



WRITTEN REASONS - LIABILITY

EMPLOYMENT TRIBUNALS

Claimant: Miss H Thomas

Respondent: T&R Direct Insurance Limited

Heard at: Southampton ET

On: 16, 17, 18, 19 October 2023

Before: Employment Judge Horder, Ms C Date, Mr K Sleeth

Appearances

For the Claimant: Unrepresented

For the Respondent: Mr A Williams, solicitor

JUDGEMENT ON LIABILITY

The unanimous judgement of the Tribunal is that:

1. The Claimant was constructively dismissed and her dismissal was unfair.
2. The Claimant's claim of discrimination arising from disability (Equality Act 2010, section 15) is well founded and succeeds in respect of the allegations at paragraph 1 a, b, c, and f in the amended list of issues.
3. The Claimant's claim of harassment related to disability (Equality Act 2010, s.26) is well founded and succeeds in respect of allegations at paragraph 1 a, b, c, and f in the amended list of issues.

REASONS – LIABILITY

Preliminary and Case Management

Reasonable adjustments

1. The Claimant indicated in writing to the Tribunal that she experienced ongoing depression and anxiety and requested regular breaks. This was discussed at the start of the hearing and the Claimant agreed to and did indicate when she would like breaks. As a result, breaks were taken regularly during the hearing.

2. On the afternoon of day 2, prior to the cross-examination of the Respondent's Director Lee Taylor, the Claimant indicated through court staff that she was feeling too unwell to continue. The Tribunal adjourned for an hour before hearing from her partner David Mallet who indicated that she still felt unable to continue. Before the Tribunal adjourned until 10am the next day, a discussion was held about alternative ways that the Claimant could cross-examine Mr Taylor. These included (with the Respondent's agreement) putting questions in writing and/or having her partner David Mallet ask questions. On the morning of day 2 the Claimant confirmed that she was in fact willing and able to continue. She started cross-examination of Mr Taylor before then handing over to Mr Mallet.

List of issues

3. A list of issues had previously been agreed and recorded in the Case Management Order of Employment Judge Craft dated 25.5.23. However, after initial reading of the Claimant's ET1 and the parties' witness statements, the Tribunal asked both parties whether the list of issues properly reflected the key issues in the case. In particular, there was agreement between the parties that the Claimant had been off work for about 8 weeks as a result of her disability. Whilst the list of issues included direct discrimination, the Claimant appeared to also be arguing that she suffered determinantal treatment thereafter as a result of the fact that she had been off work for 8 weeks, increasing the work load of others and impacting how she was both viewed and treated.
4. The Claimant agreed that her claim included a claim of discrimination arising from her disability under s.15 of the Equality Act 2010 and asked the Tribunal to add that claim to the list of issues. The Respondent initially objected to any amendment on the grounds that it was far too late and not the basis on which they had prepared for the hearing. However, during submissions Mr Williams accepted that dealing with a s.15 claim did not in fact require or necessitate any further, new or different evidence from the Respondent. The factual disputes in the case remained the same. Further, he conceded that amending the List of Issues to include consideration of discrimination arising from the Claimant's disability would not lead to any identifiable prejudice to the Respondent.
5. The Tribunal had regard to *Mervyn v BW Controls Ltd [2020] EWCA Civ 393* and *Parekh v London Borough of Bren [2012] EWCA Civ 1630*. In *Parekh* Mummery LJ observed: *"If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v English Heritage [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances."*
6. Further, in *Mervyn*, Bean LJ suggested that *"It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties*

unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice.”

7. The Tribunal concluded that it was in the interests of justice to amend the previously agreed list of issues under Rule 29 to include reference to a claim under s.15 Equality Act 2010 (as set out below). Such a potential claim was clearly apparent from both the Claimant's ET1 and the subsequent evidence exchanged in this case. The Claimant has been representing herself throughout and, as was conceded, such a claim does not give rise to any new or different evidential disputes between the parties. The Respondent did not identify any material prejudice that amending the list of issues would in fact cause. Further, the Respondent did not seek to argue that either an adjournment or further evidence would be required.

Evidence via CVP

8. At the start of the hearing the Claimant made an oral application for the witness Daniel Handley to give evidence via video (CVP) due to the fact it was proving difficult for him to get the time off work to attend in person. The Respondent did not object to the application. The Tribunal allowed the application, concluding that doing so was consistent with the overriding objective and matters set out in Rule 2(b)(c)(d) and (e) of the Tribunal Rules.

Claims and Issues

9. By way of ET1 Claim form dated 3.10.22 the Claimant complained of i) constructive unfair dismissal, ii) discrimination on the grounds of disability and ii) harassment related to her disability.
10. The Claimant began working for the Respondent, an insurance broker, on 2.3.20. It was agreed between both parties that she was, for the purposes of s.6 Equality Act 2010 and Schedule 1, disabled by reason of anxiety and depression from 11.4.22 to the end of her employment on 26.8.22.
11. The Claimant's case was that she was signed off sick between 11.4.22 to 9.5.22 as a result of her disability. When she returned to work she claims that the behaviour of the Respondent towards her changed. In particular, the two directors Justin Ward and Lee Taylor subjected to her less favourable, discriminatory treatment and bullied and harassed her because of her disability.
12. As result of such treatment she was signed off work with depression and anxiety on 12.7.22. She resigned (giving 1 months' notice) on 24.7.22.
13. The Respondent's case was that they did not subject her to any less favourable treatment nor did they bully or harass her. Further they asserted that they did not know and could not reasonably have known that she suffered from a disability prior to return to work meeting on 9.5.22.

14. The list of issues agreed between the parties (and then as amended at the start of the hearing as set out above) was as follows:

Constructive unfair dismissal

1. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express term of the contract relating to her pay and the implied term of mutual trust and confidence. The breaches alleged to have occurred after her return to work on 9 May 2022 are as follows:
 - a. Mr Ward shouted at her on several occasions;
 - b. Mr Taylor continually disagreed with what the Claimant said and demeaned her in front of other staff and no longer valued her input and suggestions as he had done before her sickness absence;
 - c. Mr Taylor accused her of finding excuses avoid working properly and efficiently;
 - d. the Respondent paid her only SSP during her sickness absences;
 - e. the Respondent revoked a bonus payment to which the Claimant was entitled;
 - f. the Respondent refused to deliver a script and headset to her when she was working from home; and
 - g. after 9 May 2022 the Respondent's Directors imposed further work responsibilities on her causing stress to her and did not implement a further pay rise increase which in February 2022 they had promised she would receive later in the year.
2. The Tribunal will need to decide:
 - a. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
 - b. Whether it had reasonable and proper cause for doing so.
3. Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
4. Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
5. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

Direct disability discrimination (Equality Act 2010 section 13)

6. Did the Respondent do the following things:

- a. The conduct and actions referred to above at 1 a to g.
7. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she 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 and therefore relies upon a hypothetical comparator.
 8. If so, was it because of disability?
 9. Is the Respondent able to prove a reason for the treatment occurred for a non- discriminatory reason not connected to disability?
 10. Was the treatment a proportionate means of achieving a legitimate aim?
The Respondent says that its aims were:
 - a. To manage its business fairly and effectively.
 11. The Tribunal will decide in particular:
 - a. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - b. Could something less discriminatory have been done instead;
 - c. How should the needs of the Claimant and the Respondent be balanced?

Discrimination arising from disability (Equality Act 2010 section 15)

12. Did the respondent treat the claimant unfavourably by:
 - a. The conduct and actions referred to above at 1 a to g.
13. Did the following things arise in consequence of the claimant's disability:
 - a. The Claimant's sickness absence between 11.4.22 – 9.5.22?
14. Was the unfavourable treatment because of any of those things?
15. Was the treatment a proportionate means of achieving a legitimate aim?
The Respondent says that its aims were:
 - a. To manage its business fairly and effectively.
16. The Tribunal will decide in particular:

- a. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - b. Could something less discriminatory have been done instead;
 - c. How should the needs of the claimant and the respondent be balanced?
17. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Harassment related to disability (Equality Act 2010 s. 26)

18. Did the Respondent do the following things:
- a. The conduct and actions referred to above at 1 a to g.
19. If so, was that unwanted conduct?
20. Did it relate to the Claimant's protected characteristic, namely disability?
21. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
22. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Remedy

Unfair dismissal

23. The Claimant does not wish to be reinstated and/or re-engaged.
24. What basic award is payable to the Claimant, if any?
25. 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?
26. If there is a compensatory award, how much should it be? The Tribunal will decide:
- a. What financial losses has the dismissal caused the Claimant?
 - b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - c. If not, for what period of loss should the Claimant be compensated?
 - d. 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?
 - e. If so, should the Claimant's compensation be reduced? By how much?
 - f. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?

