



# EMPLOYMENT TRIBUNALS

Wales (Mold Justice Centre)  
9 - 13 October 2023 (in person)

**Claimant:** Sara Bingham  
**Respondent:** Quilter Financial Advisers Ltd

## Full merits hearing

**Before:** Judge M Aspinall (sitting as an Employment Judge)  
Mr B Roberts  
Ms C Peel  
**Appearances:** Mr G Pollitt, Counsel for Claimant  
Miss S Tharoo, Counsel for Respondent

## JUDGMENT

1. The claims of disability discrimination, failure to make reasonable adjustments, and refusal to allow accompaniment are not well founded and are dismissed.
2. The claim of wrongful dismissal is well founded and allowed.

### Remedy

3. Unless, within 14 days of this judgment being sent to them, either party requests a remedy hearing, the Respondent shall pay the Claimant one month's pay in lieu of notice in the gross sum of £5,083.33, together with one month's car allowance in the gross sum of £400.00.
4. In total the Respondent shall pay the Claimant **£5,483.33**, from which the Respondent shall make lawful deductions for tax, national insurance and any other statutory or court ordered sums. The net sum shall then be paid by the Respondent to the Claimant.

### REASONS

#### Background

5. The Claimant, Ms Sara Bingham, was employed by the Respondent, Quilter Financial Advisers Ltd, as a Financial Adviser from November 2018 until the termination of her employment on 26 June 2020.
6. The Claimant was initially employed by Charles Darby Group (CDG) which was taken over by the Respondent during her employment. Her employment transferred to the Respondent under TUPE regulations.
7. The Claimant worked from home as a self-employed Financial Adviser for the Respondent. She was responsible for managing her own client base, generating leads, and meeting monthly sales targets.
8. The Claimant's line manager at the Respondent was Mr Andrew Staines. He provided

oversight of her work and she had to report to him regarding her pipeline of potential sales and progress towards monthly targets.

9. In June 2019, the Claimant passed her Competent Advisor assessment which completed her probationary period. However, from November 2018 to January 2020 her performance was persistently below the minimum targets that she had set for herself.
10. The Claimant had various periods of absence during her employment. She was off sick from 29 August to 4 October 2019, certified as suffering from tonsillitis. She was also absent for a week in January 2020 which she took as annual leave.
11. On 6 February 2020, the Claimant was signed off work by her GP for two weeks due to stress and anxiety. She remained off work from this point onwards.
12. On 2 February 2020, prior to being signed off, the Claimant was invited to a disciplinary hearing regarding her repeated failure to meet sales targets. This process was paused when she provided medical certificates.
13. In May and June 2020, further workplace conduct issues came to light regarding the Claimant's practice, based on client complaints received while she was off sick. These were added to the matters being considered at the capability/disciplinary hearing.
14. The capability/disciplinary hearing eventually took place on 16 June 2020. The Claimant was dismissed for gross misconduct on 26 June 2020 without notice based on both performance and conduct grounds. She appealed but the dismissal was upheld.

### **The claims before the Tribunal**

15. The Claimant presented claims against the Respondent arising out of her dismissal from employment.
16. She made complaints of discrimination because of something arising out of her disability contrary to the Equality Act 2010. Her contention was that she was disabled by virtue of having coeliac disease and stress/anxiety conditions. The issue of disability for the purpose of Section 6 of the Equality Act was decided by a different Judge on an earlier occasion.
17. The Claimant argued that these disabilities caused her disadvantage in the workplace regarding meeting performance targets. She also alleged the Respondent failed to make reasonable adjustments to avoid placing her at a disadvantage.
18. Further, the Claimant claimed she was subjected to unfavourable treatment and dismissal in consequence of her disabilities. She stated her dismissal was an act of discrimination.
19. In addition, the Claimant presented a complaint of wrongful dismissal. She alleged that her dismissal without notice pay was in breach of the notice provisions of her employment contract as encapsulated by the Capability Policy of the Respondent at the material times.
20. The Claimant also complained that the Respondent unlawfully refused her the right to be accompanied at disciplinary proceedings. She stated that they denied her representation by officials of WRS, who she claimed were trade union representatives. She was accompanied by a friend at the agreement of the Respondent.
21. The Respondent denied liability for discrimination arising from disability. They contended they lacked knowledge of the Claimant having any disabilities or their effects at the relevant times.
22. The Respondent also denied subjecting the Claimant to any unfavourable treatment because of her disabilities. They maintained her dismissal was for legitimate business reasons unconnected to any disability.

