence, which we accept, was that she had herself suffered from mental health issues in the past. In the circumstances, we consider it is inherently more likely that Mrs Horrocks tried to reassure the Claimant that, if she did leave, the Respondent would consider putting out a statement which would allay her concerns about letting the community down, and also that her health issues would remain confidential. Bearing in mind that it was inevitably a difficult and upsetting meeting for the Claimant, we find she simply misinterpreted Mrs Horrocks' comments.

48. The Claimant's evidence was that she told Mrs Horrocks about her diagnosis of PTSD in the meeting. The Claimant's evidence was that she did so in response to a question from Mrs Horrocks, and that when she disclosed her diagnosis Mrs Horrocks raised an eyebrow and wrote it down on her notes.

49. Mrs Horrocks evidence was that she could not recall it.

50. We find that Claimant did not mention her PTSD in the meeting, and that her recollection of doing so was mistaken. We reach that finding for the following reasons:

50.1. None of the contemporaneous documents suggested that the Claimant had raised PTSD in the meeting. The Claimant was otherwise quick to both make handwritten notes and follow matters up in email. But there was no such record of her telling Mrs Horrocks about a diagnosis of PTSD.

50.2. Given Mrs Horrocks' previous professional experience (and her personal experiences), we consider that she would have recalled had PTSD been mentioned to her. We consider also that being told about a diagnosis of PTSD would have triggered her to take some further action.

51. There was some discussion regarding the Claimant's job description. Mrs Horrocks handed the Claimant what she understood to be her job description – this was the job description produced in 2016. The Claimant indicated that it wasn't her job description. There was also some discussion regarding responsibility for health and safety.

52. Mrs Horrocks and the Claimant agreed that they would meet again on 19 October 2020, and that the Claimant would further consider whether she was going to resign from the Respondent.

53. Following the meeting, the Claimant drafted a resignation letter, although she did not submit it to the Respondent. She also produced a list of health and safety issues, which she gave to Mr Wolfers on 18 October 2020.

54. The Claimant and Mrs Horrocks met on 19 October 2021. There was some discussion about whether the Claimant's role could be altered. There was also some discussion regarding the Claimant's mental health. Mrs Horrocks shared some details of her own past mental health issues, to try to build her relationship with the Claimant and reassure her. The Claimant's evidence was that she felt more positive about her future in the organisation at following the meeting.

55. At that time, there was some work being done to the bar area of the theatre. The work needed to be completed in time for some upcoming events. On 19 October 2021, Simon Wolfers emailed the trustees updating them regarding the work. He outlined that the plumber had attended the theatre that day, and had discussed the plans with the Claimant who had changed what had previously been planned. Mr Wolfers described the Claimant as having been "interfering and causing more problems".

56. On the morning of 21 October 2021, the Claimant called her GP to get an appointment for that day. On the same morning, Mr Wolfers asked the Claimant to open up the main theatre at around 9.30am. Shortly after 10am, Ms Marshall arrived at the theatre. She asked the Claimant to talk to her about how to put on an event. She had not arranged the meeting with the Claimant, and the Claimant was unaware of her proposed visit until she arrived.

57. Ms Marshall's evidence was that, while she did want to know how to put on an event, her motivation for going to the theatre on that day was because the plumber was going in on that day to meet Mr Wolfers. Her evidence was that she went to the theatre to distract the Claimant, so that Mr Wolfers could discuss with the plumber without the Claimant's becoming involved.

58. Mrs Horrocks evidence was that she had shared with Ms Marshall her concerns that the Claimant was going to resign, and that she agreed with Ms Marshall that Ms Marshall would talk to Claimant to gain and understanding about the process of putting on events. Ms Marshall's evidence was that she had not spoken to Mrs Horrocks, and that she went to see the Claimant on her own initiative.

59. We prefer the evidence of Mrs Horrocks on the point. We find that as there had been some discussion about the possibility that the Claimant would leave, Mrs Horrocks and Ms Marshall were concerned about the loss of her experience. We find that that was why Ms Marshall wanted to find out how to run an event, although the primary motivation for going in on the day that she did was to distract the Claimant to prevent her from "interfering" with the plumbing works.

60. The meeting was lengthy. Ms Marshall asked the Claimant a number of questions about how to put on a film screening. Ms Marshall took notes, although her evidence was that she has since destroyed the notes. Her evidence was that she found the information the Claimant provided to be very helpful.

61. The Claimant's evidence was that she found the conversation uncomfortable and invasive, and that she became distressed and anxious. Her evidence was that even when she went outside to take a break, Ms Marshall followed her and continued to ask her questions.

62. Ms Marshall's evidence was that she was not aware that the Claimant was distressed or anxious. She did, however, accept that when the Claimant went outside for a cigarette, she followed her after a while.

63. We accept the Claimant's evidence that she found the conversation uncomfortable, and that she perceived the questioning from Ms Marshall as being invasive. Equally, we accept that Ms Marshall did not recognise that the Claimant was becoming upset. Having had the opportunity to observe both parties carefully during Ms Marshall's evidence, that is consistent with the dynamic we observed. While of course being aware that the pressure of giving evidence can lead witnesses to behave out of character, we observed that Ms Marshall was a considerably more forceful personality than the Claimant. She had to be reminded on a number of occasions during her evidence not to talk across the Claimant or interrupt her questions.

64. The meeting between Ms Marshall and the Claimant came to a premature end as the Claimant had to go to her office to attend her doctor's

appointment by telephone. During that consultation, the Claimant's GP signed her off work. The Claimant then left work.

65. The Claimant was signed off work for one month initially. The reason given on her fit note was "stress at work".

66. On 31 October 2021, Sandra Prior informed the Claimant that she had been put on Statutory Sick Pay with effect from 22 October 2021.

67. In the early part of her sick leave, Ms Marshall attended the Claimant's house to collect her laptop and mobile phone.

68. On 9 November 2021, Mrs Horrocks invited the Claimant to a meeting to discuss her welfare. The Claimant replied on 12 November 2021 that she was waiting for some further medical advice regarding possible support and treatment, so couldn't give a response to the request for a meeting.

69. On 13 November 2021, Mrs Horrocks wrote to the Claimant again inviting her to a meeting on 23 November 2021. She explained that the meeting would take place irrespective of whether the Claimant had received the further advice referred to.

70. On 13 Nov 2021 the Claimant wrote to Mrs Horrocks. She explained that she had been advised (and agreed) that establishing an open dialogue was important but also that discussions were not appropriate when she was not mentally well enough to engage in them.

71. On 19 Nov 2021, the Claimant emailed Mrs Horrocks again. She attached a fit note which indicated that she was not well enough to attend any work-related meeting.