Discrimination

27. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
 28. What financial losses has the discrimination caused the Claimant?
 29. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
 30. If not, for what period of loss should the Claimant be compensated for?
 31. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
 32. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
 33. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
 34. Should interest be awarded? How much?
15. It was agreed between the parties and Tribunal that the Tribunal would first deal with and give judgement on liability before then considering remedy if necessary.
16. However, whilst issues relating to the principles set out in *Polkey v AE Dayton Services Ltd [1987] UKHL*, those of contributory conduct under s.122(2) of the EA 1996 and whether either party unreasonably failed to follow the ACAS Code of Practice on Discipline under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) would only arise if the Claimant's claim succeeded, the Tribunal indicated that it would deal with the issues set out at paragraphs 20, 21 d,e,f and 28 of the list of issues at the initial liability stage. Both parties agreed to proceeding in that way.

Evidence

17. The Tribunal was provided with an agreed evidence bundle totalling initially 173 pages. However, at the start of the hearing the Claimant sought to add further pages (paged 174 to 193) that had either been left out of the bundle or previously poorly photocopied. The Respondent did not object and the Tribunal agreed to add such pages. The Claimant also sought at the start of the hearing to rely on a supplementary bundle [hereafter 'Bundle 2'] totalling some 21 pages and titled "Further evidence with the duty of full continuing disclosure". Again, the Respondent did not object and the Tribunal agreed to admit such further evidence.

18. The Tribunal heard live evidence from the Claimant, her partner David Mallet and a former employee of the Respondent Daniel Handley. The Respondent called two directors namely Justin Ward and Lee Taylor.

Findings of Fact

19. The following findings of fact were made on the balance of probabilities. Findings were limited to matters relevant to determine the key issues between the parties.
20. In making the findings set out below the Tribunal had regard to the witness statements, the agreed bundles of evidence and the oral evidence given during the hearing.
21. The Respondent is a relatively small family run and owned insurance broker. When the Claimant first started working for the Respondent on 2.3.20 her job title was Commercial Administrator. Despite having to contend with challenging events in her home life, it was common ground that she was good at her job and initially well regarded by the Respondent. There was also unchallenged evidence that on occasions she had worked unpaid overtime and that she had also been permitted to work from home when she had requested to or had needed to. It was clear from the evidence that the Claimant had been highly motivated and had enjoyed her job.
22. On 2.2.21 the Claimant was promoted to Commercial Manager. The Tribunal did not accept either Justin Ward's or Lee Taylor's oral evidence that there was no such promotion and that the Claimant instead remained a "probationary supervisor" until her resignation.
23. The Claimant's account of her promotion was not challenged by the Respondent in cross-examination. Further, she was able to point to her LinkedIn post-dated 13.10.21 displaying her "Commercial Manager" business card [Bundle 2, p.3] and her Broker Expo business pass with the same job title on it [bundle 2, p.5].) When cross-examined, Lee Taylor sought to explain both documents by saying that they had been made up solely for the Claimant's use at the Expo and that they did not reflect her true job title. However, again, this was not something that the Claimant was challenged about when cross-examined and was not an explanation that, on the balance of probabilities, the Tribunal accepted. Had the Claimant in fact been asked to simply masquerade as a manager that is something that she would have been likely to have raised as an issue or complaint when the relationship between her and the Respondent broke down. Further, the Tribunal concludes that she would not have advertised her promotion proudly on LinkedIn had she not been promoted.
24. Prior to the events described below, the relationship between the Claimant and Respondent was a good one. The Claimant had previously had to take time off work [as set out at Bundle 1 p.71] for reasons relating to her private home life. However, the fact that she had done so had not caused any difficulties at work. She had shared openly the details of adverse events in her private life with the directors Justin Ward and Lee Taylor and, as she put in her witness statement, was of the view that they treated her up "like family".

25. There were a number of occasions when the Claimant had been able to work from home without issue. One example was on 17.1.22 when she tested positive for covid and her script, folder and headset were delivered to her without difficulty or fear of infection by the person delivering it to her (as demonstrated by the WhatsApp messages at Bundle 1, p.181). Another was on 3.5.21 (as demonstrated by the WhatsApp messages at Bundle 1, p.178).
26. Up until the end of 2021 the Claimant had been managing a team of three, handling the 'commercial' side of the business. In late 2021 one member of the team left followed by, in February 2022 another (Jodie Dell). That meant that the Claimant was left as the only dedicated member of the commercial team. Whilst attempts were made to recruit other members to her team they had proven unsuccessful, with one new member only staying with the Respondent for 2 weeks before having his employment terminated. Both Mr Ward and Mr Taylor would assist the Claimant and commercial team but had other significant responsibilities across the business as Directors.
27. The Tribunal accepted that as a result of the departures of other staff the Claimant's work load increased significantly. She had to in effect try to do work previously done by a team of four (including her). As well as selling and renewing insurance policies she also had to do further administrative tasks on top.
28. Between 11.4.22 and 9.5.22 the Claimant was off work as a result of her mental health. This was not in dispute between the parties. The 'fit notes' included in the bundle refer to her "low mood" during this period.
29. The Respondent also accepted that the Claimant was disabled within the definition in s.6 and schedule 1 of the Equality Act 2010 by reason of her anxiety and depression from 11.4.22 onwards.
30. However, both Justin Ward and Lee Taylor told the Tribunal that prior to the Claimant's return to work on 9.5.22 they had been unaware that she suffered from difficulties with her mental health.
31. The Tribunal was unable to accept their evidence on that point, Justin Ward and Lee Taylor either did know or deliberately and consciously chose to ignore her illness. There was a wealth of evidence that contradicted the evidence of both Mr Ward and Mr Taylor on this point namely:
 - a. On 12.7.21 the Claimant messaged Lee Taylor saying "*my panic attacks are really quite bad. I've been without medication for a week and it's a bit of a downhill spiral. Can I get a call back from doctors and leave my phone on your desk today please. Just quietly get my head down today I think*". Mr Taylor replied "*no probs*" [Bundle 1, p.179]
 - b. On 31.12.21 the Claimant sent to Lee Taylor a screen shot of an appointment with steps to wellbeing with the message "*I'll be on a late that day but to let you know I've had a referral to the mental health team*" [Bundle 2, p.7]

- c. On 9.3.22 the Claimant messaged Lee Taylor stating *“Just be aware I’m in a very dark place at the moment and I keep crying”* [Bundle 2, p.9]
 - d. On 7.4.22 the Claimant messaged Ryan Taylor (Lee Taylor’s son whom Mr Ward described in his oral evidence as the Claimant’s line manager) as follows: *“Hi mate I’m not going to be in today. I self-harmed last night. I’m waiting for a call back from my doctor. I’m at rock bottom and I really don’t know what to do. I know this is gonna put me on a warning but I physically and mentally can’t deal with my life. It shouldn’t be this hard. I don’t want to be signed off because I don’t want to let you all down but I need help. I know it and so does your dad xx”* [Bundle 1, p.184]
 - e. On 10.4.22 the Claimant again messaged Ryan Taylor: *“Hey mate I had bit of a breakdown. They have altered my medication, will take week or so to take effect. Doctor suggested I sign off for 4 weeks but I declined....”* [Bundle 1, p.184]
 - f. The evidence of David Handley that the Claimant disclosed that she suffered from a multitude of mental health issues at the initial interview stage.
 - g. The evidence of David Handley that he had discussed the Claimant’s mental health with both Justin Ward and Lee Taylor on multiple occasions.
32. The Respondent company is not a large one. It is a small family owned and run company and the Tribunal concluded that it was more likely than not that any important and sensitive information about an employee provided to those in leadership positions would be shared and made known to other directors/managers.
33. The thrust of the Claimant’s claim was that when she returned from that period of absence caused by anxiety and depression the Respondent’s attitude, and in particular the behaviour of Justin Ward and Lee Taylor, changed towards her. She alleged that as a result of her mental health difficulties and time off work she was regarded as a burden or “problem” (as she put it in closing) rather than an asset. Instead of supporting her the Respondent treated her unfavourably to the extent that she was unable to continue to face working for them and had no option but to resign.
34. She pointed not just to her absence from work between 11.4.22 – 9.5.22 but also to later evidence of her mental health difficulties, for example an email she sent to Justin Ward and Lee Taylor referring to a mental health review on 15.6.22 [Bundle 1, p.134] and a message she sent to Ryan Taylor on 6.7.22 that referenced an eating disorder [Bundle 1, p.144].
35. Whilst the Tribunal addresses the Claimant’s specific allegations further below, the Tribunal was satisfied on the balance of probabilities that after the Claimant’s return to work on 9.5.22 the Respondent did treat her differently from how they had done before.