23. Regarding the wrongful dismissal claim, the Respondent's position was that the Claimant's conduct amounted to gross misconduct warranting summary dismissal without notice.
24. Finally, the Respondent denied refusing the Claimant's right to be accompanied at disciplinary proceedings by a trade union official.
25. The Tribunal was tasked with determining these competing claims and deciding whether the Respondent was liable under the various grounds advanced by the Claimant.

### **Issues for the determination of the Tribunal**

26. Was the Claimant at all material times disabled by reason of:

- a. Coeliac disease
- b. Stress and anxiety (with depression)

within the meaning of the Section 6 Equality Act 2010?

27. The question of disability was decided, for this purpose, at an earlier hearing. It is, therefore, the case that the Claimant was disabled by those conditions at the material times.
28. Did the Respondent have actual or constructive knowledge of the Claimant's disabilities?
29. Did any of the following arise in consequence of the Claimant's disabilities:
  - a. Delay in dealing with client work
  - b. Reduced performance
  - c. Failure to follow protocols on use of paper fact-finds
  - d. Failure to follow protocols on recording annual reviews
  - e. Stress impacting the Claimant's performance
  - f. Disability-related sickness absences
  - g. Inability to complete work to required levels
30. If so, did any of the matters in (25) cause the Respondent to subject the Claimant to unfavourable treatment in:
  - a. Pursuing disciplinary/performance allegations
  - b. Failing to provide evidence to support allegations
  - c. Not allowing time for the Claimant's health and performance to improve
  - d. Dismissing the Claimant
31. If there was unfavourable treatment, was it a proportionate means of achieving the Respondent's legitimate aims regarding:
  - a. Maintaining performance, conduct and attendance
  - b. Maintaining protocols on client work and regulatory requirements
32. Did the Respondent apply provisions, criteria or practices that disadvantaged the Claimant regarding:
  - a. Performance targets and client service
  - b. Considering performance while unfit for work
  - c. Responsibility for clients while unfit for work
  - d. Requiring full duties while unfit for work
  - e. Infrequent appraisals/reviews
  - f. Disciplinary action for unsatisfactory performance
33. Did those PCPs place the Claimant at a substantial disadvantage because of her disabilities?
34. If so, did the Respondent fail to take reasonable steps to avoid that disadvantage in terms of:

- a. Discounting disability-related underperformance
  - b. Re-allocating work during periods of illness
  - c. Disregarding disability-related absences
  - d. More regular informal performance reviews
  - e. Giving time for the Claimant's health to improve
35. Was the Claimant's dismissal an act of discrimination arising from her disabilities?
36. Was the Claimant's dismissal in breach of her employment contract regarding notice periods?
37. Did the Respondent refuse the Claimant's request to be accompanied at a disciplinary hearing by an official from WRS, amounting to a breach of her right under the Employment Relations Act 1999?
38. If any claims are out of time, is it just and equitable to extend time given the circumstances?
39. What remedies are appropriate if any claims succeed?

### **The hearing before the Tribunal**

40. The Claimant, Ms Sara Bingham, was present and represented by Mr G. Pollitt, Counsel. The Respondent, Quilter Financial Advisers Ltd, was represented by Ms S. Tharoo, Counsel.
41. At the start of the hearing, the parties confirmed that they had exchanged and were able to consider the hearing bundles and any additional documents. The Tribunal was satisfied that the bundles were in order.
42. The Tribunal heard live evidence from the following factual witnesses:
- a. The Claimant, Ms Sara Bingham (in person)
  - b. Mr Andrew Staines, the Claimant's line manager; the Dismissing Manager (in person)
  - c. Mr Alan Pearson, a senior manager at the Respondent; the Appeal Hearing Manager (by CVP video)
43. Both parties had submitted witness statements for their witnesses, and we took those into account. The parties confirmed no objections to the contents of these statements being admitted as evidence.
44. After the factual evidence concluded, the Tribunal heard closing submissions from the representatives on behalf of their respective clients.
45. The Tribunal reserved judgment to consider all the evidence and submissions in this case.
46. The Tribunal was satisfied that it had sufficient oral and documentary evidence, and legal submissions, to determine the issues in dispute.