72. On 22 November, Mrs Horrocks emailed the Claimant asking her to answer a list of questions about her health (as she could not attend a meeting). The email contained a list of 25 questions. The questions were detailed, and there was some repetition within the list. The letter requested the Claimant to respond by no later than 30 November 2021. Mrs Horrocks also proposed to refer the Claimant to Occupational Health ("OH").

73. Mrs Horrocks evidence was that the questions were drafted by the Respondent's HR advisers, Peninsula, although her evidence was that she had read them before she sent them and that she considered that sending them to the Claimant was appropriate.

74. The Claimant did reply on 30 November 2021, responding to the questions posed. She also asked some questions about the proposed OH referral.

75. The Claimant did agree to be referred to OH. The Claimant was also given details of an Employee Assistance Programme, to which employees of the Respondent had access. The EAP gave access to counselling and legal advice.

76. The Claimant was referred to Occupational Health. She was given the opportunity to write some background information for OH, which she did.

77. The Claimant was not updated regarding what was going on at the theatre during her absence. Mrs Horrocks' evidence was that she did not consider that it was appropriate to do so given that the Claimant was signed off sick.

78. The Claimant's OH assessment took place on 2 March 2022. The Claimant was sent a copy of the report in draft; she made some comments which were taken on board. The final report was sent to the Respondent on 8 March 2022.

79. On the referral form, Mrs Horrocks ticked a number of boxes for the questions the Respondent wanted answered. She did not tick the box for the question relating to the Claimant's underlying health. The report nonetheless contained a heading "Current / Relevant Health Status", which dealt with the Claimant's underlying health.

80. The report noted that the Claimant had been diagnosed with PTSD. It noted that:

    80.1. The Claimant was unfit to return to her role for the foreseeable future (3 – 6 months);
    80.2. There was no accurate way of predicting future sickness absence. It said this:
        "A guide to future absence can be previous absence for a condition, although this can change with things such as changes in triggering factors or treatment. It is the nature of psychological health conditions that she is likely to have episodes of increased symptoms and therefore further sickness absence cannot be ruled out."
    80.3. The Claimant was likely to be covered within the scope of the Equality Act 2010.
    80.4. There were no adjustments the Respondent could make that would enable a return to work in the foreseeable future.
    80.5. The Claimant was fit to attend internal hearings.

81. The Claimant's evidence to the Tribunal was that she agreed that the report was accurate.

82. Ms Marshall's evidence in her witness statement was that she did not know that the Claimant had a disability. Somewhat surprisingly, her witness statement said this:

    "At no point in our discussions did Alison say that her mental health was a disability; we cannot take into account a disability if the employee does not let us know that they feel they are disabled. Had we had that information we could have researched and found other ways of supporting Allison."

83. Her oral evidence to the Tribunal was that she had not noticed the part of the OH report which opined that the Claimant was disabled; either when it was first received, or when she was preparing her statement for the Tribunal.

84. The Claimant was invited to a Medical Capability Hearing. The invitation letter noted that one possibility was that the Claimant may be given notice of termination of her employment. The Claimant was informed of her right to be accompanied to the meeting by a friend.

85. The hearing took place on 21 March 2022. It was chaired by Mrs Horrocks and Ms Marshall.

86. The Claimant asked at the start of the meeting if she could make an audio recording of it. She was told that she could not. She did not explain why she wanted to record the meeting – she had not sought to record any previous meetings. Mrs Horrocks and Ms Marshall both took notes. They combined and typed up their notes in the form of minutes, on which the Claimant was given the opportunity to make comments. The Claimant added a considerable amount of detail to the notes prepared by Mrs Horrocks and Ms Marshall.

87. The Claimant agreed in the meeting that she may not be in a position not return to work in the foreseeable future, at least in her current capacity. She did not suggest that she thought the Respondent should be seeking further medical input.

88. There was some discussion regarding whether there was any alternative in terms of adjusting the Claimant's role or reducing her hours of work. The Claimant explained that she could not afford to cut her hours at the Respondent. Mrs Horrocks' evidence, which we accept, was that she was unable to further explore any potential adjustments with the Claimant given her indication that she could not consider reducing her hours and responsibilities. Mrs Horrocks' and Ms Marshalls' evidence, which we also accept, was that Respondent was keen to keep the Claimant given her experience.

89. The Claimant raised an issue about the Respondent's insurance. She asked if she could speak to the Respondent's insurers about the possibility of her making a claim regarding the flooding (her position being that she believed her PTSD had stemmed from the flooding issues). She was told that she could not contact the Respondent's insurers. Mrs Horrocks' evidence was that she did not consider it would be appropriate for the Claimant to be contacting the Respondent's insurers in her capacity as a manager about a claim she herself would be bringing, and furthermore that it did not feel appropriate for the Claimant to be doing so while off sick given the nature of her sickness. We accept Mrs Horrocks' evidence in that regard.

90. On 25 March 2022, Mrs Horrocks wrote to the Claimant to explain that her employment was being terminated by reason of ill health. The letter noted that:

    90.1. The OH report had been considered.
    90.2. The Respondent had considered whether there were any reasonable adjustments, but none had been found.
    90.3. The Respondent considered the possibility of suitable alternative employment, but there were no suitable vacancies.
    90.4. Mrs Horrocks and Mrs Marshall had concluded that there was no prospect of the Claimant returning to work within the near future, and they needed to permanently fill the role.

91. The Claimant was offered a right of appeal. She exercised her right of appeal. Her appeal letter was drafted on her behalf by her CAB representative. The letter noted that the Claimant agreed that a full and immediate return to her post was not feasible, but indicated that the Claimant considered that the dismissal was not a fair one. She referred specifically to the failure to consider alternative employment and the failure to let her speak to the Respondent's insurers.

92. The Claimant was invited to an appeal meeting on 20 April 2022. The appeal was heard by Alison Statham and Kate Moyce. Notes of the meeting were kept. The Claimant was given the opportunity to comment on the notes, which she did. The Claimant did not suggest that there was any issue with the OH report, or that the Respondent should have considered further medical evidence.

93. Alison Statham wrote to the Claimant on 3 May 2022 to give her the outcome of the appeal (the outcome having been formulated by Ms Statham and Ms Moyce jointly). The Claimant's appeal was not upheld.

94. The outcome letter did not expressly deal with the question of whether alternative employment or adjustments to the Claimant's role had been properly considered. Ms Moyce's evidence was that she and Ms Statham had considered the point, although they did not expressly capture that in their outcome letter.

95. Regarding the insurance point, the appeal outcome letter noted that further investigation had been carried out and the Respondent's insurance policy would not cover any claim on the Claimant's behalf regarding the flooding. It noted that the Claimant should seek her own advice about her situation.