36. The Tribunal recognised that the Respondent was, during the relevant period, having to contend with the impact of covid and the fact that a number of important staff members had left. That inevitably placed demands on the Respondent and its Directors. The Tribunal also recognised that the Claimant did, both before and after 9.5.22 share details of her (at times) challenging home life with the Respondent. However, the Tribunal concludes that her lengthy absence from work played a significant part in the Respondent's (and in particular Mr Taylor and Mr Ward's) attitude towards her and their treatment of her following her return. As a result of her absence they regarded her as a far less useful and reliable member of staff. They were insensitive to her disability, regarding her mental health difficulties as something arising out of, and as something that should be confined to, her personal life.
37. In reaching that conclusion and the conclusions set out below, the Tribunal accepted the Claimant's evidence (unless otherwise indicated below). She gave what the Tribunal considered to be a measured and plausible account. She was able to say when asked in cross-examination if she did not know or was unsure of something. She was also willing to agree with points advanced by the Respondent when necessary. For example, she acknowledged that her absence from work caused the Respondent company difficulties. Rather than simply painting the Respondent and its directors in the worst possible light she also accepted and volunteered the positive things about them and the company (i.e. previously treating her like family, encouraging her to attend events like the Broker Expo, promoting her). She also had no hesitation in saying that she had liked and enjoyed her job Her account of some of the key events was also supported by contemporaneous or near contemporaneous WhatsApp messages [see further below].
38. On points of difference, the Tribunal did prefer the evidence given by the Claimant to that given by the Respondent's Justin Ward and Lee Taylor. The evidence given by both did contain inconsistencies and was, in a number of instances contradicted by or implausible in light of other documentary or contemporaneous evidence made available to the Tribunal.
39. For example, as set out already, Justin Ward's and Lee Taylor's evidence about when they first knew about the Claimant's mental health difficulties and their evidence about her promotion to manager was contradicted by other clear evidence contained within the bundle.
40. In respect of Lee Taylor's evidence there was also an obvious contradiction between the Respondent's grounds of response at paragraph 20 [*It is denied that Lee said to the Claimant she looked for reasons not to work*] and both paragraphs 12 to 13 of his witness statement (where he said the exact opposite). Further, the assertion made in the grounds of resistance was also contradicted by the actual minutes of that meeting on 6.7.22 [Bundle 1 p.145]. Whether Mr Taylor had told the Claimant that she had looked for reasons not to work was an important issue and point of difference in this case.
41. Mr Taylor's explanation for that contradiction was that the assertion at paragraph 20 of the Grounds of Resistance was simply a typo with "denied" being added

instead of “accepted”. However, that explanation was not accepted by the Tribunal. The remainder of that paragraph from the Grounds of Resistance does not make sense if there was such a typo. Further, the same phrase appears both in the original Grounds of Resistance and a later amended version.

42. There was another aspect of Lee Taylor’s evidence that the Tribunal had regard to when weighing up the accuracy and truthfulness of his evidence, namely paragraph 13 of his witness statement. There he detailed that as of 6.7.22, when he met with the Claimant to discuss her performance, she had an attendance deficit for the year of 572 hours. As a figure 572 hours absence appeared to be a significant and eye catching number.
43. However, as the Claimant’s cross-examination of Lee Taylor revealed such a figure was in fact wholly inaccurate and misleading. The report relied on by Lee Taylor to arrive at such a figure was in fact generated 2 weeks after the 6.7.22 meeting. It therefore took account of a further 2 weeks (so approximately 80 hours) when the Claimant was signed off from work due to ill health arising out of her disability. Further, the figures advanced by Mr Taylor failed to take account of any of the Claimant’s authorised absences, parental leave or annual leave. Whatever the true figure was, it was significantly below 572 hours.
44. In assessing the differences of fact between the Claimant and Respondent, the Tribunal also had available and placed weight on evidence from other sources other than the direct evidence given by the Claimant, Lee Taylor and Justin Ward.
45. In this regard the Tribunal heard and accepted the evidence of David Handley who gave live evidence via CVP. He had been an employee of the Claimant up until October 2021. In his evidence he made a number of serious allegations relating to the Respondent’s handling of staff and HR issues. His evidence included the following assertions:
 - a. The Claimant had disclosed that she suffered from a multitude of mental health issues at interview stage.
 - b. He (David Handley) had had multiple meetings regarding the Claimant’s mental health with both Lee Taylor and Justin Ward. Both had mentioned on a number of occasions that she was ‘faking’ her conditions to avoid work.
 - c. Meeting minutes were often manipulated after the event to avoid any “come back”.
 - d. He witnessed both intimidation and bullying from both directors.
 - e. He had been coached by Lee Taylor and Justin Ward on how to make someone resign rather than ending their employment as it would be less complicated if the member of staff ever disputed the dismissal.
46. The Tribunal found Mr Handley a candid and straightforward witness who volunteered when he could not remember something or he was unsure of detail. He fairly conceded when it was put to him by the Respondent’s solicitor that he could not point to any documentary records of the conversations he had with Lee Taylor and Justin Ward about the Claimant. Significantly, he also stated in his evidence that he had never in fact been particularly close to or had got on with the Claimant. That was unchallenged by the Respondent. Further, whilst Justin Ward

accused him in his own oral evidence of being a disgruntled ex-employee who had resigned whilst facing the prospect of disciplinary action, nothing of the sort was ever put to or suggested to Mr Handley in cross-examination.

47. The Tribunal also had regard to other evidence of the Respondent's attitude towards staff members. Included within the agreed bundle [Bundle 1, p.101] was a staff meeting with Jane Watkins, another staff member dated 22.10.21. In those minutes Justin Ward is recorded as making the following observations;

"Justin told Jane she always comes into the office with a miserable outlook and attitude that brings the whole atmosphere down"

"Justin said he does not pay staff to come into the office being miserable"

"Justin said Jane needs to change"

"Justin has indicated that he and other staff can sometimes get the impression that Jane doesn't want to be here, Jane emphasised that this isn't the case and that she does want to be here but sometimes the mood of other staff members and how she spoken to impacts her own mood."

"Jane indicated that at times she doesn't feel part of the team and often feels excluded from conversations etc. Justin mentioned it could be because of her negative attitude. Justin told Jane to speak to Hayley if about concerns. Justin also mentioned if she wants to be part of the group, Jane should make a better effort to be included."

"all the relevant training have been given but silly mistakes were still happening...Justin explained Jane must start paying attention and being position to progress with RAW. Not only is it holding her back, it holds the business back"

"Jane needs to come back on Monday with an action plan"

"During this 121 Jane was told she had 2 weeks to improve"

"Justin told Jane she has until Friday 29.10.21 to show significant improvements. Justin explained to Jane if this was not the case, a further conversation would be held to consider a position within the company."

"Justin explained that the business cannot carry staff and continue to make excuses to partners for mistakes"

48. The above passages are selected extracts from a longer minute of a performance meeting and of course do not relate to this Claimant. Further Jane Watkins has not been called as a witness by either side. However, the Tribunal concluded that, on its face, that minute demonstrates an insensitive and uncompromising way of dealing with issues involving staff. Such management style, demonstrated here by Justin Ward, appeared to the Tribunal to be consistent with the attitude towards staff and HR matters that both Mr Handley and the Claimant detailed in their evidence. The Tribunal further observed that the above comments were ones that the Respondent chose to minute and they therefore appear not to have regarded them as improper.

49. When the Claimant returned to work on 9.5.22 a return-to-work interview was held and an accompanying form filmed out. That recorded *"reduced responsibilities, work closer with her and help build up her team. Hayley to communicate problems"* [Bundle 1, p.111].

50. As to her team, the Commercial side of the business was at the time solely her with support from Justin Ward and Lee Taylor when available. The Tribunal has not seen any evidence to suggest that the volume or work dealt with by the commercial team had reduced or diminished to any significant degree notwithstanding the reduction in staff numbers and the Claimant's absence from work.
51. Following her return from illness, the relationship between the Respondent and Claimant rapidly deteriorated.
52. Rather than simply setting out the events that follow, the Tribunal addressed the key factual allegations identified by the Claimant in turn (and set out in the list of issues at paragraph 1 a to g.) The allegations unfortunately do not flow or conform to a precise chronology/

1a) JW shouted at her on several occasions

53. The main allegation raised under this heading by the Claimant is that on 9.6.22 she advised Lee Taylor that due to a glitch in a computer system, policies sent out by Justin Ward were dated one day late. When Justin Ward overheard her, instead of speaking with her privately he shouted at her loudly in front of the office, causing her to be shocked and upset.
54. The Tribunal accepted that this incident took place as described by the Claimant. The Claimant's version of events was supported by a message she sent to her partner Mr Mallet that same day at 1307: "*...I walked out of the office in tears this morning, Karen convinced me to go back. It's just not a nice place to work and I know I just can't up and leave because of the kids and money. What Justin did I was warned would happen by previous managers so I kind of expected it but not nice being on the receiving end xx*". The Tribunal also noted that the Respondent chose not to rely on or adduce any evidence from Karen Taylor or indeed any other staff members who were in the office on that day.
55. In her oral evidence the Claimant also detailed another similar incident [set out at paragraph 44 of her witness statement]. She was overheard speaking to Lee Taylor about an issue relating to terms of business. Justin Ward reacted by shouting at the Claimant. Whilst the Claimant was unable to identify precisely when this happened (beyond after her return from work), again, on the balance of probabilities, the Tribunal accepted that there was a second such incident of her being shouted at work and in front of others by Mr Ward.

1 b) LT continually disagreed with what the Claimant said and demeaned her in front of other staff and no longer valued her input and suggestions as he had done before her sickness absence;

56. Here the Claimant alleged that Lee Taylor demeaned her in a variety of ways, signalling to her and others that he did not want her to be part of the Company anymore. This included what otherwise might have appeared as trivial matters such as disagreeing with her when she said she liked a song.