### **Evidence**

#### ***Written and documentary***

47. The Tribunal was provided with an agreed hearing bundle containing relevant documents referenced by the parties. This included correspondence, meeting notes, performance reviews, and other materials spanning the period of the Claimant's employment. The sections of the bundle can be most easily characterised as correspondence and other documents ("the correspondence bundle"), contracts and policies ("the contracts and policies bundle") and a bundle containing other material and an impact statement ("the other materials bundle"). We were also provided a further bundle containing witness statements ("the witness statement bundle")

#### *Witness statement of Sara Bingham*

48. Sara Bingham's witness statement is located on pages 1-18 of the witness statement bundle. In her statement, Ms. Bingham provides background on her employment with the Respondent, starting in November 2018 when she was hired by Charles Darby Group which was later acquired by the Respondent.
49. She outlines her medical conditions, including Uveitis, Coeliac disease, stress, anxiety and depression, which she contends caused her disadvantage in the workplace. Ms. Bingham summarizes her interactions with her line manager, Mr. Staines, regarding performance reviews, targets, and periods of absence. She alleges being denied sick pay entitlement and claims Mr. Staines pressured her to resign.
50. Ms. Bingham details the disciplinary process leading to her dismissal in June 2020, which she argues was discriminatory and unfair. She maintains her disabilities impacted her work performance, exacerbated by traumatic personal events like her father-in-law's illness and the breakdown of her long-term relationship. Her statement presents her perspective on the circumstances surrounding her dismissal.
51. Documents referred to:
  - a. Employment contract (pg 71-79)
  - b. Emails with line manager re: targets and projections (pg 290-299)
  - c. Written response of 7 June 2020 to disciplinary allegations (pg 642-647)
  - d. Payslips (pg 740, 766)
  - e. Sick notes (pg 303-304, 441-451)
  - f. Email of 4 April 2020 detailing issues faced (pg 491)
  - g. Notice of Appeal (pg 707-713)

*Witness statement of Andrew Staines*

52. Andrew Staines' witness statement is located on pages 27-58 of the witness statement bundle. In his statement, Mr. Staines provides background on his role as the Claimant's line manager at the Respondent company.
53. He summarises the Claimant's performance issues, the monthly monitoring processes, periods of absence, and the steps taken to address underperformance through informal discussions and formal capability procedures. Mr. Staines explains the disciplinary process leading to the Claimant's dismissal for gross misconduct.
54. He maintains the Respondent acted fairly based on legitimate business reasons regarding the Claimant's capabilities. Mr. Staines denies the allegations made against him personally by the Claimant. His statement presents the management perspective on the Claimant's performance and dismissal.
55. Documents referred to:
  - a. Emails between line manager and Claimant re: projections, targets, and performance (pg 290-307)
  - b. Notes from meetings on 20/11/19 and 29/11/19 (pg 309-317, 319-326)
  - c. Spreadsheet tracking Claimant's pipeline and targets (pg 312-315, 316-318)
  - d. Email invitation to disciplinary meeting on 6/2/20 (pg 434-437)
  - e. Notes from disciplinary meeting on 17/6/20 (pg 649-666)
  - f. Outcome letter after disciplinary meeting (pg 700-705)

*Witness statement of Alan Pearson*

56. Alan Pearson's witness statement is located on pages 19-30 of the witness statement bundle. In his statement, Mr. Pearson explains his role in conducting the appeal hearing for the Claimant's dismissal.
57. He provides background on the appeal process, including reviewing the documentation related to the initial disciplinary procedure and meeting with the Claimant and her companion. Mr. Pearson summarizes the Claimant's grounds of appeal and her responses to the

allegations during the hearing.

58. He explains his decision to uphold the Claimant's dismissal after consideration of all the evidence and factors. Mr. Pearson sets out his rationale that the dismissal was within the range of reasonable responses given the performance and conduct concerns. His statement presents his perspective on the appeal proceedings.
59. Documents referred to:
  - a. Notice of Appeal email and grounds (pg 707-713)
  - b. Documentation provided for appeal review (pg 715A-C)
  - c. Notes from appeal hearing on 10/8/20 (pg 725-734)
  - d. Emails from Claimant after appeal hearing (pg 734A-C)
  - e. Notes from meeting with Andrew Staines on 1/9/20 (pg 749-752)
  - f. Appeal outcome letter on 7/9/20 (pg 759-761)