96. The letter dealt with various other points the Claimant had raised in the course of the appeal.

97. After the Claimant's dismissal, the Respondent advertised for three posts:

97.1. A Theatre & Community Centre Manager, initially for 20 hours per week, at a rate of £15 per hour (around 17.5% more than the Claimant had been paid per hour).

97.2. A Theatre and Community Centre Administrator, again initially for 20 hours per week, at a rate of c.£12 per hour

97.3. A Marketing lead, for approximately 7 hours per week on a self-employed basis, at a rate of £15 per hour.

98. Applications for those roles closed on 4 June 2022. A new manager was appointed. The Respondent conducted interviews for the Administrator role and did appoint a candidate, but she did not take it up as she elected instead to remain with her current employer. Someone was found to undertake the marketing lead role, but left after around 2 months. Ms Marshall therefore undertook in the Administrator role on an interim basis. At the time of the hearing before us, the role was being re-advertised with the title "Assistant Manager".

99. On termination of her employment, the Claimant was paid the sum of £1,051.05 (gross) in respect of 13.75 days accrued but untaken annual leave. That calculation was expressed to have been for five months. It was calculated on the basis that the Claimant's annual leave entitlement was 25 days per year plus bank holidays (a total of 33 days per year). It was calculated based on the Claimant's (gross) daily rate of £76.44 per day. The Claimant's evidence was that her annual leave had always accrued at the rate of two days per month plus bank holidays.

100. The Claimant took issue with the calculation. She was later paid a further sum of £688.85, which she had calculated and requested be paid. The details of how that calculation was made were not in evidence before us.

101. The Claimant notified ACAS under the early conciliation process of a potential claim on 22 June 2022 and the ACAS Early Conciliation Certificate was issued on 3 August 2022. The claim was presented on 2 September 2022.

Law

Discrimination – Equality Act 2010

102. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:

102.1. In the terms of employment;

102.2. In the provision of opportunities for promotion, training, or other benefits;

102.3. By dismissing the employee;

102.4. By subjecting the employee to any other detriment.

Protected characteristics - disability

103. Disability is a protected characteristic. The starting point is section 6 of the Equality Act 2010, which provides as follows:

> "(1) A person (P) has a disability if—
> a. P has a physical or mental impairment, and
> b. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability –
>
> a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability
>
> (4) This Act …applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly …
> a. a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability…
> b. a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

104. The Government has issued guidance under section 6(5) of the EqA 2010, entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ("the Guidance"). The Guidance does not impose any legal obligations in and of itself, but the tribunal must take account of it where it is considered to be relevant.

105. The Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (2015) ("the Code"). The Code provides guidance on the meaning of 'disability' for the purposes of the EqA 2010. It does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.

106. There is no definition of 'mental impairment' in the EqA 2010 but Appendix 1 of the Code provides that the term is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities. "Mental impairment" should be given its "natural and ordinary meaning" (*McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074).

107. Section 212 of the EqA 2010 defines "substantial" as being more than minor or trivial.

108. Paragraph 5 of Schedule 1 provides as follows:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
>
> (a) measures are being taken to correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."

109. In considering whether an impairment has a substantial adverse effect on the ability to carry out normal day-to-day activities, it is necessary to take account not only evidence that person is performing a particular activity less well, but also of evidence that a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation (Appendix 1 to the Code).

110. Schedule 1, para. 2 of the EqA 2010 defines "long-term" as follows:

> (1) The effect of an impairment is long-term if -
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

111. In that context, "likely" has been held to mean it is a "real possibility" and "could well happen" rather than something that is probable or more likely than not (*SCA Packaging Ltd v Boyle* [2009] ICR 1056).

112. The question of how long an impairment is likely to last must be determined at the date of the alleged discriminatory act, not at the date of the Tribunal hearing (*McDougall v Richmond Adult Community College* [2008] ICR 431).

<u>Direct discrimination</u>

113. The definition of direct discrimination is contained in section 13(1) of the Equality Act 2010:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

114. The comparison may be to an actual or a hypothetical comparator. In either case, there must be no material difference between the circumstances relating to each case (s.23(1)). That is, the comparator must be in the same position in all material respects save only that he or she is not a member of the protected class *(Shamoon v Chief Constable of the RUC* [2003] ICR 337).

115. In considering whether a Claimant was treated less favourably because of a protected characteristic, the tribunal generally have to look at the "mental processes" of the alleged discriminator (*Nagarajan v London Regional Transport* [1999] IRLR 572). The protected characteristic need not be the only reason for the less favourable treatment. However, the decision in question must be significantly (that is, more than trivially) influence by the protected characteristic.

Discrimination arising from disability

116. The definition of discrimination arising from disability is set out in s.15 of the Equality Act 2010:

> "(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

117. "Unfavourable" is not defined in the statute. The EHRC Statutory Code of Practice provides that it means that the disabled person "must have been put at a disadvantage".

118. Guidance for Tribunals on how to approach the test in s.15 was set out by the EAT in *Pnaiser v NHS England* [2016] IRLR 170:

> "(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to 'something' that caused the unfavourable treatment."

119. The Respondent does not need to have knowledge that the "something" leading to the unfavourable treatment was a consequence of the Claimant's disability (*City of York Council v Grosset* [2018] ICR 1492).

Reasonable adjustments

120. The duty to make reasonable adjustments is set out in section 20 of the Equality Act 2010. In particular, subsection 3 provides as follows:

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

121. Paragraph 8 of schedule 20 of the same Act provides that an employer is not subject to the duty to make reasonable adjustments if he or she does not know, and could not be reasonably be expected to know that the Claimant:

121.1. Has a disability; and

121.2. Is likely to be placed at a disadvantage by the employer's provision, criterion or practice, the physical features of the workplace or a failure to provide an auxiliary aid.

122. The Tribunal must therefore ask itself two questions:

122.1. Did the employer both know that the employee was disabled and that the disability was liable to put the employee at a substantial disadvantage?

122.2. If not, ought the employee to have known both of those thing?

123. If the answer to both questions is "no", the duty to make reasonable adjustments is not triggered.

124. The EHRC Code provides that employers must "do all they can reasonably be expected to do" to find out whether an employe has a disability.

125. If an employer's agent or employee knows in that capacity that an employee is disabled, the employer will have imputed knowledge of that disability.

Burden of proof

126. Section 136 of the Equality Act deals with the burden of proof:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

127. Section 136 prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International PLC* [2007] EWCA Civ 33.

128. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

129. The Court of Appeal gave guidance to tribunals the application of the burden of proof provisions in the case of *Igen v Wong* [2005] EWCA Civ 142 (the guidance was given in the context of the Sex Discrimination Act, but subsequent authorities have confirmed that it remains good law).