Comments about eating

57. However, it also included more serious allegations, namely Lee Taylor making repeated insensitive and inappropriate comments about her eating habits. These included repeated comments that she would be “the size of a house” if she did not stop eating. In this regard, on 16.6.22 the Claimant messaged her partner to say *“Lees got a new thing today making comments every time I eat something to the point I’ve not bothered eating my lunch. “I’m surprised you aren’t the size of a house the amount you eat” “you eating again” XX”* [p.193].

58. Lee Taylor denied making any such comments, adding that he had never used the phrase “size of a house”. However, the Tribunal again preferred the Claimant’s evidence here, finding that had the comments not been made she would have had no good reason at the time (June 2022) to message her partner detailing such behaviour. The reference to “Lee’s got a new thing” is significant, indicating to the Tribunal that this was part of a pattern of behaviour as described elsewhere by the Claimant.

Returning keys and laptop

59. The Claimant also stated that Mr Taylor ignored suggestions she made and that she had both her lap top and keys taken from her, again indicating to both her and others in this small, close knit family business that he did not want her there.

60. The Tribunal accepted the Claimant’s evidence that this was behaviour that had happened. In respect of the keys the Tribunal was unable to reach the conclusion that this was targeted or deliberate behaviour aimed at the Claimant.

61. However, in respect of the laptop, the Tribunal rejected Lee Taylor’s evidence that all staff laptops had had to be returned to do an update. The Claimant was during this period a manger working in an area that was chronically short staffed. Any update could have been planned or arrangements made for a replacement or alternative lap top.

62. The Tribunal also took into account the message that the Claimant sent to Lee Taylor asking for the return of her laptop on 10.6.22 *“Also can I have my laptop back please?? We are behind by about 15 renewals. Justin was stressed yesterday and I can sit and do this evening, I can bring it back Monday”* [Bundle 3p.21]. That message followed a request for the Claimant to work from home and then come into work late due to her son being unwell. The response from Lee Taylor was indicative of his attitude to the Claimant at that time: *“I will see you at 1pm I’m not happy as I’m sure you can understand, hope Lewis gets better”*. Nowhere is there reference in those messages (or indeed elsewhere) for the need for the Respondent to retain her laptop to update it [p.21].

63. The Claimant forwarded a screenshot of that message exchange on to a work colleague “Debs Work” who replied *“That’s Lee I assume?....trouble is your all they have...there lack of staff isn’t your issue...so now you’ll feel shit for being off xxx”* [p.191].

64. The Tribunal concluded that the taking of the Claimant's laptop was indicative of the Respondent's change in attitude to the Claimant working from home. Further it further hindered the Claimant's attempts to complete her work and manage a part of the business that was short staffed. The Claimant was offering to, and trying to keep working even when events outside her control prevented her physically coming into work.

Advertising alternative role

65. The Claimant additionally pointed to the fact that on 26.5.22 she saw an advert that Lee Taylor had posted for a new Commercial advisor with a salary range of £22,000 to £25,000. That was a more junior role and someone that the Claimant would end up managing. However, she was only earning £22,000 at the time and so it was a job being advertised at an equivalent or higher salary than hers. When she found out she messaged Lee Taylor expressing her unhappiness [p.126 bundle 1]: *"heads up I saw your job advert on indeed. Offering same salary as I am on for an advisor. As you can imagine I'm not happy. Yes I have my break down but I have always worked my arse off for T&R. I'll be honest I'm fed up of being a people pleaser. The way Adi spoke to me yesterday was a joke. I'll come to work and do my job but that is it now, I feel let down and I don't want to be there anymore."*
66. When the Claimant arrived at work the next day she was taken to a boardroom by Lee Taylor who told her how he was disgusted by the message she had sent and that she had always been supported and he would prefer that she left the business rather than have a bad attitude. This led to the Claimant backing down and apologising and she sent a further message later that day repeating the apology.
67. Lee Taylor stated in his evidence that the commercial advisor salary was in fact advertised with his approval on Indeed (a jobs website) with a salary range of £18,000 to £25,000 and not £22,000 to £25,000. Unfortunately, the only copy of the advert in the bundle is not of the advert in its original published form [p.59-60]. The message the Claimant sent to Lee Taylor after seeing it starts *"heads up I saw your job advert on indeed. Offering same salary I'm on for an advisor..."* [p.126] and goes on to say *"yes I had my breakdown but I have always worked my arse off for T and R"* [p.126].
68. In the absence of the original advert, the Tribunal accepts that the salary range may have been £18,000 to £25,000. However, both the fact that the Claimant had not been pre-warned of such an advert and the fact that the Respondent was advertising a more junior role in her team for a potential salary greater than hers is of note. The Tribunal concludes that it does demonstrate that Lee Taylor (and the Respondent) no longer valued the Claimant and were happy to undermine her.
69. Further, the Tribunal accepted the Claimant's account of the meeting that she had with Lee Taylor following her seeing that advert, namely that he told her that he was "disgusted with her" and that "if she had a bad attitude she should leave the business."

70. The context in which such comments were made is also relevant. The Claimant had only recently returned from 8 weeks absence due to her mental health difficulties. She had referenced those difficulties again in her message to Lee Taylor [dated 26.5.22, p.126]. She was managing an under-resourced team. With no notice or consideration of the impact on her, the Respondent advertised a more junior job for a potentially higher salary. The fact that she was then rebuked when she complained and told to leave if she had a bad attitude again demonstrates an approach to her and her circumstances.

Further allegations under this heading

71. The Claimant also relies under this heading on the fact that after 10.6.22, Lee Taylor was constantly browbeating her and disagreeing with anything she said. He made her feel uncomfortable as a result.

72. Whilst that allegation and all such allegations under this heading are denied by Lee Taylor, the Tribunal again accepts and prefers the evidence given by the Claimant. The Tribunal accepts that his behaviour towards her did change and created an unpleasant and unwelcoming work environment, signalling to her that she was no longer a valued employee. Such an attitude towards her is further evidenced by the meeting he had with her on 6.7.22

1c) Mr Taylor accused her of finding excuses to avoid working properly and efficiently;

73. This allegation is closely related to 1 b) above.

74. The Claimant pointed to and relied on the minutes of the meeting that she attended on 6.7.22 with Lee Taylor. The minutes were written up after the event by Mr Taylor [Bundle 1, p.145]. The Respondent did not ask anyone else to attend or independently minute what was a significant meeting that was called to discuss the Claimant's performance less than 8 weeks after her return to work meeting had been held.

75. The minutes of this meeting start with the following: "LT [Lee Taylor] asked HT [Claimant] what was going on with her as HT isn't the same as she was last year".

76. There then followed the Claimant detailing a list of serious and sensitive difficulties relating to her private life. The minutes then recorded the following:

- a. *"LT asked HT if she should be at work, given her current situation and HT said that she loves her job and shes better at work [SIC]"*
- b. *LT has said that HT needs to be more aware of what's going on in the office and stop wandering around the office looking for excuses not to work LT said "you know we're on thin ground and we expect everyone to be firing on all cylinders "*
- c. *HT agreed and said she would make an effort to do so*
- d. *LT has told Hayley that she has had seven unauthorised absences this year and her attendances are the worst we have ever had, LT has said that Justin*

was going to discipline her for the last absence, but LT talked him out of it now she seems to not care.

- e. *LT also mentioned that HT takes a lot of toilet breaks and asked her why, she has blamed this on her emotions and what is going on at home, LT said that it appeared to be her way of being away from her desk.*
- f. *LT has said that she should take a few minutes to get herself together, as HT has had a lot of tears during this meeting.*

77. Very soon after being sent a copy of the minutes drafted by LT, the Claimant replied [at 08.59 on 8.7.22], disputing their accuracy and making the following points [p.146]:

- a. In relation to her absences, Lee Taylor knew that the Claimant's mental health was suffering and that on one occasion she was signed off by her doctor.
- b. Mr Taylor had failed to record in the minutes about asking her if she had an eating disorder which she denied.
- c. The comment about *"looking for excuses not to work"* was unfair and that she was *"almost at the top of the calls every day"* and was *"consistently putting new business on"*.
- d. *"You mentioned I come in at 8.55 and leave dead on five which you haven't put in the minutes and I said yes I do, I don't feel the atmosphere in the office is great and I've mentioned to you on several occasions that sometimes Justin doesn't talk to me or greet me. The atmosphere makes me feel uncomfortable and I go home almost every day in tears."*

78. In the Grounds of Resistance, the Respondent stated that the information that the Claimant had bulimia or an eating disorder was not shared with the Respondent until after that meeting on 6.7.22 [p.39, para.19]. However, Lee Taylor in his oral evidence flatly contradicted that, stating that the Claimant had told him that she had an eating disorder in that meeting but that they had agreed not to minute it in order to be *"nice and professional"*.

79. The Tribunal again preferred the Claimant's evidence about what had happened at that meeting. Not only did Lee Taylor's oral evidence contradict the Ground of Resistance and amended Grounds of Resistance, his witness statement also made no mention of any such conversation about agreeing with the Claimant not to minute the conversation about her eating disorder. Further, had there been an agreement not to minute such a conversation, there would have been no reason for the Claimant to respond to seeing the minutes by emailing *"...you haven't put in the minutes about asking me if I had an eating disorder which I denied"* [p.146].