#### *The correspondence bundle*

60. The correspondence bundle contains communications between the Claimant, Miss Sara Bingham, an employee, and her manager Mr Andrew Staines, as well as human resources personnel, regarding the Claimant's performance and an upcoming disciplinary hearing.
61. The bundle begins with monthly projections of sales targets that the Claimant was expected to meet. It shows she fell significantly short of these targets over the course of several months in 2019. There are also notes summarising business written versus targets, with mentions of the Claimant being off sick for a period.
62. Further emails document preparations for a disciplinary hearing, including the invitation letter outlining the allegations of the Claimant's failure to meet sales targets. After receiving the invitation, the Claimant emailed that she had been signed off work by her doctor for two weeks. Additional correspondence includes a sick note, discussions of postponing the hearing, and an instruction letter rescheduling the hearing.
63. The bundle contains other performance-related items, such as the Claimant's target projections, summaries of business written compared to projections, and notes about support being provided through appointments booked by the "Hub." There are also exchanges planning weekly meetings and tracking the Claimant's progress on specific cases in her pipeline.
64. In summary, the correspondence bundle chronicles the Claimant's struggles to meet expectations over many months, provides evidence to support the scheduled disciplinary hearing, and sets out the Respondent's stated efforts to work with the Claimant through support mechanisms and a formal process to address the performance issues. The contents offer insights into both sides of the employee-manager relationship in this situation.

#### *The contracts and policies bundle*

65. The bundle contains the contract of employment between the Claimant, Miss Sara Bingham, and the Respondent, Charles Derby Group Limited. It sets out terms including duties, place of work, hours, notice periods, remuneration, deductions, absence, annual leave, and confidentiality.
66. It also includes the Charles Derby employee handbook covering areas like annual leave, sick pay, disciplinary procedures, grievance procedures, equal opportunities, training, and conduct expectations. The handbook states it forms part of the contractual terms for employees.
67. Additionally, the bundle contains human resources policies from the Respondent and related entities Quilter Cheviot and Quilter. These cover topics including sickness absence, retirement, bullying and harassment, capability, discipline, grievances, equal opportunities, and conduct.

68. The contents provide insights into the contractual rights and obligations between the parties, company rules and expected standards of conduct, and relevant HR policies and procedures. They offer context around issues like performance management, attendance, paid leave, and termination of employment.
69. In summary, the employment contract and HR policies outline the formal employment relationship, expectations, and processes intended to govern the Claimant's employment with the Respondent company. Their contents are relevant for considering the background context and contractual framework underlying the employment issues in dispute.

*The other materials bundle*

70. The bundle contains text message exchanges between the Claimant, Miss Sara Bingham, and her manager at the Respondent company, Mr Andrew Staines. The messages cover communications during Miss Bingham's periods of sickness absence in 2020 up until her dismissal. They provide insights into the contact between the parties regarding sick notes, return to work, and performance management issues.
71. Additionally, the bundle includes a news article regarding the rebranding of the Respondent company Charles Derby to Quilter Financial Advisers. This background context on the company transition provides relevant context.
72. Finally, the bundle contains a witness impact statement from the Claimant outlining the effects of her disabilities (coeliac disease and acute stress/anxiety) on her day-to-day life and activities. It describes the progression of her conditions over time and the medical treatment and medication required. The impact statement also covers the effect of her dismissal by the Respondent company on her health and wellbeing.
73. In summary, the text messages, news article, and impact statement contained in this bundle provide useful additional context and evidence regarding the Claimant's employment relationship and termination. The contents offer insights into her communications with management, the company environment, and the significant impact of her dismissal on her personal situation.

*Other written evidence*

74. The Respondent provided the Claimant's original employment contract (pages 72-86), setting out her pay, role, and other terms and conditions.
75. During the disciplinary process, the Respondent sent the Claimant case summaries and allegations (pages 538-547). The Claimant provided responses disputing the allegations (pages 642-647).
76. The Respondent also supplied copies of the Claimant's fit notes and medical certificates confirming periods of absence from February 2020 onwards (pages 441-451).
77. The documentary evidence provided contemporaneous information about the Claimant's performance, absences, and the processes followed by the Respondent during the disciplinary proceedings leading to her dismissal.

**Oral**

78. The Claimant, Ms Sara Bingham, gave extensive oral evidence expanding on the events covered in her witness statement. She discussed in depth her health conditions of coeliac disease and stress/anxiety, explaining the symptoms she experiences and how these impact her ability to work effectively. She stated that coeliac in particular causes fatigue, confusion, migraines and a weakened immune system leading to susceptibility to illnesses. She provided little medical evidence.
79. Under cross-examination on her health issues, the Claimant accepted that she did not expressly inform her manager, Mr Staines, about the extent of her disabilities or specifically

explain how they affected her while at work. She stated that she worked around occasional migraines by making up time later, without taking formal sick leave.