> "(1) Pursuant to section 63A of the SDA, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to below as "such facts".
> (2) If the Claimant does not prove such facts he or she will fail.
> (3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
> (4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
> (6) 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.
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
> (9) Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.

(10) It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

130. If the Claimant satisfies that initial burden, the burden shifts to the employer at stage 2 to prove on balance of probabilities that the treatment was not for the prescribed reason.

Jurisdiction

131. Section 123 of the Equality Act 2010 sets out the time limit for bringing complaints under the Act:

123 Time limits
(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

132. The Court of Appeal, in the case of *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, gave the following guidance to Tribunals regarding the "just and equitable" extension of time:

> "...there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the Claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

Chagger

133. In the case of *Abbey National PLC v Chagger* [2010] EWCA Civ 1202 the Court of Appeal held that, in assessing the compensation to be paid in respect of a discriminatory dismissal, the Tribunal must determine the chances that the dismissal would have occurred had there been no unlawful discrimination.

Unfair dismissal

134. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the Respondent under section 95.

135. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Both redundancy and capability are potentially fair reasons for dismissal.

136. Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason. Section 98(4) then provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

137. In considering dismissal for long term ill health, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return (*BS v Dundee City Council* [2014] IRLR 131)

138. The employer must consult with the employee about the proposed dismissal and discover the true medical position (*East Lindsey District Council v Daubney* [1977] ICR 566).

139. The *Burchell* test is applicable to dismissals for long term ill health (*DB Schenker Rail (UK) Ltd v Doolan* EAT 0053/09). The employer must:
- Genuinely believe that the employee is incapable of returning to their post;
- Have carried out reasonable investigation into the position; and
- Have reasonable grounds for that belief;

140. It is not for the Tribunal to substitute its own view on whether to dismiss; rather, the question for the Tribunal is whether dismissal was in the range of responses open to a reasonable employer.

141. The fact that an employer has caused the employee's ill health is not a barrier to a fair dismissal, although the employer may be expected to "go the extra mile" in finding alternative employment or put up with a longer period of sickness absence than would otherwise be reasonable (*McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806).

Polkey

142. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed. Further guidance was given in the cases of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.

143. In undertaking the exercise of determining whether such a deduction ought to be made, The Tribunal is not assessing what it would have done. Rather, it must assess the actions of the employer before it, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 at para 24.

Contributory fault

144. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

145. Section 122(2) provides as follows: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it

would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

146. Section 123(6) then provides that: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Redundancy

147. Redundancy is defined in section 139 of the 1996 Act as follows:

> "For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

Holiday pay

148. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the Claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the Claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the Claimant on termination of employment in lieu of any accrued but untaken leave.

Conclusions
Disability discrimination

149. It is common ground that Claimant was disabled by virtue of both PTSD and a further mental impairment described as stress manifesting as anxiety, depression and psychosis. It is not, however, conceded that the Respondent had either actual or constructive knowledge of the claimant's disability. We will deal first with the question of the Respondent's knowledge.

150. We have found that the Claimant did not mention her PTSD in the meeting on 15 October 2021. The Claimant's diagnosis of PTSD was mentioned in the OH report, which also opined that the Claimant was likely to be covered by the Equality Act 2010. Ms Marshall's evidence was that she had not noticed that part of the OH report. That cannot, however, absolve the Respondent of (at the very least) constructive knowledge that the claimant had a disability by reason of her PTSD from 8 March 2022.

151. Regarding the second condition relied upon, stress manifesting as anxiety, depression and psychosis:

151.1. The claimant had been absent from work due to work-related stress from 30 November 2020 to 26 July 2021; a period of 8 months. During that time her fit notes had said "work related stress" or "stress at work".

151.2. The claimant had told Leah Watkins that she had had "a one-off episode of reactive psychosis due to work related issues". Although we accept that Leah Watkins had not passed that on to Mr Vincent, she was engaged by the respondent as their HR adviser. Her knowledge of the diagnosis is therefore imputed to the Respondent.

151.3. On 12 October, the Claimant had told Mrs Horrocks that she was reacting to stress was not coping, and was becoming overwhelmed.

151.4. Also on 12 October, the Claimant had forwarded the fit note which said that she needed support dealing with stressful issues, which would continue for at least 4 weeks.

152. Taking all of that into account, we conclude that Respondent ought, by 12 October 2021, to have known that the Claimant had a disability. From that date, the Respondent had knew (or had imputed knowledge) that:

152.1. The Claimant had had a mental impairment, stress and reactive psychosis.

152.2. The impairment was likely to last for at least 12 months. It had already lasted for some ten and a half months at that point. The claimant had presented a fit note for a further 4 weeks indicating that she was fit subject to adjustments. There was absolutely no suggestion that the situation would have resolved at the end of that fit note.

152.3. The impairment had had a substantial effect on ability to carry out ordinary day to day activities. By that point it had led the claimant to have eight months off work. And although she was fit to work at that time, that was only with the adjustments set out in the fit note.

153. So we conclude that the Respondent had constructive knowledge that the Claimant had a disability within the meaning of the Equality Act 2010 by virtue of her condition of stress manifesting as anxiety, depression and psychosis, with effect from 12 October 2020.

Direct disability discrimination (Equality Act 2010 section 13)

154. The claimant relies on nine allegations of direct discrimination. We deal with each of them in turn.

6.1.1 On 15 October 2021 tell the Claimant she could leave quietly with mental health issues and no damage to her reputation (para 6 ET1)

155. We have found that this did not happen as described by the Claimant. It follows that this element of the claim fails.

6.1.2 In October 2021 fail to take the Claimant's health and safety concerns seriously on the basis of her mental health and an assumption she was overreacting (paras 6 & 7 ET1 and paras 15.3.1 F&BP's);

156. We consider that the Respondent did respond to the Claimant's concerns about health and safety seriously by:

156.1. Asking a Trustee to volunteer to be H&S Lead Trustee, and in doing so recognizing that a Trustee should take the lead on H&S matters;

156.2. Mrs Horrocks taking on the role of carrying out COVID risk assessments;

156.3. Making H&S a standing item on the monthly Trustee meetings; and

156.4. Offering to reduce the Claimant's role.

157. The allegation needs to be seen in the context that there had been a significant change in the Trustee body, and that the Chair and Vice Chair were new in post and getting to grips with the pressures on the organization.