80. The Tribunal further concluded that the content and minute of that amounted to a clear, yet unreasonable allegation that the Claimant was finding excuses to avoid working properly and efficiently. The Tribunal acknowledges that the Claimant raised serious concerns about her private life and mental health difficulties, however, there was no reasonable or objective basis to conclude that she was looking for excuses not to work.

81. Further, the comment recorded by Lee Taylor that “*you know we are thin on the ground and we expect everyone to be firing on all cylinders*” sits uneasily with the expressly stated aims set out in the return to work interview [p.111] that took place just 8 weeks earlier.
82. The Tribunal concluded that the recorded minutes of the 6.7.22 meeting again demonstrate an insensitive, unsupportive and inflexible attitude to an employee who the Respondent knew to have had difficulties with her mental health and who was managing the commercial side of the business that was significantly understaffed.
83. The Tribunal also concluded that after her return to work there was no substantive or meaningful support or assistance put in place to assist the Claimant. The Respondent did not identify any such support or assistance beyond an unsuccessful attempt to recruit a further commercial advisor (on a salary equivalent to or higher than the Claimant’s) and the fact that Lee Taylor and Justin Ward provided unspecified and adhoc assistance when they could.
84. Lee Taylor accepted in his evidence that at no time did he consider consulting with or getting any occupational therapy support for the Claimant. He also accepted that the idea of flexible working was not considered or discussed with the Claimant at any time, albeit he that was something he now knew about (after the event) having been advised about it by his HR advisor Peninsula.
85. Six days after that meeting on 12.7.12 the Claimant was signed off as sick from work as a result of her mental health. She remained unwell and was signed off from work with “depression and anxiety” initially from 12.7.22 to 31.7.22 and then from 1.8.23 to 23.8.22. The Tribunal accepted that her treatment by the Respondent was a significant reason for her being signed off work for this period, notwithstanding other serious stressors in her private life. In reaching such a conclusion the Tribunal had regard not just to the Claimant’s evidence but also that of her partner Derek Mallet who described her reaction to work events in clear and understated terms.

1 d). The Respondent paid her only Statutory Sick Pay during her sickness absences

86. This allegation was withdrawn during the hearing by the Claimant who accepted that she was only contractually entitled to Statutory Sick Pay.
87. As a result the Tribunal did not need to consider it further.

1 e). The Respondent revoked a bonus payment to which the Claimant was entitled

88. There was no dispute that the Claimant’s bonus was revoked, as set out in an email dated 5.4.22 [p.107]. However, this was clearly an event that took place before the Claimant’s absence from work as a result of her disability between 11.4.22 –

9.5.22. As such it cannot amount to a breach that took place after her return to work as alleged in the list of issues.

89. The Claimant's contract did not include any express term as to the payment of a bonus. The Tribunal accepted the Respondent's evidence that the bonus entitlement was and had always been a non- contractual discretionary bonus

90. The Tribunal also accepted that the Claimant, at the point of her departure from the Claimant had good reasons to feel aggrieved to have had her bonus withdrawn and then not reinstated. As her email to Justin Ward and Lee Taylor dated 1.7.22 demonstrates, the Commercial Teams profit had increased from £17,814.55 to £21,880.69 [p.15]. However the Tribunal is unable to conclude that that would have been known to the Respondent at the time the decision to revoke her bonus was made.

91. The Tribunal also accepted that the Claimant was not the only staff member who had a bonus that was revoked and that this had been a companywide decision. Further, the Tribunal notes that the Claimant did not challenge or protest the removal of her bonus after being sent the 5.4.22 email.

1 f). The Respondent refused to deliver a script and headset to her when she was working from home.

92. On 18.5.22, 9 days after the return to work meeting previously detailed above the Claimant contacted Ryan Taylor to advise that an immediate family member had covid but that she could not afford to take any further time off work. She asked whether she could work from home.

93. The Claimant's evidence that she had previously worked from home on occasions and without difficulty was not challenged by the Respondent. It was also clearly evidenced by WhatsApp messages contained within the bundle (e.g. p.181 relating to 17.1.22 and p.178 relating to 3.5.21). Those messages also demonstrate that the Respondent had previously been happy to deliver items from work to her house when required to allow her to work at home, despite her having covid at the time.

94. In order to effectively work from home on 18.5.23 the Claimant required a headset and asked Ryan Taylor whether he could drop it off that morning together with a script she used to make calls. He informed the Claimant that he could not [p.121]. His messaging also reveals a clear shift in the Respondent's attitude to the Claimant working from home: *"You can work at home on this occasion but I will stress it isn't the norm and it won't be happening again if something else arises and you must be the first to the phone for any commercial or pub calls and it will be monitored"* [p.121].

95. The Claimant later asked Lee Taylor whether he could drop the headset off on his way home as she knew that his route home passed her house. That would enable her to work from home the following day. Lee Taylor did not reply to the Claimant's message [p.118].

96. Lee Taylor's evidence to the Tribunal was that the Claimant already had the necessary sales script on her home laptop and, in any event, if she did not she could recite it from memory. The Tribunal concluded that that was an implausible and unreasonable expectation. Despite the fact the Claimant was experienced and knew the Respondent's scripts well, to expect her or any worker to memorise completely what were the scripts of essential legal and regulatory insurance waivers and terms and conditions was wholly unrealistic and an obvious corporate risk for the Respondent.
97. Lee Taylor in his oral evidence went on to state that the reason why he could not visit the Claimant's house post work to deliver the headset was because he had to go straight to Broadstone to attend to a personal commitment relating to his in-laws. That detail was wholly absent from his witness statement and the Tribunal had no difficulty concluding that had Lee Taylor wanted to he could easily have arranged delivery either himself or via another employee. The Claimant lived only 2.5 miles away from her place of work.
98. Further, in contrast to Lee Taylor's oral evidence, the Respondent's grounds of resistance stated that the reason for the non-delivery of her head set was because *"the Claimant had tested positive for coronavirus and the Respondent could not risk the health and safety of a member of staff who would be dropping off the equipment to the Claimant or risk the potential wider transmission of coronavirus to the other members of the Respondent's staff."*
99. The Tribunal rejected that explanation, deeming it simply implausible. In order to drop off a headset to the Claimant none of the Respondent's staff members needed to have entered her home or indeed to have any close contact with her or anyone else. As had happened previously the items could have been posted through her letter box or left on her doorstep.
100. The Tribunal concluded that this was an example of the Respondent seeking to frustrate the Claimant's attempts to work from home in what was a marked contrast to how they had treated her prior to her 11.4.23 to 9.5.23 sickness absence. The Respondent advanced no reason for any change in position in respect of allowing the Claimant to work from home.
- 1g. After 9.5.22 the respondents directors impose further work responsibilities on her causing stress to her and did not implement further pay rise increase which in February 2022 they promised she would receive later in the year**
101. Following her return to work the Claimant's work load was significant. She was managing the commercial side of the business that had previously been staffed by herself and three others. No one was found to replace those who left and the Claimant was offered no additional support. Assistance from Justin Ward and Lee Taylor was adhoc and combined with their other duties.
102. However, whilst the Tribunal accepted that the Claimant may have subjectively felt that extra work responsibilities had been imposed on her deliberately, the Tribunal was unable to conclude that the Respondent did so intentionally at that point. Her excessive work load was the result of the understaffing that the Tribunal

finds that the Respondent did nothing to alleviate. Further, they took no significant steps to assist or support the Claimant. However, that is not the allegation made under this heading.

103. The Tribunal was also not satisfied that the Claimant had established on the evidence that there was a failure to implement a promised pay rise made in February 2022. Whilst the Tribunal, as previously stated, found her evidence to be credible and preferred it to that of Justin Ward and Lee Taylor, there was a lack of any documentary evidence about this particular promised pay rise (as distinct from the pay rise that followed the removal of the bonus). Further, even if there was such a promise, the Tribunal concluded that there was insufficient evidence that any failure was targeted at the Claimant. The Tribunal also observed that 'later in the year' includes the 4 months after the Claimant resigned.

The Claimants resignation

104. Having been signed off sick on 12.7.22 as a result of her depression and anxiety, the Claimant resigned by email on 24.7.23 [p.148], giving 1 months' notice. In that email she set out a number of reasons for her decision including the following:

"Since I came back after a period of mental illness in April it had become very uncomfortable in the office"

"I came into the office only to be ignored by Justin frequently. I felt that Lee continuously disagreed with a lot of things without reasonable justification to be awkward (this made me feel uncomfortable and demeaned me in front of other staff). In the past you always valued my input and suggestions. I could not understand this change in our relationship."

"My bonus was revoked as the company was losing money, even though the commercial team are performing with growth and profitability..."

"you weren't happy on occasions when I took time out to look after my unwell children and this was voice in WhatsApp messages. When I had to work from home, it was made difficult for me to the point where dropping off a headset or a script was an issue."

"I was also reprimanded when I questioned the fact that you were advertising a position lower than mine for a salary £3000 more than mine. I was made to feel guilty for even mentioning it."

...