80. Regarding her absences from work, the Claimant confirmed she took some time off in June 2019 due to her house flooding but did not mention to her employer any related mental health or stress impacts. She reiterated feeling under pressure and stressed during that period but not formally raising these concerns with Mr Staines beyond requesting time off for the flood impact.
81. On her performance difficulties in meeting sales targets during 2019, the Claimant acknowledged that targets set by the Respondent were missed but felt they were unrealistic and unachievable for her situation, given inadequate leads and lack of support. She maintained regularly telling her manager that there were insufficient quality leads being provided to enable her to meet expectations.
82. Mr Andrew Staines, the Claimant's former manager, gave extensive evidence for the Respondent about his supervision of the Claimant and her performance issues. He discussed her frequent failure to meet monthly sales targets at various stages throughout 2019 and not attributing this underperformance to any disability or health condition.
83. On the Claimant's absences from work, Mr Staines reiterated that she only cited the house flooding as the reason when taking leave in June 2019. He asserted firmly that she did not raise or discuss any related mental health or stress concerns arising from these events. He also stated that she did not request any workplace adjustments or support due to medical issues during this period.
84. Mr Staines explained in detail the performance review process he followed to try to support the Claimant and improve her results. This included regularly updating her client pipeline spreadsheet based on their discussions, to focus her attention on priority actions needed.
85. Under cross-examination, Mr Staines accepted that he did not refer the Claimant for any occupational health assessment at any stage. However, he argued firmly that this was not required given the lack of specific health or disability issues raised with him directly by the Claimant at the relevant time during her employment and performance management.
86. Mr Alan Pearson, who conducted the Claimant's internal appeal hearing, gave oral evidence for the Respondent about his role and involvement in the case. He discussed reviewing the full history of the Claimant's performance issues and the prior disciplinary process undertaken by Mr Staines.
87. Mr Pearson explained that during the appeal hearing itself, the Claimant raised her medical conditions including coeliac disease and stress/anxiety. She claimed these impacted her work performance for the first time. However, in his view, the contemporaneous evidence available did not substantiate or support this assertion.
88. Under cross-examination, Mr Pearson accepted that he did not request any further medical information from the Claimant or refer her for an occupational health assessment at the appeal stage. He strongly argued this was not deemed necessary or appropriate given the circumstances of the case based on the information presented during the appeal.

## **The law**

### ***Legislation***

89. The Claimant brought claims of disability discrimination under the Equality Act 2010 ('the EqA').
90. Section 6 of the EqA defines disability as follows:

*"6(1) A person (P) has a disability if—*



- (a) *P has a physical or mental impairment, and*
- (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

91. Section 15 of the EqA prohibits discrimination arising from disability:

- "15(1) A person (A) discriminates against a disabled person (B) if—*
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

92. Sections 20 and 21 of the EqA impose a duty on employers to make reasonable adjustments:

*"20(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) The duty comprises the following three requirements.*

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

93. The Claimant also brought a claim of wrongful dismissal, alleging breach of her employment contract.

94. Finally, the Claimant claimed a breach of her right under section 10 of the Employment Relations Act 1999 to be accompanied at a disciplinary hearing.

### **Case law**

*Madarassy v Nomura International plc [2007] IRLR 246 (CA)*

95. In *Madarassy*, the Court of Appeal held that to establish a prima facie case of discrimination, the evidence must allow a reasonable tribunal to properly conclude there has been discrimination. The burden then shifts to the respondent to disprove discrimination.

96. We distinguish *Madarassy* because in the current case, the Claimant has been unable to establish a prima facie case of discrimination. She has not shown that the Respondent had real, constructive or appreciable knowledge of her disabilities at the material times. Even if the Respondent had known about the disabilities, the Claimant has not satisfied us that the Respondent's actions amounted to discrimination arising from her disabilities.

*Cockram v Air Products Plc UKEAT/0122/15*

97. In *Cockram*, the EAT held that when defending a discrimination claim, the burden is on the employer to provide clear findings showing their aim was legitimate, the measures taken were appropriate and reasonably necessary, and proportionate to achieve the aim.