158. We conclude that the Respondent did take the Claimant's concerns about health & safety seriously in October 2021. It follows that the Respondent did not make decisions about the health & safety based on any assumption about the Claimant overreacting. The allegation is not made out.

159. Therefore, this element of the claim fails.

6.1.3 On or around 13 November 2021 insist that the Claimant attend a welfare meeting (para 9 ET1 and paras 1.2, 1.3 of F&BP's);

160. We consider that the email of 13 November 2021 went beyond simply requesting the Claimant to attend, and that she could reasonably have perceived it in context as insisting that she do so.

161. In terms of the correct comparator, we consider that the correct hypothetical comparator is an employee in the Claimant's role, who had the Claimant's sickness absence history, but did not have her disability.

162. In the context of a tiny organisation, where she was overseen by volunteer Trustees, the Claimant's role as manager was critical to the functioning of the Respondent. The background context was that the Respondent had, very recently, been threatened with closure due to the lack of Trustees. The Respondent had also been under significant financial pressure for a sustained period of time. A new Chair and Vice Chair had just taken up their posts. There was an obvious desire to move things forward to keep the Respondent on a firm footing. That led the Respondent to take a particularly proactive approach to attempting to manage the Claimant's sickness absence. In light of that, we conclude that the hypothetical comparator would have been treated in exactly the same way as the Claimant. The Claimant was not treated less favourably.

163. It follows that this element of the claim fails.

6.1.4 Between 13 – 30 November 2021 require the Claimant to reply to 25 questions. The nature of the questions were discriminatory in that they required the Claimant to explain the cause of her mental health issues and how she would be in the future;(para 9 ET1 and paras 1.4 F&BP's)

164. We have found that this did occur, in that the Claimant was required to reply to a list of 25 questions about her health. We consider that the correct hypothetical comparator is, again, an employee in the Claimant's role, who had the Claimant's sickness absence history, but did not have her disability.

165. For the same reasons as for the previous allegation, we conclude that the hypothetical comparator would have been treated in exactly the same way as the Claimant was.

166. That is not to say that the list of questions was good practice. The claimant was off sick with work-related stress, and the respondent had received a fit note from her GP saying that she was unable to attend work-related meetings. The list of questions was long and repetitive. We consider that the Respondent sending the list of questions when they did was poor practice, and we can see why the Claimant was upset by it and found it difficult. But as we have concluded that a non-disabled employee would have been treated in the same way, it follows that it cannot be direct disability discrimination.

167. Therefore, this element of the claim fails.

6.1.5 Failed to provide HR support as opposed to EAP referral (paras 9, 10 and 13 ET1 and 15.5 F&BP's);

168. We consider that this was based on a misunderstanding about the role and purpose of HR. What emerged in the Claimant's evidence was that what she really wanted was advice about her own position, whether from the CAB, a solicitor or an advice centre. The Respondent did have HR support in place, from Peninsula.

169. In any event, we consider that what the Respondent put in place, in terms of the HR support they received from Pensinsula and the Employee Assistance Programme, is exactly what they would have had in place for the hypothetical comparator employee. It follows that Claimant was not treated any less favourably than a comparable non-disabled employee.

170. Therefore, this element of the claim fails.

6.1.6 Dismiss the Claimant on 25 March 2022; (para 13, 14 ET1, paras 2.4 and 2.5 F&BP's)

171. It is common ground that the Claimant was dismissed.

172. At the point that the Claimant was dismissed:

172.1. She had been off sick for 5 months.
172.2. She had previously had a period of 8 months sickness absence, followed by a lengthy and protracted phased return to work process.
172.3. She had only returned to her full working hours for less than 2 months between the two periods of sickness absences.
172.4. The OH advice, with which she did not disagree, was that she would be unable to return to work for the foreseeable future, which was said to be 3-6 months.
172.5. The Claimant had indicated to the Respondent that she was not open to reducing her hours work or job-sharing.
172.6. The Claimant was in a critical role for the functioning of Respondent, in particular as it sought to increase use of the facilities post-COVID.

173. We conclude that a non-disabled comparator employee in the same circumstances as the Claimant and with the same sickness absence and lack of clear return to work date would also have been dismissed.

174. It follows that the Claimant was not treated less favourably. Therefore, this element of the claim fails.

6.1.7 Refuse to allow the Claimant to speak to the insurance company or investigate whether the Claimant would be covered by insurance. This claim is unclear. I have recorded it as described by the Claimant. The Claimant contends that she should have been allowed to speak to the insurance company to find out if she was an insured person or if a claim could be made on behalf of the Respondent to compensate the Claimant for her mental health injuries. She wanted to be able to approach the insurance company and to ask if there were any sections of the policy where she would be covered. She was prevented from doing so and maintains the reason is that the Respondent thought she was unstable and did not trust her to because of her disability. (paragraph 13 ET1 and para 1.6, 2.6 and 15.5 1.3 F&BP's).

175. It is common that the Respondent did not allow the Claimant to speak to the Respondent's insurance company. We have found that Mrs Horrocks made enquiries about the insurance situation following the Claimant's appeal, and these were fed back to the Claimant in the appeal outcome letter. So, the second part of the allegation is not made out.

176. In respect of the first part of the allegation, we accepted Mrs Horrocks' evidence that the reason she did not allow the Claimant to speak to the insurer was two-fold – partly because it was inappropriate for her to do so while off sick, and partly because it was inappropriate for her to do so when her purpose was to enquire about a claim she might bring. There was nothing to suggest that a non-disabled employee in the same position would have been treated any differently. We consider that the Claimant was not treated less favourably than the hypothetical comparator employee would have been.

177. It follows that this element of the claim fails.

6.1.8 Refuse to discuss funding with the Claimant or provide reassurance. This claim is unclear. I have recorded it as described by the Claimant. The Claimant says she should have bene provided with reassurance that she would not need to generate the same level of income if funding was available and also that the Respondent withheld funding information from her to prevent her from applying for the alternative positions advertised in May 2022 as they did not want to her apply for those roles because of her disability.(paragraphs 13 ET1 and para 2.5 and 2.6 F&BP's).

178. It is common ground that the Respondent did not update the Claimant about its financial position while she was off sick.

179. We have found that the reason the Claimant was not updated was because she was off sick. Mrs Horrocks evidence, which we accept, was that she did not consider it would be appropriate to keep the Claimant updated. There was, again, nothing to suggest that a non-disabled employee who was off sick as the Claimant was would have been kept up to date or had the respondent's funding position discussed with them during that sickness absence.

180. It follows that the Claimant was not treated less favourably than the hypothetical comparator. This element of the claim fails.

6.1.9 Fail to consider the Claimant for alternative roles (March – May 2022).(paragraphs 13 and 16 ET1 and 15.4.B, B.3F&BP's).