"it was also mentioned in our meeting on 6.7.2 to have a look for excuses not to work. This is a complete fabrication when phone logs and sales prove otherwise. I was told I am not dedicated because I would arrive 5 minutes before a shift and leave on time..."

"I've never been in a job where there has been so much negativity and animosity. I feel that my superiors let me down in providing a pleasant work environment. It's okay I'm back in May I felt belittled and an outsider. I could go on."

"Consequently my work and my mental health have significantly suffered and affected all aspects of my life. I anticipate I'll be signed off for the duration of my notice period..."

105. The Tribunal accepted the Claimant's evidence as to the reason for her resignation. Because of the change in treatment of her by the Respondent following her return to work and the impact it had on her mental health she felt unable to remain in post. The Tribunal concluded that the Respondent had created an unwelcoming and hostile environment for her.
106. The Respondent's response came via letter from Lee Taylor dated 27.7.23 [p.150]. The letter quoted his surprise at her resignation and stated "I am aware that you have been experiencing some difficulties recently and am concerned that this may be the underlying reason for your resignation". The letter referred to the Respondent's grievance policy and the "importance of arising any concerns which you may have and to resolve matters through the formal process". It further stated "if you wish to raise a formal grievance then we would kindly request you put this in writing within 5 working days".
107. As to the Respondent's grievance policy, the only evidence relied on by the Respondent as to such a policy was the following brief passage included in the Claimant's written contract of employment: "Should you feel aggrieved at any matter relating to your employment, raise a grievance properly with your line manager, either verbally or in writing. There is no deadline by which grievances must be lodged, it may be more difficult for the company to effectively deal with your grievances of the complaints relate to something which took place a long time ago. Further information is attached". No further information was in fact attached to the Claimant's contract and the Respondent has not sought to adduce any further evidence of any additional grievance policy. Further, it was not suggested in cross-examination to the Claimant (or at any other point during the hearing) that there was any further or more detailed policy in existence.
108. The Tribunal observes that here the Claimant's complaints were against the two senior directors and co-owners of the business Lee Taylor and Justin Ward. Further, her line manager was Lee Taylor's son Ryan. The Respondent's policy provided no guidance on how she could raise a grievance against either he line manager or the Company Directors.
109. However, by way of email on 5.8.22 the Claimant confirmed that she did wish to raise a grievance. She stated that she would feel intimidated if she came in to work for a meeting so she would like to "go down the official mediation route through ACAS".
110. By way of response dated 8.8.22 Lee Taylor offered to arrange a meeting off site or with anyone else she would prefer to speak to [p.152]. Further the letter states "you can speak to ACAS in the meantime or you can hold off until the grievance hearing is complete, the decision is completely up to you"
111. The Claimant replied by way of email dated 11.8.22 stating that she would agree to meet with Peter Smith, an employee of the Respondent, at a mutual location to discuss her grievance. She provided her availability [p.153].
112. The Claimant's evidence was that thereafter she heard nothing and no grievance meeting was held or arranged. She was not challenged about this in cross

examination by the Respondent. However, in his oral evidence Lee Taylor stated that there was an email reply sent to the Claimant and that the Respondent's agreed to such a meeting but that they then heard nothing further from the Claimant.

113. No such reply has been produced in evidence by the Respondent. After Lee Taylor referred to such an email in his oral evidence (shortly before lunch on day 3) the Tribunal addressed the Respondent's solicitor Mr Williams and made it clear that should there be any application to adduce any further documentary evidence (i.e. the further email referred to by Mr Taylor) then we would hear such an application after the lunch adjournment. No such application was made and no further documentary evidence adduced during the liability hearing. Mr Williams instead asked a further oral question of Lee Taylor about the email and he stated , that there was no further meeting and that things 'fizzled out'.
114. The Tribunal accepted the Claimant's evidence on this point, namely that she had agreed to meet with Peter Smith but thereafter had not heard anything from the Respondent.

Law

Constructive dismissal

115. A dismissal is defined by section 95 of the ERA and includes the employee terminating the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, section 95(1)(c). This is otherwise known as a constructive dismissal.
116. An employee will be entitled to terminate his contract without notice to his employer only if the employer is in repudiatory breach of contract: see *Western Excavating (ECC) v Sharp [1978] ICR 221*. An employee would only be entitled to do so if the employer is guilty of a "*significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract*".
117. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (*Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT*).
118. In *Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462*, the House of Lords held the implied term of trust and confidence to be as follows: '*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*' The italicised word 'and' is thought to be a transcription error and should read 'or'.
119. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law

that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

120. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council* [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e. from the perspective of a reasonable person in the claimant's position. (*Tullett Prebon PLC v BGC Brokers LP* [2011] IRLR 420, CA.)
121. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (*Nottinghamshire County Council v Meikle* [2004] IRLR 703, CA; *Wright v North Ayrshire Council* UKEATS/0017/13.)
122. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract (*United Bank Ltd v Akhtar* [1989] IRLR 507, EAT).
123. A claimant may resign because of a 'final straw'. The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence. See for example the judgement of Langstaff J in *Lochuak v L B Sutton* UKEAT/0197/14.
124. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. He may demonstrate by what he says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign.
125. In the context of affirmation, the Tribunal has considered in particular *Abrahall v Nottingham City Council* [2018] ICR 1425, CA in which it observed that it was not right to infer that an employee had agreed to a significant diminution in their rights unless the conduct, viewed objectively, clearly evidenced an intention to do so.

Disability

126. A person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities – s.6 and schedule 1 Equality Act 2010. As substantial adverse effect is one minor or trivial, and long-term effects as one that is lasted or slightly to last for at least 12 months to last the rest of the person's life.
127. The respondent accepts that at the material time (from 11.4.22 to 26.8.22) the claimant had a disability by reason of having anxiety and depression.

Direct discrimination – s.13 Equality Act 2010

128. A person (A) discriminates against another (B) if, because of a protected characteristic, they treat B less favourably than they treat or would treat others – s.13 Equality Act 2010 ('the Act').
129. Direct discrimination claims require a comparison between the treatment of different individuals i.e. individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (S.23 EA 2010). The tribunal must therefore compare 'like with like'.
130. Section 136 of the Act sets out provisions relating to the relevant burden of proof. 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 court must hold the contravention occurred. However, this does not apply if A shows that they did not contravene the position.
131. There is a two-stage process for analysing a complaint of direct discrimination. Firstly, a Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. The second stage, if the Claimant is able to raise a prima facie case of discrimination following assessment of all of the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons – Igen v Won [2005] EWCA Civ 142, Ayodele v CityLink Ltd [2018] ICR 748 and more recently Efobi v Royal Mail Group Ltd (2021) ICR 1263.
132. In Madarassy v Nomura International PLC [2007] ICR 867, Mummery LJ held: *"The Court in Igen v Won expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The benefits of a difference in status and a difference in treatment only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination."*

133. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which the Tribunal “could conclude” that the Respondent had committed an unlawful act of discrimination. “Could conclude” means that a reasonable tribunal could properly conclude from all the evidence before it. Such evidence includes evidence adduced by the Claimant in support of the allegations of discrimination. It also includes evidence adduced by the Respondent contesting the complaint.
134. The Court of Appeal in *Igen* warned tribunals “*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*” but made it clear that a finding of “unexplained unreasonable conduct” is a primary fact from which animal prints can properly be drawn to shift the burden of proof.
135. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant’s less favourable treatment. In *Gould v St John’s Downshire Hill 2021 ICR 1, EAT*, Mr Justice Linden, after summarising the established case law discussed in detail below, helpfully explained: “*The question whether an alleged discriminator acted “because of” a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the “reason why” question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a “significant influence” on the decision to act in the manner complained of. It need not be the sole ground for the decision... [and] the influence of the protected characteristic may be conscious or subconscious.*’
136. As to determining the reason for discriminatory treatment, the following summary from IDS at 15.80 is often of assistance:

*“In the majority of cases, the best approach to deciding whether allegedly discriminatory treatment was ‘because of’ a protected characteristic is to focus in factual terms on the reason why the employer acted as it did. This entails the tribunal considering the subjective motivations — whether conscious or subconscious — of the putative discriminator in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. To do this, the tribunal will be required to examine evidence as to what the relevant mental processes were in order to identify what operated on the putative discriminator’s mind and caused him or her to decide to act in that particular way. Such evidence will include evidence of the decision maker but also evidence as to the context in which the decision was made. In other words, the tribunal will have to examine all of the relevant circumstances of the case with a view to deciding whether the decision maker’s professed reasons were his/her/its actual reasons. As Lord Nicholls put it in *Nagarajan v London Regional Transport 1999 ICR 877, HL*: ‘Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable,*

is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.”

Discrimination arising from disability (Section 15 Equality Act 2010)

137. Section 15 of the Equality Act provides as follows:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavorably 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.