98. We distinguish *Cockram* because in this case, the burden never shifted to the Respondent to justify its actions, as the Claimant did not establish a prima facie case of discrimination based on disability. She did not demonstrate the Respondent's knowledge of her disabilities or that its treatment of her amounted to disability discrimination.

*Barry v Midland Bank [1999] ICR 859 (HL)*

99. In *Barry*, the House of Lords held that to show treatment was proportionate, the employer must prove the measures were reasonably necessary to achieve the aim, not that there were

no alternatives.

100. We distinguish *Barry* because the Claimant did not establish a prima facie case of discrimination arising from disability that would require the Respondent to prove justification and proportionality. She did not show knowledge or discriminatory treatment.

*Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] IRLR 368 (ECJ)

101. In *Kutz-Bauer*, the ECJ held that if less discriminatory alternatives were available to achieve the same legitimate aim, the treatment cannot be regarded as objectively justified.

102. We distinguish *Kutz-Bauer* because without a prima facie case of discrimination, the issue of justification does not arise. The Claimant did not demonstrate the Respondent knew of her disabilities or treated her unfavourably due to them.

*Allonby v Accrington & Rossendale College* [2001] IRLR 364 (HL)

103. In *Allonby*, the House of Lords held that justifying discrimination involves balancing the discriminatory impact against the reasonable needs of the business. The more serious the disparate impact, the more substantial the business need must be.

104. We distinguish *Allonby* because the Claimant did not establish a prima facie case of discrimination on grounds of disability that would require justification. She did not show knowledge of disability or resulting discrimination.

*Smith v Churchill's Stairlifts plc* [2006] IRLR 41

105. In *Smith*, the Court of Appeal held the test of reasonableness for an adjustment is an objective one for the tribunal based on all the circumstances.

106. We distinguish *Smith* because without proof the Respondent knew of the disabilities, there was no basis to judge the reasonableness of adjustments. The Claimant did not establish knowledge or discrimination.

*Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10

107. In *Leeds Teaching Hospital*, the EAT held that for an adjustment to be reasonable, it need only have a prospect, not a certainty, of removing or reducing the disadvantage.

108. We distinguish this case as the Claimant did not demonstrate the Respondent's knowledge of her disabilities or resultant discrimination. Absent this, the issue of reasonable adjustments did not arise.

*Cosgrove v Caesar and Howie* [2001] IRLR 653

109. In *Cosgrove*, the EAT held that the employer has the principal duty to consider reasonable adjustments, not just the employee suggesting them.

110. We distinguish *Cosgrove* because without proof of the Respondent's knowledge of the Claimant's disabilities, no duty to consider adjustments could arise. The Claimant did not establish knowledge or discrimination.

*Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09

111. In *Sandwell*, the EAT held that gross misconduct requires a deliberate and wilful breach of contract or gross negligence by the employee. Breach of a policy is not necessarily gross misconduct.

112. We distinguish *Sandwell* because the Claimant was dismissed for persistent incapability and failure to meet targets over 12+ months, not for gross misconduct. Her dismissal followed capability procedures.

*Wilson v Racher* [1974] ICR 428

113. In *Wilson*, the EAT held that gross misconduct must be conduct so serious as to go to the

root of the contract, making further working relations impossible.

114. We distinguish *Wilson* as we find that the Claimant was, properly, dismissed for incapability over a sustained period, not an allegation of gross misconduct. The persistent failure to meet targets made working relations impossible.

### **Findings of the Tribunal**

115. The first issue was whether the Claimant was disabled at the material times by Coeliac disease and stress/anxiety (with depression). This had already been determined at a preliminary hearing where the Tribunal found the Claimant was disabled under the Equality Act 2010 by these conditions.

116. The next question was whether the Respondent had actual or constructive knowledge of the Claimant's disabilities. The Tribunal found the Respondent lacked knowledge of the Claimant's disabilities or their substantial effect prior to February 2020 when she went on sick leave. The Claimant did not inform the Respondent she was struggling with any disability-related health issues impacting her work before this date. Her earlier absences were attributed only to house flooding and relationship problems, with no mention of associated health difficulties. The Tribunal concluded the Respondent lacked sufficient knowledge of any disability situation requiring adjustments prior to February 2020.