181. We do not consider that the Respondent could be said to have failed to consider the Claimant for alternative roles. The Claimant expressed in the dismissal meeting that she was not interested in working fewer hours than she already worked, and gave the appearance that she was closed-minded to alternative roles at that stage. She did not express any interest in the roles that the Respondent subsequently advertised after her employment had terminated. The reality is that the Respondent's scope to consider alternative roles was very limited. There were simply no other suitable roles for the Claimant. In order to have created a reduced role for the Claimant, the Respondent would have had to have reduced her hours (so as to have the funding to pay someone to do the other parts of the role). The Claimant did not want to reduce her hours.

182. It follows that this element of the claim fails.

183. All elements of the complaint of direct disability discrimination having failed, that complaint is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

184. We turn next to the complaint of discrimination arising from disability. The claimant relies upon eight allegations of unfavourable treatment. We deal with each in turn.

7.1 Did the Respondent treat the Claimant unfavourably by:
7.1.1 On 21 October 2021 subject the Claimant to a two hour meeting where she was questioned closely and belittled her concerns (paragraph 7 of ET1 and paragraphs 15.4 A.5 of F&BP's)

185. We have found that Mrs Marshall did subject the Claimant to what the Claimant reasonably perceived as being intrusive and unpleasant questioning. Moreover, she did so having disguised the true reason for her visit.

186. We consider that the way Mrs Marshall conducted herself towards the Claimant on 21 October was objectively unfavourable treatment.

7.1.2 Place the Claimant in a capability procedure; (para 13 ET1)

187. Although the Respondent did not have a robust written procedure, it did manage the Claimants ill health by seeking to meet with her, requiring her to answer a written questions about the state of her health, referring her

to Occupational Health, and ultimately inviting her to a meeting at which the termination of her employment was to be considered.

188. We consider that that was, again, objectively unfavourable.

7.1.3 Failed to give the Claimant time and enough information following the medical capability meeting to consider her position regarding the part time work offer and how this would impact on her finances (para 2.5 F&BP's);

189. The Claimant said in outright and in unambiguous terms in the medical capability meeting that she could not afford to reduce her hours. In the circumstances, the question of giving her more time or more information did not arise. The Claimant cannot criticise either the information she was given, or the time available to her to consider the position, when she had indicated that she was closed-minded to the possibility of reduced hours.

190. It follows that this element of the claim fails.

7.1.3 On 25 March 2022 dismissed the Claimant (para 14 ET1 and 2.5, B.1, B.2;

191. It is common ground that this happened.

192. Dismissing the Claimant was, objectively, unfavourable.

7.1.5 Refuse to consider a psychiatric report concerning a diagnosis of PTSD (para 2.5 F&BP's);

193. The Claimant's psychiatric report had not been prepared as at the date of the Medical Capability Hearing. The Claimant did not suggest that she believed a psychiatric report was sought, either at dismissal or at appeal. In the circumstances, we do not consider that the Respondent could be said to have refused to consider a psychiatric report. In any event, we consider that the Respondent was entitled to rely on the OH report. The OH report did not suggest that any further input was required from either the Claimant's psychiatrist or GP. The OH report gave clear advice, and the Respondent was entitled to rely upon it.

194. This allegation was therefore not made out. It follows that it does not succeed.

7.1.6 Failed to provide HR support as opposed to EAP referral (paras 9, 10 and 13 ET1 and 15.5 F&BP's);

195. Again, we consider that this was based on a misunderstanding about the role and purpose of HR. What emerged in the Claimant's evidence was that what she really wanted was advice about her own position, whether

from the CAB, a solicitor or an advice centre. The Respondent did have HR support in place, from Pensinsula. So, we do not consider that the Respondent could be said to have failed to have put HR support in place.

196. This allegation was therefore not made out. It follows that it fails.

7.1.7 At the appeal hearing on 20 April 2022, refuse to discuss the Claimant's appeal points and asked the Claimant about matters she had not prepared to discuss (paragraph 15 ET1);

197. The notes of the appeal meeting record that there was discussion of the Claimant's appeal points. They further recorded that the Claimant was given the opportunity to raise anything else she wanted to raise, and to say if anything had changed that needed to be taken into consideration. While there was no detailed discussion of the possibility of alternative work or reduced hours, the Claimant had the opportunity to raise it. The minutes recorded that the focus of the Claimant's attention was on achieving what she described as a "fair outcome"; that is, some sort of exit package that went beyond the statutory minimum. In respect of the of the discussion about points in the document the Claimant submitted with her appeal letter, which went to the subject of a "fair outcome", the Claimant ought to have anticipated that they would be discussed at the meeting since she had submitted that document with her appeal letter.

198. We therefore conclude that this allegation was not made out. It follows that it fails.

7.1.8 Failed to address appeal points in the outcome letter (3 May 2022) (para 15 ET1).

199. The appeal outcome letter did fail to address the possibility of alternative work or reduced hours. Given that the focus of the way the Claimant presented her appeal was somewhat different, we find that is unsurprising. The outcome letter was focused on what was discussed at the meeting; we find therefore that the failure to mention the possibility of alternative work or reduced hours did not constitute unfavourable treatment in the circumstances.

200. It follows that this allegation does not succeed.

7.2 Did the following things arise in consequence of the Claimant's disability:

201. We next consider the things said to arise in consequence of the Claimant's disability.

7.2.1 An inability to withstand detailed questioning at lengthy meetings;

202. There was limited medical evidence before us. The Claimant's impact statement did not assert that that was a symptom or that it arose in

consequence of her disability. We are not satisfied on the evidence before us that that this is something which arose in consequence of the Claimant's disability.

7.2.2 The Claimant's sickness absence;

203. It is common ground that the Claimant's sickness absence arose in consequence of her disability.

7.2.3 A need for additional time and support to process and consider information provided at meetings;

204. There was no direct evidence that this was a symptom or that it arose in consequence of her disability; either by way of medical evidence or in the Claimant's impact statement. We are not satisfied on the evidence before us that it arose in consequence of the Claimant's disability.

7.2.4 A difficulty in building relationships of trust.

205. The Claimant's evidence in her impact statement went into this in some detail. Her evidence in that regard was unchallenged. We find that the Claimant did have difficulty in building relationships of trust, and that this arose in consequence of her disability.

7.3 [Was the unfavourable treatment because of any of those things? / Did the Respondent [e.g.] dismiss the Claimant because of [e.g.] that sickness absence]?

206. We then consider, in respect of the three allegations which we have found constituted unfavourable treatment, whether they were because of something arising in consequence of the Claimant's disability.