138. The difference between direction discrimination (s.13) and discrimination arising from a disability (s.15) was set out in *Bennett v Mitac [2021] IRLR 25* at para.40 in the following terms:

*“Because in the case of disability discrimination the circumstances include a person’s abilities, when assessing a claim of direct disability discrimination it is necessary to compare the treatment of the complainant with an actual or hypothetical person with comparable abilities. Thus, if the consequence of a disability is a reduction in a person’s ability to do a job and that reduction in ability is the reason for adverse treatment it will not be possible to make out a claim of direct discrimination because the comparator would have the same level of ability as the disabled person. That is why s 15 Equality Act 2010 is necessary, which provides for discrimination because of something arising in consequence of disability. However, if stereotypical assumptions are made about the ability and/or likely future ability of a disabled person this can amount to direct disability discrimination: *Chief Constable of Norfolk Constabulary v Coffey [2019] EWCA Civ 1061, [2019] IRLR 805, [2020] ICR 145.*”*

139. In *Pnaiser v NHS England [2016] IRLR 170* the key ingredients of such a claim were set out. They were helpfully summarised in Harvey [at Q1468] as follows:

- a. Was there unfavourable treatment and by whom?
- b. What caused the impugned treatment, or what was the reason for it?
- c. Motive is irrelevant.
- d. Was the cause/reason 'something' arising in consequence of the claimant's
- e. disability?
- f. The more links in the chain of causation, the harder it will be to establish the

- g. necessary connection.
- h. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
- i. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.
- j. It does not matter in which order these matters are considered by the tribunal.

140. Further, at paragraph 31(b) of *Pnaiser*, Simler P set out that the focus of the analysis must be on the on the state of mind of the alleged discriminator as to the underlying reason for the allegedly unfavourable treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment.

141. As to knowledge, there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment.

Harassments related to disability – s.26 Equality Act 2010

142. Section 26 provides as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection

(1)(b),

...(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

143. However unwanted and offensive conduct may be, it will not constitute harassment unless it is so related to the protected characteristic.

144. Whether conduct is 'related to' a protected characteristic is a matter of fact for the tribunal drawing on all the evidence before it. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. Nevertheless, in any given case there must still be some feature or features of the factual matrix which properly leads to the conclusion that the conduct in question is related to the particular characteristic in question— Tees Esk and Wear Valley's NHS Foundation Trust v Aslam 202 IRLR 495 495 EAT
145. Related to has a broad meaning and the fact that conduct may not be because of a particular characteristic does not necessarily mean that it is not 'related to' it. A Tribunal considering s.26 must evaluate the evidence in the round, recognising that a witness will not "readily volunteer" that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question' - Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT.

Reductions from the basic and compensatory award

146. If compensation is to be awarded then the tribunal must order the respondent to pay a basic award (calculated on a standard formula) and a compensatory award. In accordance with s123(1) ERA the compensatory award is to be such amount as the tribunal considers just and equitable. Both awards may be subject to reductions for certain reasons. Section 122(2) ERA provides that the basic award may be reduced where the claimant's conduct before dismissal renders it just and equitable to do so. Under s123(6) ERA, the tribunal must likewise consider whether the claimant contributed to their dismissal in some way and if so reduce any compensatory award accordingly. For a reduction to be made for this reason, the relevant action by the claimant (proven on the balance of probabilities) must be culpable or blameworthy; it must have actually caused or contributed to the dismissal; and it must be just and equitable to reduce the award by some proportion. Furthermore, the compensatory award may be reduced where it is evident that the claimant might have been dismissed fairly regardless of any actual unfair dismissal (the Polkey principle).

Conclusions

147. The Tribunal now applies the law to the facts to determine the issues.

Issues 1 and 2 - Fundamental breach of contract / breach of implied term of trust and confidence

148. The Tribunal concluded that the Claimant had proven on the balance of probabilities the events set in paragraph 1a, 1b, 1c, and 1f of the list of issues for the reasons set out above. The Tribunal was not satisfied that the Claimant had established the allegations in paragraphs 1 d, e or g.

149. The allegations found proven did amount to a fundamental breach of the implied term of trust and confidence.
150. The Tribunal reminds itself that the test here is an objective one and not whether the Claimant subjectively feels that such a breach has occurred. It is not sufficient that the Claimant subjectively feels there has been such a breach nor is it enough that the Respondent acted unreasonably in some regards. The bar is set higher than that.
151. However, the Tribunal is satisfied that the behaviour here, when viewed cumulatively, was both calculated and likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent. The Respondent's behaviour went directly to how the Respondent saw and valued the Claimant as an employee. It represented a marked shift in how they had treated the Claimant previously. As the Claimant said in her closing submissions following her return to work the Respondent saw her as a problem rather than an asset and treated her accordingly.
152. Allegation 1a involved humiliating behaviour on two occasions in an office setting from a director and part owner of the company to a more junior staff member who had recently returned from a lengthy absence due to issues related to her mental health. The said director, Justin Ward knew at that point about the Claimant's fragile mental health.
153. Allegation 1b involved a course of demeaning behaviour that signalled to the Claimant that she was no longer valued or respected as an employee. Repeated comments about her weight were particularly hurtful and any reasonable employer would have known that such behaviour would cause significant upset (and evidence from contemporaneous WhatsApp messages demonstrates that it did). Again, Mr Taylor knew about the Claimant's mental health difficulties at that point. Advertising a more junior post at a potentially higher salary without consulting the Claimant was also clearly an action that would undermine the Claimant.
154. Allegation 1c involved a wholly unfounded and insensitive allegation that the Claimant was finding excuses to avoid working properly and efficiently. The minutes of that meeting demonstrate that the apparent support offered to the Claimant in her return to work meeting about 8 week earlier was a sham without any real intent to actually provide meaningful support to her. The minutes also clearly help to demonstrate the hostile atmosphere created by the Respondent.
155. Allegation 1f relates to the Respondent hindering the Claimant's ability to work from home. That was in stark contrast to how she had been treated previously. It was a further act that sought to undermine her and that created an unpleasant work environment for the Claimant.
156. There was no reasonable and proper cause for the breaches found proven by the Tribunal. The Respondent's case was that the alleged events set out in allegations 1 a) and b) did not happen. That was rejected by the Tribunal.

157. In respect of allegation 1 c) the Respondent argued that they were simply seeking to evaluate and question the Claimant's performance at work. The Tribunal rejected such an argument for the reasons set out above, most notably that there was no reasonable and proper basis to accuse the Claimant of "finding excuses to avoid working properly and efficiently".
158. As to allegation 1 f) the Respondent sought to argue that there was a good reason for failing to deliver the script and headset to the Claimant, namely Mr Taylor's other commitments and a fear of being infected with Covid-19. Again, as set out above the Tribunal rejected those reasons.

Issue 3 - Did the Claimant resign because of the breach? Was the breach so serious that the claimant was entitled to treat the contract as being at an end.

159. The Tribunal concludes that the Claimant did resign as a result of the above breaches. This was not in fact a point challenged by the Respondent in closing submissions.
160. The Tribunal concluded that the 6.7.22 meeting was the final straw in a series of acts that clearly demonstrated that the Respondent no longer saw the Claimant as a valued employee.
161. The breaches found proven were not trivial ones. They went directly to the relationship of trust and confidence between the Claimant and Respondent and created a hostile and unwelcoming atmosphere towards her. Such behaviour was bound to destroy or seriously damage the employment relationship between them.
162. The Claimant was entitled to treat the contract at an end. Shortly after the 6.7.22 meeting she was signed off work as a result of further mental health difficulties. The Tribunal accepted her evidence that her mental state at the time was caused in significant part by the Respondent's actions. Her evidence about this was supported by both her GP notes from the period between her return to work and resignation and by the evidence from her partner Mr Mallet.

Issue 4 - Did the Claimant tarry before resigning and affirm the contract?

163. Tarry in this context means delay. The Claimant resigned by email on 24.7.22. In the context of her being off work unwell with mental health difficulties, the Tribunal does not find that there was any undue delay in her tendering her resignation following the 6.7.22 meeting.
164. A repudiatory breach of breaches need not be the sole cause of the Claimant's resignation. The question is whether the claimant resigned, at least in response to the breach. The Tribunal concludes that she did.
165. The Tribunal notes that on 14.7.22 the Claimant told her GP that she was looking for a new job [p.65]. That entry needs to be read in conjunction with the earlier entries in her medical notes between April and 14.7.22 that clearly evidence the impact on the Claimant of events at work. She detailed to her GP the adverse

treatment she faced at work and the changed and hostile atmosphere at work as well as the impact it was having on her.

166. The Tribunal had no hesitation in concluding that the Claimant resigned as a result of the breaches found proven. Had they not occurred, the Tribunal concluded that the Claimant would have wanted to stay and progress her career with the Respondent. She had previously liked and been good at her job. Further, she had previously been supported and allowed to work flexibly and from home when her personal circumstances required it.
167. Whilst the Respondent did not seek to argue in closing submissions or put to the Claimant in cross-examination that she resigned for some other reason (i.e. the removal of her bonus or the lack of a pay rise), the Tribunal nevertheless considered whether those were in fact reasons for the Claimant's resignation and concluded that they were not. The Claimant had not previously complained about or raised the issue of her bonus or lack of pay rise and had she not resigned there remained the prospect of the bonus being restored and pay rise implemented before the end of the year.

Issue 5 - In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

168. The Respondent did not seek to argue that the Claimant's dismissal was otherwise a fair one and there was no evidential basis for the Tribunal to conclude that it was.