117. The Tribunal found that prior to February 2020, the Claimant had persistently sought to justify her failing performance on a claimed lack of "quality leads" and persistently expressed dissatisfaction with her own performance. Given the Claimant's 30 years of experience and expertise in the field, including 25 years with LloydsTSB, the Respondent was reasonably entitled to expect her to be able to manage meeting the targets she had set for herself.

118. The Tribunal then had to decide whether various matters arose in consequence of the Claimant's disabilities. The Tribunal considered each issue and found no evidence that delay in the Claimant's work, reduced performance, procedural failures, stress impacting her performance, disability-related absences, or inability to complete duties to the required standard arose as a result of her disabilities. The Claimant did not demonstrate these were connected to her medical conditions.

119. It followed that since the Tribunal made no positive findings that the above matters arose from the Claimant's disabilities, her treatment in regard to performance management, disciplinary action and dismissal did not occur because of or in consequence of anything arising from her disabilities. The Respondent had raised concerns over poor performance and conducted a disciplinary process prior to having knowledge of any disability or health issues. The Tribunal concluded there were legitimate reasons connected to underperformance behind the Respondent's actions rather than any disability factors.

120. Given no unfavourable treatment was found to be because of something arising from the Claimant's disabilities, the Tribunal did not need to examine whether such treatment was proportionate.

121. Considering the alleged discriminatory provisions, criteria and practices, the Tribunal found none were shown to have disadvantaged the Claimant. The performance targets and disciplinary policies were standard and not specific to her situation. The evidence showed sickness absences were excluded from performance considerations. There was also no requirement for the Claimant to work while unfit. While more regular appraisals may have helped, there was regular communication about her performance and no complaints over this.

122. As the alleged PCPs did not disadvantage the Claimant, there could be no substantial disadvantage arising from them related to her disabilities. It followed that no failure to make reasonable adjustments was established.

123. Given the above conclusions, the Tribunal determined the Claimant did not show her dismissal was because of something arising from her disabilities. The Respondent lacked sufficient knowledge of any disability situation and performance reasons justified dismissal. The Tribunal found the dismissal was not an act of discrimination arising from her disabilities.
124. The Tribunal considered the conduct issues involving client complaints that arose during the period after February 2020 when the Claimant had gone on sick leave citing stress. These included allegations about clients Mr C, Mr J, Mr H, and Ms H in relation to the Claimant allegedly delaying work, retaining client documents, and not following procedures.
125. Having reviewed the evidence, the Tribunal found that none of these conduct complaints, either individually or collectively, could be reasonably categorised as gross misconduct warranting summary dismissal. They amounted to issues regarding delays, communication failures and procedural oversights. While poor client service, the Tribunal determined they were not serious enough to destroy the employer-employee relationship and forfeit the notice period.
126. The Tribunal found that no reasonable employer, considering the relevant circumstances, could have decided that dismissal without notice for gross misconduct was within the range of reasonable responses to these conduct issues. At most, they warranted potential performance management or disciplinary action short of summary termination.
127. When combined with the existing concerns over the Claimant's capability in terms of underperformance against targets, the Tribunal found dismissal with notice for capability grounds would have been within the band of reasonable employer responses. However, neither the capability nor conduct issues, individually or together, justified summary dismissal for gross misconduct.
128. The Tribunal found that the Claimant was clearly dismissed on the basis of capability, and this was, in the circumstances and on the evidence, within the range of reasonable responses. She would have been dismissed for capability even without the inclusion of the conduct issues.
129. Examining the Claimant's contract, the Tribunal found she was entitled to one month's notice which the Respondent failed to provide on summarily dismissing her. Her dismissal was therefore wrongful. She was dismissed for capability and the Respondent's own capability policy requires that dismissal for such reasons must be with notice.
130. Regarding accompaniment rights, the Tribunal found the Claimant did not clearly communicate she wanted a trade union official from WRS to attend her disciplinary hearing. The Respondent reasonably understood she wished to bring a legal representative which was not allowed under its policy; the Claimant, for from disabusing the Respondent of their error, compounded it by confirming that she accepted that it was at the Respondents' discretion to allow her to be legally represented. As there was no clear refusal of the Claimant's request for a certified trade union official, there was no breach of her accompaniment rights.
131. The only claim found to succeed was the wrongful dismissal claim lodged in time, so the Tribunal did not have to consider extending time for other matters.

## **Conclusions**

132. This case concerned claims of disability discrimination, wrongful dismissal, and breach of the right to accompaniment brought by the Claimant against her former employer, the Respondent.
133. The principal claim was one of discrimination arising from disability contrary to the Equality Act 2010. The Claimant contended that she was disabled by Coeliac disease and stress/anxiety conditions. She argued that these disabilities caused her disadvantage in the

workplace regarding meeting performance targets. She also alleged the Respondent failed to make reasonable adjustments.

134. Further, the Claimant claimed she was subjected to unfavourable treatment and dismissal because of something arising in consequence of her disabilities. She stated her dismissal was an act of discrimination.
135. The Respondent denied liability for discrimination arising from disability. It contended it lacked knowledge of the Claimant having any disabilities or their effects at the relevant times. The Respondent also denied subjecting the Claimant to any unfavourable treatment because of her disabilities, maintaining that her dismissal was for legitimate business reasons unconnected to any disability.
136. Having carefully considered all the documentary and oral evidence presented, and the submissions made by the parties' legal representatives, the Tribunal reached the following conclusions:
137. The Tribunal was satisfied that the Claimant was disabled at the material times by reason of Coeliac disease and stress/anxiety amounting to mental impairments under the Equality Act 2010 definition.
138. However, the Tribunal found that the Respondent did not have actual or constructive knowledge of the Claimant's disabilities or their substantial adverse effect prior to her taking sick leave in February 2020.
139. Prior to February 2020, the Claimant had persistently sought to justify her failing performance on a claimed lack of "quality leads" and expressed dissatisfaction with her performance. Given the Claimant's extensive experience in the field, the Respondent was reasonably entitled to expect her to meet the targets she set for herself.
140. The Claimant did not inform or make the Respondent aware that she was struggling with any disability-related health difficulties or their impact on her work prior to February 2020.
141. When she was absent in mid-2019, this was attributed solely to house flooding and relationship problems rather than to any associated health issues. The Tribunal accepted the Respondent's evidence that it was not placed on notice that any disability situation required adjustments to be made at that stage.
142. The Tribunal determined that none of the matters complained of by the Claimant - such as delay in her work, reduced performance, procedural breaches, or inability to perform her contractual duties prior to February 2020 - were shown to have arisen because of her disabilities.
143. The Claimant did not demonstrate these situations were caused or connected to her medical conditions. She did not advise the Respondent of any disability-related problems impacting her duties and performance.
144. The Tribunal found that the Respondent had raised concerns over the Claimant's poor performance and conducted a disciplinary process prior to having knowledge of any disability or health issues.
145. It concluded there were legitimate reasons connected to the Claimant's underperformance which caused the Respondent's actions, rather than any matters arising from her disabilities.
146. As no link was established between the Claimant's treatment and her disabilities, her dismissal could not be considered an act of discrimination arising from disability. There was insufficient knowledge and the evidence indicated performance-related justification for dismissal.

147. Regarding the conduct issues raised while the Claimant was on sick leave, the Tribunal found these did not amount to gross misconduct warranting dismissal without notice, either individually or together with the capability issues. At most they warranted potential disciplinary action short of summary termination.
148. Dismissal with notice for capability grounds was within the range of reasonable responses. However, summary dismissal for gross misconduct was unreasonable given the Claimant's notice entitlement under her contract and the applicability of the capability policy.
149. The alleged discriminatory provisions, criteria and practices were also not proven to have placed the Claimant at a substantial disadvantage. The performance targets and disciplinary policies were standard and applied generally, not just to her.
150. There was regular communication about her performance and no evidence that she was pressured to work while unfit. More regular appraisals may have helped but would not have avoided the disciplinary action.
151. The Tribunal carefully considered the Claimant's contract of employment. It was satisfied that she was contractually entitled to one month's notice on termination. As she was dismissed summarily without notice, this was a breach of contract making her dismissal wrongful at common law.
152. However, regarding accompaniment rights, the Claimant did not clearly communicate she wished to be represented by a trade union official. The Respondent reasonably understood she wanted to bring a legal representative. As there was no clear refusal of a certified trade union official, there was no breach of her statutory accompaniment rights.
153. As no other claims were made out on the evidence, the wrongful dismissal claim was the only one to succeed. The Claimant is entitled to compensation equivalent to one month's pay in lieu of notice, together with her contractual car allowance for that period. The remainder of her wider claims for discrimination arising from disability and breach of statutory rights fail and are dismissed.

**Judge M Aspinall  
5 November 2023**

JUDGMENT SENT TO THE PARTIES ON 9 November 2023  
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

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