7.1.1 On 21 October 2021 subject the Claimant to a two hour meeting where she was questioned closely and belittled her concerns (paragraph 7 of ET1 and paragraphs 15.4 A.5 of F&BP's)

207. The reason the meeting occurred was partly because the Claimant had said she was considering leaving the Respondent's employment, but mostly to prevent her from speaking to the plumber. Neither of those things arose in consequence of the Claimant's disability. Putting it another way, neither the Claimant's sickness absence nor her difficulty in building relationships of trust be said to be in any way causally linked to the meeting with Mrs Marshall.

208. It follows that this aspect of the claim fails.

7.1.2 Place the Claimant in a capability procedure; (para 13 ET1)
7.1.4 On 25 March 2022 dismissed the Claimant (para 14 ET1 and 2.5, B.1, B.2;

209. We deal with these two allegations together. Both were because of the Claimant's sickness absence. The sickness absence arose in consequence of the Claimant's disability.

210. We therefore consider the question of objective justification.

7.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

7.4.1 Engaging the Claimant in discussions to develop an appropriate response to enable a return to work;

7.4.2 Running an efficient service and requirements of the business.

211. The Respondent's principal aim was running and efficient service and the requirements of the business. We are satisfied that that is a legitimate aim for the Respondent to pursue.

212. We have carefully considered whether firstly engaging in the capability procedure, and then dismissing the Claimant, were proportionate. In that regard:

212.1. The Claimant had been off sick for five months at the time of the medical capability meeting,

212.2. She had previously had a period of eight months sickness absence, followed by a lengthy and protracted phased return to work process.

212.3. She had only returned to full work for less than two months between her two periods of sickness absences.

212.4. The OH advice (with which she did not disagree) was that she would be unable to return to work for the foreseeable future, which was said to be three to six months.

212.5. The Claimant had indicated to the Respondent that she was not open to reducing her hours work or job-sharing.

212.6. The Claimant was in a critical role for the functioning of the Respondent, in particular as it sought to increase use of the facilities post-COVID.

212.7. The Respondent was a very small, charitable organization, so the loss of the Claimant would be felt more keenly.

212.8. The Respondent had sought to explore the possibility of adjusting the Claimant's role, but the Claimant was not open to reducing her hours of work (which would have been required in order to adjust or reduce her role).

212.9. Set against that of course, the Claimant had 18 years service, and a great deal of knowledge and experience of the operation of the theatre and community centre.

213. Weighing all of that up, we consider that managing the Claimant through the process that they did, and subsequently dismissing her, were proportionate in all of the circumstances. Put simply, the Respondent needed someone to do the Claimant's job, and there was no sign that the Claimant would be able to do so in the foreseeable future.

214. It follows that the claim of discrimination arising from disability fails and is dismissed.

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

215. We turn next to the complaint of failure to make reasonable adjustments. The Claimant relies upon three provisions, criteria or practices (PCPs). Taking each in turn:

8.2.1 Non provision of HR Services to support staff instead offering an EAP programme;

216. It is common ground that this was applied to the Claimant, in that she was not provided with direct HR support. The Respondent did not provide HR support directly to its staff.

217. However, we do not consider that it put the Claimant at a substantial disadvantage compared to someone without her disability. Again, in our view this was based on a misunderstanding by the Claimant of the purpose and function of HR. We do not consider that the failure to provide HR services directly to the Claimant could be said to have put her at a disadvantage compared to someone who did not share her disability.

218. It follows that this element of the claim fails.

8.2.2 A policy of not audio recording formal meetings;

219. The Respondent did have a practice of not audio recording formal meetings. It applied that to the Claimant, in that she was not permitted to audio record the Medical Capability Hearing.

220. The Claimant's evidence in her impact statement focused heavily on what was, effectively, a degree of paranoia arising from her psychosis. Her evidence in that regard was unchallenged. In light of that, we conclude that the Respondent's offer to take minutes would not have satisfied the Claimant; she would not have trusted the minutes. Indeed, that distrust was borne out to a degree by the number of changes she made to the draft minutes in due course. We consider that the failure to allow her to record the meeting did put her at a substantial disadvantage in terms of her trust in the process, when compared to someone who did not share her condition.

221. We have found that the Claimant did not explain to the Respondent why she wanted to record the Medical Capability Hearing. The Claimant did not suggest in her evidence that the Respondent was or ought to have been aware of the contents of her impact statement while she was in employment. The duty to make reasonable adjustments only arises where the Respondent is aware, or ought reasonable to have been aware, that the Claimant would be placed at the disadvantage. We find that the Respondent was not aware that the Claimant would be inclined to distrust the minutes because of her mental health. She had not explained that to them, and it was not mentioned in the Occupational Health advice. We further find that

the Respondent did not have constructive knowledge. Between what the Claimant had told the Respondent, and what was written in the fit notes and Occupational Health advice, there was no suggestion that the Claimant's psychosis would cause her to distrust the minutes taken by the Respondent.

222. It follows that this element of the claim fails, because the Respondent did not have the necessary knowledge that the Claimant would be put at a substantial disadvantage.

8.2.3 A requirement to sustain regular attendance at work.

223. The final PCP was the requirement to sustain regular attendance at work. It was common ground that this was applied to the Claimant.

224. Self-evidently, it put her at a substantial disadvantage because of her disability, because she had lengthy periods of sickness absence caused by her disability. Furthermore, the Respondent knew that the Claimant was likely to be placed at a disadvantage, because they were aware that she had a heightened rate of absence due to her disability.

225. It follows that the Respondent was under a duty to make reasonable adjustments.

226. The adjustment suggested by the Claimant in respect of this PCP was providing information about part-time working or alternative roles. On the facts as we have found them, the Claimant was not open to those possibilities. It was not unreasonable for the Respondent not to consider them further in light of the clear steer they were given by the Claimant.

227. One step the Respondent could have taken, although not captured in the List of Issues, was extending the period of time it would wait for the Claimant to be well enough to return to work. In that regard:

227.1. The Claimant had been off sick for five months at the time of the medical capability meeting,
227.2. She had previously had a period of eight months sickness absence, followed by a lengthy and protracted phased return to work process.
227.3. She had only returned to full work for less than two months between her two periods of sickness absences.
227.4. The OH advice (with which she did not disagree) was that she would be unable to return to work for the foreseeable future, which was said to be three to six months.
227.5. The Claimant had indicated to the Respondent that she was not open to reducing her hours work or job-sharing.
227.6. The Claimant was in a critical role for the functioning of R, in particular as it sought to increase use of the facilities post-COVID.
227.7. The Respondent was a very small, charitable organization, so the loss of the Claimant would be felt more keenly.

228. Taking all of that into account, we conclude that it would not have been reasonable for the Respondent to have waited longer than they did. The effect of not having someone in the Claimant's role was too significant. Therefore the Respondent did not fail to make reasonable adjustments.

229. It follows that the complaint of failure to make reasonable adjustments fails and is dismissed.

Unfair Dismissal

230. We start by considering the reason for the Claimant's dismissal. We are satisfied that the reason for the dismissal was the Claimant's capability to undertake her role, give her long-term ill health. The Claimant had been absent for five months, with no return predicted in the foreseeable future. That is, in our judgment, the real reason why the Claimant was dismissed.

231. Capability is, of course, a potentially fair reason for dismissal. We then turn to consider whether the Respondent acted reasonably in all of the circumstances in treating it as sufficient reason to dismiss the Claimant.

232. In that regard:

232.1. We are satisfied that the Respondent had a genuine belief that Claimant was not capable of performing the role. The Respondent had sought OH advice. The advice received was clear and unambiguous, that the Claimant would remain incapable of undertaking the role for three to six months. The Claimant did not suggest that was inaccurate. We are satisfied that the Respondent's belief in the Claimant's incapability was genuine, and that it had reasonable grounds for that belief.

232.2. In terms of consultation, Mrs Horrocks and Ms Marshall met with the Claimant before making the decision to dismiss her. Mrs Horrocks had tried to meet with the Claimant earlier in her absence but had been unable to do so. The Claimant had had sight of the OH report before the meeting. She was warned that the outcome of the meeting may be dismissal. She was able to make representations about the potential dismissal before any decision was taken. For those reasons, we conclude that the Respondent adequately consult with the claimant before reaching the decision to dismiss her.

232.3. Turning then to the investigation carried out by the Respondent, the Respondent sought OH advice. The advice received was clear and unambiguous. They were entitled to rely on that advice, which came from an expert in workplace health. The Claimant was given the opportunity to comment on that advice. She did not suggest, in either the Medical Capability Meeting or the Appeal Hearing, that the OH advice was inaccurate or could not be

relied upon. We conclude that the Respondent carried out a reasonable investigation.

232.4. In terms of whether the Respondent could reasonably have been expected to wait any longer, we bore in mind the same factors as we considered in respect of the objective justification defence (see paragraph 212 above). Weighing those factors up, we do not consider that the Respondent could reasonable have been expected to wait any longer.

233. We then take a step back and look at the dismissal in the round. We bear in mind that we are not deciding what we would have done as a Tribunal. We are deciding whether what this Respondent did fell within the range of reasonable responses open to a reasonable employer.

234. We could not, on the evidence before us, make any direct finding about whether the Respondent caused the Claimant's sickness absence. We bear in mind that the Claimant's understanding was that her ill health had been caused initially by the flooding. We can entirely see why she would have found dealing with that to be extremely difficult. Of course, that is not the same thing as saying that the Respondent caused the ill health. But even if the Respondent had been entirely responsibility for the Claimant's ill health, we do not consider that that would have made it unreasonable for them to dismiss her when they did. In coming to that conclusion, we bear in mind the small size of the Respondent, and the pressing need to have someone doing the Claimant's role.

235. In terms of the process followed by the Respondent, we would not say that it was a counsel of perfection. As we have already said, we considered the list of questions sent to the Claimant in the early part of her sickness absence to be poor practice. And it was of some concern that Ms Marshall appeared not to have understood from the OH report that the Claimant had a disability within the meaning of the Equality Act 2010. But overall, bearing in mind the size and administrative resources of the Respondent, we consider that the process followed and the outcome reached fell within the range of reasonable responses open to a reasonable employer.

236. It follows that the complaint of unfair dismissal fails and is dismissed.

<u>Redundancy payment</u>

237. We have found that the reason the Claimant was dismissed was her capability.

238. There was no reduction in requirement for employees to do work of the kind that she was employed to do. Although the Respondent sought to rearrange things after her dismissal, that was not their initial plan. The bottom line was that the Claimant was not dismissed because her role was

not needed. Rather, she was dismissed because her role was urgently needed by the Respondent.

239. It follows that the redundancy payment claim fails and is dismissed.

10. Holiday Pay (Working Time Regulations 1998)

10.1 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

240. The Respondent's position was that the Claimant's annual leave had been correctly paid by the two payments made following termination (although no calculation was provided). The Claimant's position was that she had been underpaid by three days. Prior to hearing submissions, we explained to the parties that we proposed to calculate the Claimant's accrued annual leave ourselves based on the facts as we had found them to be, since given the nature of the dispute it was not possible to deal with liability separately from remedy. Neither party took issue with that.

241. The Claimant's annual leave year was 1 April to 31 March. She was dismissed on 25 March 2022. So, she had effectively accrued a whole year's annual leave at the point of dismissal.

242. The Claimant's annual leave entitlement was 24 days plus 8 bank holidays – a total of 32 days per year. Insofar as there was a reference to her annual leave on termination being calculated based on 25 days per year, we consider that that was simply an error.

243. The Claimant had been permitted to carry over 15 days from 2020/21, so her total annal leave for the 2021/2022 leave year was 47 days.

244. On the Claimant's evidence, she had taken 16.5 days annual leave. The Respondent did not suggest that that figure was inaccurate. She had also had 5 bank holidays – the first four Bank Holidays of the year occurred when the Claimant was on furlough and unwell, and was being paid 100% of her salary. The Claimant had not ever requested that those days be treated as anything other than Bank Holidays, on which she would be deemed to have taken annual leave. We therefore consider that they were taken as annual leave. There was a further bank holiday on 30 August 2021, after Claimant had returned to work. Again, that constituted one day's annual leave.

245. That gave a total of 21.5 days leave taken at the point of termination. Subtracting that from the 47 days accrued left 25.5 days accrued but untaken. At the Claimant's (gross) daily rate of £76.44 per day, that gave a total of £1,949.22.

246. The Claimant was paid a total of £1,719.90 for accrued but untaken annual leave on termination (£1,051.05 initially, plus a further £688.85). It

follows that she was underpaid for accrued but untaken annual leave by the sum of £229.32 (equivalent to three days pay).

247. It follows that this aspect of the claim succeeds. We find in favour of the Claimant, and the Respondent must pay the Claimant the sum of £229.32.

248. We should say, for the avoidance of any possible doubt, that we do not consider that the underpayment was attributable to anything more than a calculation error, based on a lack of familiarity with the correct method of calculating accrued annual leave on termination.

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Employment Judge Leith

Date – 31 October 2023

REASONS SENT TO THE PARTIES ON 1 November 2023

FOR THE TRIBUNAL OFFICE Mr N Roche