Issues 6 to 11 - Direct disability discrimination (Equality Act 2010 section 13)

169. As set out above The Tribunal concluded that the Claimant had proven on the balance of probabilities the allegations set in paragraphs 1a, 1b 1c, and 1f of the list of issues.
170. However, the Tribunal had to consider whether such treatment amount to less favourable treatment and whether the Claimant was treated worse than someone else was treated. There must be no material difference between her circumstances and those of the comparator
171. Here the Claimant pointed to a hypothetical comparator, so someone who would have shared her characteristics and circumstances save for the fact of her disability.
172. In light of the above findings of fact about the Respondent's culture at the time, treatment of staff and attitude to Human Resource issues, the Tribunal was unable to conclude that the Claimant was in fact treated less favourably than a hypothetical comparator. The treatment of her, as set out above, did create a hostile work environment and was in significant part as a result of the change in perception of the Claimant following her return to work. The change in perception was, in significant part because she had been away from work as a result of her mental health difficulties. The Claimant's mental health difficulties also fed into the Respondent regarding her as a less reliable and useful member of staff.

However, the Tribunal was unable to conclude that that the Respondent in fact treated the Claimant differently to a hypothetical comparator who had been off work for a similar period of time. The Tribunal concluded that a comparator who had been absent from work for a similar period and who was regarded as less useful and reliable as a result and was likely to have encountered similar treatment to that directed at the Claimant.

173. As a result the Claimant's claim of direct discrimination must fail.

Issues 12 to 17 - Discrimination arising disability (Equality Act 2010 section 15)

174. The Tribunal concluded, as set out above that the allegations set out in the List of Issues at paragraphs 1 a), b), c) and f) were proven. Each such allegation did amount to unfavourable treatment and the Respondent did not seek to argue otherwise if they found proven (as per issue 12).

175. Further, there was no dispute between the parties that the Claimant's sickness absence between 11.4.22 and 9.5.22 arose as a result of her disability (issue 13).

176. The real question under this heading was whether the unfavourable treatment was because of that sickness absence (issue 14). The Tribunal reminds itself that the focus must be on the state of mind of the alleged discriminator and that the 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment.

177. Here, the Tribunal concluded that the allegations found proven were all part of the change of attitude that the Respondent displayed towards the Claimant following her return to work. That change of attitude, shared and demonstrated by both Justin Ward and Lee Taylor was in significant part as a result of the fact that following her absence they regarded her as a less useful and reliable member of staff and resented the impact her absence had had on others and the business. As a result, the Tribunal was satisfied that that unfavourable treatment was, under s.15, 'because of' her absence from work occasioned by her mental health.

178. The Tribunal did not ignore the fact that the Respondent also appeared to have been concerned about ongoing problems in the Claimant's personal life and shorter absences relating to that (i.e. the fact that she was the main carer of 3 children during COVID-19). However, the Claimant had previously had short absences unrelated to her mental health without any difficulty or repercussions. The Tribunal concluded that those further concerns about the Claimant's personal life were not the main or significant driver behind the Respondent's treatment of her.

179. As to issues 16 and 17, the treatment of the Respondent was not a proportionate means of achieving a legitimate aim. Whilst the Respondent was entitled to take steps to manage their business effectively and ensure the performance of staff,

the Tribunal did not accept that the adverse and unfavourable treatment of the Claimant was in any way a proportionate means of achieving such an aim.

180. Further, there were many other non-discriminatory ways in which the Respondent could have aided and assisted the Claimant's return to work and dealt with any ongoing concerns about her ability to do her job or her attendance (including but not limited to implementing an actual phased return to work, flexible working, consideration of reasonable adjustments, referral to or taking advice from an Occupational Health Professional). No such steps were taken by or considered by the Respondent.
181. As to when the Respondent knew or could reasonably have been expected to know that the Claimant had a disability (issue 17) this was in dispute, with the Respondent arguing that they did not know about her disability until 9.5.22. For the reasons already set out above, the Tribunal rejected that concluding that the Respondent knew about the Claimant's disability much earlier and prior to her being signed off work on 11.4.22.
182. As a result, the Claimant's claim of discrimination under s.15 is well founded and succeeds in respect of the allegations set out at paragraph 1 a), b), c) and f) of the list of issues.

Issue 18 to 22 - Harassment related to disability (Equality Act 2010 s. 26)

183. The Tribunal has already concluded that the Claimant has proven on the balance of probabilities the events set in paragraph 1a, 1b, 1c, and 1f of the list of issues.
184. Such conduct was clearly unwanted conduct (issue 14) and the Respondent did not seek to argue otherwise in the event that the allegations were proven.
185. The Tribunal next had to consider whether such conduct related to the Claimant's disability (issue 15). Here the Tribunal kept in mind that in contrast to the test for direct discrimination, harassment under s.26 does allow for a looser connection between the conduct and the protected characteristic. Further, it was not necessary under this heading for the Tribunal to consider whether or not the respondent would have treated someone somebody without the relevant protected characteristic in the same way.
186. The Tribunal concluded that such unwanted conduct as set out in paragraphs 1a, b, c and f did so relate. The unwanted conduct was the result of the change in attitude to the Claimant that took place after her return to work. It was conduct that was occasioned by, in significant part, the fact that she had taken time of work as a result of her disability and as result was a less reliable and valuable member of staff. As a result it was conduct that did relate to her disability.
187. The Tribunal also concluded that some of the conduct did have the purpose of creating a hostile and humiliating environment for the Claimant (issue 16), most notably the shouting by Mr Ward, the weight comments from Mr Taylor, the advertising of a more junior role at a potentially higher salary. However, all of the conduct found proven, both individual and cumulatively had the effect of creating

a hostile and humiliating environment for the Claimant (issue 17). Such conduct undermined her and caused her obvious distress as demonstrated by her written and oral evidence to the Tribunal, her contemporaneous WhatsApp messages and the fact of and content of her GP notes that demonstrate her disclosing to her GP the impact on her of her treatment at work. The Tribunal concluded that it was reasonable (and inevitable) for the Respondent's behaviour to have impacted someone in the Claimant's position and sharing her circumstances in the serious way that it did.

188. As a result, the Tribunal concluded that the Claimant's claim under s.26 of the Equality Act in respect of allegations set out 1a, 1b, 1c, and 1f of the list of issues must succeed.

Issues 25, 26f – contributory conduct and failure to follow ACAS Code of Practice

189. As agreed with both parties the Tribunal agreed to deal with the issues of contributory conduct under s.122(2) and 123(6) of the EA 1996 and whether either party had unreasonably failed to follow the ACAS Code of Practice on Discipline under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) as part of the liability hearing.

190. Under this heading the Respondent sought to argue that the Claimant had unreasonably failed to comply with the ACAS Code by not raising and then not following the Respondent's grievance procedure.

191. The Respondent did not identify or point to any other contributory fault on behalf of the Claimant.

192. The Tribunal concluded that there was no such failure and, in the circumstances, here it would not be just and equitable to make any reduction to either the Claimant's basic or compensatory awards. She did not contribute to her dismissal and did not unreasonably fail to follow the ACAS Code of Practice.

193. As to the submission that she failed to pursue a grievance before resigning, the Tribunal considered the terms of the Respondent's grievance policy. The only evidence of a policy was the brief paragraph in the Claimant's employment contract. That did not provide any guidance on how to raise a grievance against the Respondent's directors, nor provide an alternative means of raising a complaint where part of the complaint related to the conduct of an employee's line manager. It also placed no time limit on raising a grievance. Further, the Tribunal concluded that the Claimant was in a very difficult position whereby her line manager was Lee Taylor's son and it was his conduct that formed a large part of her complaint. The Tribunal also accepted that at the point of her resignation, given the treatment there had been of her by the two senior directors and company owners, the Claimant would have had no confidence in the Respondent's grievance procedures or in the Respondent's ability to fairly or objectively determine her complaints.

194. Further, on 8.8.22 Lee Taylor via email to the Claimant offered to arrange a meeting off site or with anyone else she would prefer to speak to [p.152]. The Claimant agreed to such a meeting with an employee called Peter Smith and provided her availability. However, the Respondent thereafter failed to contact her or to ever arrange such a meeting.
195. The 8.8.22 email from Lee Taylor also stated “you can speak to ACAS in the meantime or you can hold off until the grievance hearing is complete, the decision is completely up to you”. In light of that email the Claimant cannot, in the Tribunal’s conclusion, be criticised for thereafter contacting and choosing to pursue her complaints against the Respondent through ACAS.
196. As such there is no basis to reduce the Claimant’s basic or compensatory awards.

Issue 26 d and 33 - Polkey

197. This issue related to the Polkey principle, namely whether the Claimant might have been dismissed fairly regardless of any actual unfair dismissal. The Respondent conceded that there was no basis for a Polkey reduction in this case. The Tribunal agreed.

Remedy

198. At the conclusion of the hearing and with the agreement of both parties, a further case management order was made relating to a one-day remedy hearing on 6.11.23

Employment Judge Horder
Oral Judgement delivered on 19/10/2023
Written reasons dated 16/11/2023

Sent to the parties on: 13/12/2023

For the Tribunal Office:

