## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4113765/2021 Hearing Held at Edinburgh on 16, 17, 21, 22, 23 and 24 November 2023, and 10, 11 and 12 January 2024; and Members' Meeting on 16 February 2024**

10 **Employment Judge: M A Macleod**
**Tribunal Member: M Watt**
**Tribunal Member: S Cardownie**

15 **Lian Boughen** — **Claimant, Represented by Mrs L Lindsay, Solicitor**

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**Registers of Scotland** — **Respondent, Represented by Ms J Forrest, Solicitor**

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The unanimous Judgment of the Employment Tribunal is:**

1. **That the respondent did not have actual or constructive knowledge that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010, and that as a result, the claimant's claim under section 15 of the Equality Act 2010 fails, and is dismissed; and** 35
2. **That the claimant was unfairly dismissed by the respondent, and that the case will now proceed to a Remedy Hearing to determine the just and equitable award to be made to her;**
3. **The claimant's application to amend her claim is refused.**

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## REASONS

1. The claimant presented a claim to the Employment Tribunal on 20 December 2021, in which she complained that she had been unfairly dismissed and discriminated against on the grounds of disability by the respondent.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. The claimant presented further particulars of her claim, to which the respondent responded.

4. A Hearing was listed to take place at the Employment Tribunal in Edinburgh on 16, 17, 21, 22, 23 and 24 November 2023. As it turned out, the Hearing did not conclude within those initial dates, and accordingly a further Hearing was listed to take place on 10, 11 and 12 January 2024 in order to bring the case to its conclusion.

5. A Joint Bundle of Productions was presented to the Tribunal and relied upon in the course of the Hearing. Some additions were made, without objection, during the course of the Hearing.

6. The following witnesses were called to give evidence before the Tribunal:

   - The claimant;
   - Sean Fegan, a Plans Officer and Trade Union representative for the PCS Union;
   - Douglas MacGregor MacDonald, a Plans Officer and Assistant Secretary for the PCS Union Branch;
   - Jennifer Grandison, retired Legal Higher Executive Officer;
   - John David Jamieson, full time PCS Union Officer;
   - James ("Jamie") Thomson, retired Higher Executive Officer;

- Craig Philip Gardiner, Head of Delivery;
- Janet Egdell, Interim Chief Executive Officer, National Records of Scotland, and formerly Accountable Officer for the respondent.

7. The Tribunal permitted the claimant to be recalled to give evidence following Mr Gardiner, for the purpose of allowing her to address any documents which he had referred to in his decision to dismiss her. The reason for this was that the claimant was unclear, when she gave her evidence to the Tribunal, as to exactly what documents Mr Gardiner had seen.

8. It was agreed that the Hearing should address the issue of liability only, and that remedy would be dealt with at a separate Hearing in the event that the claimant succeeded in any or all of her claims before us.

9. On the fifth day of the Hearing, Mrs Lindsay, for the claimant, intimated that she wished to make application to amend paragraph 35(d) of the amended statement of claim (46).

10. Paragraph 35(d), which was part of the section under "Remedies", stated that the claimant sought "An award for compensation for the personal injury suffered by the Claimant in consequence of the injury at work she received on 16 July 2020 and compensation for the pecuniary loss suffered as a result of the personal injury."

11. The proposed amendment sought to revise this plea so as to read: "An award for compensation for the personal injury suffered by the Claimant in consequence of her dismissal and compensation for the pecuniary loss suffered as a result of the personal injury."

12. The respondent objected to the application to amend. On the basis that it related to the issue of remedy, the Tribunal reserved consideration of the application to amend. We address it at the conclusion of the Judgment below.

**The Case and Issues**

13. It is useful to summarise the case before us, and to set out the Agreed List of Issues presented by the parties.

14. The claimant was dismissed following a period of absence from work of some 18 months, by letter dated 27 September 2021 (238), on the basis that there had been a fundamental breach of mutual trust and confidence in the employment relationship. The claimant complains that not only was her dismissal unfair, but that she was discriminated against for a reason arising in consequence of her disability.

15. The List of Issues is as follows:

**Knowledge of disability**

1. **Did the respondent know, or could they reasonably be expected to know, that the claimant was disabled (under section 6 of the Equality Act 2010) by reason of her chronic contact dermatitis, at the time of dismissal?**

**Discrimination arising from disability**

2. **Whether the claimant's absence from work between February 2021 and 15 July 2021 and then 17 July 2021 until 27 September 2021 arose in consequence of her disability, chronic contact dermatitis?**

3. **If so, did the respondent treat the claimant unfavourably (by dismissing her) because of that outlined at 2 above?**

4. **If so, did the respondent treat the claimant unfavourably in pursuit of a legitimate aim, being to employ staff that were able to perform the role for the respondent and those with whom they held a relationship of trust and confidence?**

5. **If so, was the action taken by the respondent a proportionate means of achieving that legitimate aim?**

**Unfair Dismissal**

6. **Whether the claimant was dismissed for a potentially fair reason under section 98 of the Employment Rights Act 1996, namely some other substantial reason?**

7. **If a potentially fair reason is established, did the respondent follow a fair procedure when dismissing the claimant?**

8. **Whether the decision to dismiss fell within the band of reasonable responses of a reasonable employer?**

16. On the basis that this Hearing was only for the purpose of determining liability, the issues relating to Remedy have been omitted from the agreed List at this stage.

17. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

**Findings in Fact**

18. The claimant commenced employment with the respondent on 5 May 2002. Her date of birth is 2 December 1971. During the course of her career with the respondent she progressed to the position of Higher Executive Officer (HEO) Registration Officer. She described her position as that of a "Legal Settler", who would deal with complex cases of registration of properties on sale and purchase. She worked full time, approximately 37 hours per week, and was based at Meadowbank House, London Road, Edinburgh.

19. The respondent is responsible for the registration of property and other matters in Scotland. It receives no direct Government funding, but charges and retains fees in respect of the registration of documents, from which its budget is drawn.

20. In March 2020, the global Covid-19 pandemic had spread so that the respondent decided to send its employees home, and not require them to return to work while the effects of the pandemic remained widespread.

The claimant was required then to absent herself from the workplace at Meadowbank House.

21. The claimant lives alone in a small flat, which was subject to ongoing renovation work at the time of the national lockdown in March 2020. Members of her family, based in England, had been assisting her with the work, which had to be abandoned in an incomplete state in compliance with the national instructions in place at that time.

22. The claimant did not own or operate a laptop in March 2020, nor did she have internet access at home. Her view was that since she had grown up without internet access in her formative years, she had no need of it at home. Further, she associated the use of the internet with her work, and she wished to maintain her home as a space separate from that of her workplace. When lockdown occurred, she had a personal mobile phone and a telephone landline, by which she would keep in contact with people.

23. The claimant was then placed on furlough leave under the Government's Coronavirus Job Retention Scheme from March until October 2020. She received 100% of her pay during this time. She was not permitted to work while on furlough leave. She was in any event unable to work at home, partly due to the ongoing works which had been left in an incomplete state and partly due to her lack of a laptop and internet access.

24. During furlough, the claimant's line manager was Louise Lumsden. She made contact with the claimant in order to keep in touch with her. Meetings among the team were organised by video call, though the claimant was unable to attend as she did not have a laptop, smartphone nor access to the internet. In any event, during the furlough period from March until October 2020, the claimant was unable to work owing to rules of the Coronavirus Job Retention Scheme.

25. Some of the respondent's staff who had access to a laptop and internet at home were able to continue working, and were not placed on furlough leave, during the period from March to October 2020.

26. In October 2020, the claimant's furlough leave came to an end. The respondent placed her, and a number of others who were unable to work at home, on paid special leave.

27. In approximately November 2020, the claimant was advised by her manager that she would be among the first wave of employees to return to work in the office at Meadowbank House. However, a further lockdown required to be put in place owing to concerns about the spread of the virus, and she did not at that stage return to the office. Accordingly, she continued to be absent from work and on special leave.

28. On 15 January 2021, Rachel Porrelli, of the respondent's Employee Relations Team, wrote to the claimant to advise that a referral was being made to the respondent's Occupational Health provider, Optima Health (115ff). She attached the referral form which had been completed by Catherine Willis (117), who had been appointed by the respondent to deal with individuals who remained absent from work following the end of lockdown restrictions. The reason for the referral was stated to be that *"we have a small group of individuals who cannot work from home as per the Scottish Government's guidance either because of lack of broadband connectivity or space and privacy."* Optima were requested to carry out an assessment on the claimant and advise whether there were any underlying health conditions which would require additional reasonable adjustments if she were to return to work in the office. They were also invited to provide advice about travel to and from work.

29. The referral also stated: *"Lian has not been able to attend work since March and her personal circumstances do not allow for her to work from home. Lian has reasonable adjustments in place in the office environment and our Health and Safety adviser will be able to replicate these in the new office space that has been redesigned to support social distancing."*

30. The Optima Health assessment was carried out by Iain Dunkley, a Senior Occupational Health Adviser, by telephone on 25 February 2021. His report (120ff) was not produced to the respondent at that time, however,

as the claimant was offered the opportunity to comment on its terms in line with the respondent's standard practice, and made some observations about its contents to Optima. At the heading of the report, there was a reference to the Scottish Prison Service which was plainly incorrect. The report (121) stated that:

*"I understand from Lian that she has been at home, shielding since March of 2020. She tells me that this was due to concerns regarding her immune system which she believes makes her more vulnerable to serious illness from the COVID 19 virus. We discussed the background health concerns which Lian feels put her at increased risk. We discussed the potential benefit to the clinical decision making in seeking a General Practitioner report. Lian is considering whether to offer consent at the moment. A subsequent review of the clinical literature has not been particularly helpful in giving additional advice regarding these health concerns and any potential associated risk with COVID 19 and I am not in a position to advise effectively upon them.*

*We additionally discussed an established condition affecting the skin on Lian's hands for which she normally uses prescription emollients. She advises that these are not available under current government guidelines at the moment. She tells me using hand gels and generally available soaps has exacerbated this causing pain and difficulty with her hands. This may be a barrier to being able to adopt recommended hand hygiene measures."*

31. He went on to note that the claimant was not currently on sickness absence, but that he did not have sufficient information to fully address the question of whether or not the claimant was fit to carry out their normal duties at that time. He did note that the claimant would prefer to await the second dose of the COVID vaccine to be regarded as effective. At that time, no phased return to work was advised at that stage, though it may be helpful in due course.

32. The adviser went on to say that no specific work adjustments were advised at that stage, though with "additional clinical information" specific recommendations may be forthcoming.

33. He concluded by stating that no routine review was planned, but that *"Shound you require additional advice or information regarding Lian's fitness for work, then I recommend consideration of a referral specifically for Occupational Health Physician assessment."*

34. In April 2021 (by which time the respondent had not received the Optima report) Stephen Bennett was allocated responsibility to support the claimant. Optima advised that they had attempted to contact the claimant on a number of occasions to discuss the report, but had been unable to obtain a response. The claimant, in evidence, said that she recalled receiving one voicemail message from Optima, and that she herself left several messages with them.

35. She spoke with Mr Bennett on 9 April 2021, returning a voicemail message which he had left. She expressed her concern that contact from the respondent had not been what she expected, and arranged that a weekly call should be set up. She confirmed that her landline number would be the best way to contact her, but that her mobile could also be used, and that both had voicemail capacity.

36. The claimant was concerned that the Optima report was very vague and basic, and contained no definitive advice.

37. On 10 May 2021, Rachel Porrelli wrote to Mr Bennett (131) to confirm that she had received an update from Optima about the claimant, from a person called Natalie. In the update, Natalie advised that the nurse had been on sick leave and annual leave, and that there had been a slight further delay in the release of the report. She said that when the nurse returned to work at the end of that week, she would arrange a call with him and the claimant to discuss the changes required, and then release the report.

38. An impasse appears to have developed with regard to the Optima report. The claimant maintained that she attempted to contact them to discuss the report, but did not seek to obstruct its release to the respondent. The respondent presented information from Mr Bennett which suggested that there was a developing sense of frustration on the part of the respondent, and a feeling that the claimant was being obstructive and difficult to contact.

39. The Tribunal did not hear evidence from Mr Bennett, nor any of the managers who dealt with the claimant between March 2020 and June 2021, namely Louise Lumsden, Carolyn Dyer and Catherine Willis. Avril Watson took over the claimant's line management in June 2021. The Tribunal did not hear evidence from Ms Watson.

40. We deal below with the different timelines which were presented to us by the respondent during the Hearing, but in general we noted that the terms of the timelines, and particularly those produced at 123ff and 314ff, were not factual statements, but commentaries on the events as they had transpired, with considerable opinion and comment on the claimant's actions and assertions. We treated them with considerable reserve, especially in light of the fact that no witness was called by the respondent to speak to their terms. We require to take care with regard to any criticisms we might have about these timelines, since the author or authors were not called to give evidence, and thus have had no direct opportunity to defend themselves. However, we make clear that we do not regard the timelines as statements of proven fact, except to the extent that the claimant accepted their terms, as she did from time to time, for example agreeing that a particular phone call did take place, such as on 8 June. She made it clear, however, that she did not accept the tenor of the notes contained therein.

41. On 8 June 2021, the claimant had a conversation with Mr Bennett. The claimant found this a distressing conversation. She felt that Mr Bennett was asking inappropriate questions about her medical condition. She told him that she had a skin condition which made it impossible for her to use

hand sanitiser, and understood that this was a key element of working in Meadowbank House. She also said that she had another condition, leptospirosis, which left her immuno-compromised, and made her anxious about the risks of returning to the workplace if it could not be clear that she would be safe to do so.

42. They discussed whether or not the claimant could work at home. She said that the condition of her home, with unfinished works and some exposed wiring, meant that it was an unsuitable environment within which to work. She expressed the preference to return to the office, notwithstanding the concerns which she had.

43. The claimant did not consider that she was being obstructive in her responses, but at the same time felt that working at home was simply not an option, partly because of the state of her flat and partly due to her lack of a laptop and internet connection. She asked, over time, for a dongle to be provided to her, which would then have enabled her to use a laptop without requiring to enter into a contract with an internet provider.

44. The claimant found the conversation with Mr Bennett an intimidating and difficult one. Her evidence, which is not supported by the timeline, was that Mr Bennett had become so frustrated that he had hung up the call on her, but noted that he had not included this in the timeline of events. She said she called him back on this occasion and that he was “sheepish”, and said that he did not know what had happened.

45. Having read the timeline she considered it to be very one-sided, subjective and an inaccurate portrayal of her.

46. Further, the respondent lodged what appeared to be a document setting out a number of contacts, or attempted contacts with the claimant, commencing in May 2021 (129). Again, we regard this document with some reserve. No witness spoke to it (it appears to have been composed of contacts by Louise Lumsden and Avril Watson) directly, but it was not explained why the record only began in May 2021 and not before. In addition, the claimant did not accept that the record was an accurate one,

and queried why, for example, there were 4 entries on 29 July 2021 at 12.34, 12.42, 12.44 and 13.52.

47. On 9 June 2021, the claimant had a text exchange with Louise Lumsden (141). She apologised for being upset, describing herself as stressed and anxious as a result of her call with Mr Bennett the previous day, and for placing Ms Lumsden in a difficult position. Ms Lumsden responded by saying that there was no need to apologise, reassured her that she was there to support her and that she should not worry. She then confirmed that she had escalated the claimant's complaint about Mr Bennett to his line manager. The claimant said that she was not sure she would categorise it as a formal complaint at that stage, and went on, in a subsequent text message (142) to say that she would prefer it to be dealt with informally at that stage.

48. On 11 June 2021, the timeline presented by the respondent (314ff) prepared by Mr Bennett, contains the following entry:

*"Lian has been in touch with her manager, Louise Lumsden to complain strongly about SB's conduct, professionalism, intimidating, hostile, judgmental, bullying, abusing his position, etc etc. Louise reported that to Natalie Dalton (SB's manager, as requested by LB). LB advised that she did not want to raise a formal grievance, but would not engage with SB under any circumstances going forward.*

*While acknowledging that the call on 8 June was very challenging and upsetting, for both individuals, SB strongly refutes LB's accusations finding them malicious and slanderous. SB reported that LB reacts with hostility and aggression every time she is asked a difficult question or challenged about her position and responses. She fails to recognise this, perhaps deliberately, perhaps lacking self-awareness. Her attitude and demeanour on calls can be volatile, and can change to defensiveness and hostility very quickly. LB is a very private individual, so she does find sharing personal info with a stranger she has never met very difficult. However, she refuses to accept that in order to support her back into*

*productive work, she needs to participate fully in the process and do everything she can to help. She absolutely refuses to do so, throwing multiple obstacles in the way at every opportunity, not recognising, or caring, about the impact on those trying to support her. she very much views herself as an unfortunate victim in this situation, with no-one understanding how difficult it is for her.*

*SB has been supported by his manager and colleagues, but is considering whether to take any formal action about LB's accusations and behaviour. This would certainly add further complexity to an already untenable situation."*

49. On 2 July 2021, the claimant attended a meeting with Ruth Jamie. She was accompanied by John Jameison of the PCS Union, and Ms Jamie was assisted by Akin Ogunsuyi, who also took notes (135ff). The note stated that the reason for the meeting was *"Discuss return to productive work and address health and safety concerns raised."*

50. At the start of the meeting, it was confirmed that the claimant had been absent from work since March 2020, including a period of furlough leave, and that she had been on full pay throughout that whole absence. Ms Jamie confirmed that the respondent's preference was for the claimant to return to work from home, and the claimant's was to return to Meadowbank House *"…as she is unable to work from home because she doesn't have a suitable home environment to facilitate remote working (renovation work, rewiring and small flat ie no room for desk/chair etc)"* The claimant confirmed that this remained her position, but that there were concerns relating to her medical issues. She went on to explain that her GP was no longer able to prescribe the treatment for her skin condition as it was not considered "Covid safe"; she could not use hand sanitiser, so she restricted leaving her flat to a minimum, so as to avoid hand washing too much, as that had a negative impact upon her skin.

51. Ms Jamie advised that Robert Francis, Health and Safety Officer, had confirmed that he could provide the claimant with nitrile gloves.

52. The claimant asked how many staff were currently working in the same office, and was told that there were 5. Ms Jamie explained that all Covid measures were in place to ensure that the environment was secure and Covid safe. The claimant responded that while she thought that the environment would be safe for people with normal immune systems, she had a compromised immune system which left her at greater risk of contracting Covid, and that she was still concerned.

53. Ms Jamie replied: *"Stated that she understood LB's concern and said all the concerns had been well thought through. She reiterated that RoS has put everything in place to ensure its work environment is Covid safe for all staff. She added that every regulation has been followed and RoS have had some staff members working in the office for a number of months with no instances of anyone contracting the virus from the office."*

54. There was a discussion about flexibility in the working hours, so as to avoid travelling at rush hours, but Ms Jamie said that everyone had to be out of the building by 5pm every day, due to the need to have scheduled cleaning to ensure the Covid security of the building.

55. The claimant raised the possibility of waiting for her second Covid vaccination before returning, including a period thereafter to allow it to have its greatest effect. Ms Jamie said that the next step would be to provide the claimant with a letter detailing the concerns raised, which may contain a date on which the claimant would be expected to return to the office to resume productive work

56. On 6 July 2021, a "General Risk Assessment" was carried out by Louise Lumsden, in the name of the claimant (151).

57. In relation to commuting to and from work, it was noted that *"Wherever possible private transport should be used to maintain isolation from the public when commuting to RoS. This may include bicycle, car, motorbike. If public transport cannot be avoided, current government advice should be followed in respect of what PPE should be worn whilst travelling, for example, face masks, disposable gloves. On arrival at the site, staff*

*should sanitize hands at entry point thoroughly using sanitizer provided and then wash their hands for at least for 20 seconds as a method of infection control throughout the day."*

58. Under the heading, "Do you need to do anything else to control this risk?", it was noted that *"Hand sanitizer available at entry point and throughout building where work areas have been identified – Colleague can supply their own hypo-allergenic sanitiser if required."*

59. The claimant's position on hand sanitiser was that her GP prescribed her a particular form of emollient, which would not, however, be effective against the spread of Covid-19, and therefore was not approved. The claimant found it very difficult to identify a suitable hand sanitiser which would not affect her chronic contact dermatitis, and ultimately, on the evidence, none was available.

60. The risk assessment went on (156) to confirm where the hand sanitisers were positioned.

61. It appears that this risk assessment was conducted and completed by Louise Lumsden. Again, however, Ms Lumsden was not available to speak to the document and it is not clear what conversations she had, if any, with the claimant, to identify what particular issues might arise for her in returning to the office.

62. Following the meeting on 2 July with the claimant, Ms Jamie wrote to her on 8 July 2021 (164). She enclosed a copy of the note of the meeting, and confirmed that the claimant would receive a letter from the Keeper confirming her essential worker status and her return to work date of 14 July 2021.

63. Owing to the impact of the pandemic, the Scottish Government issued a document entitled "Coronavirus (Covid-19) – Impact on Terms and Conditions of Employment for Scottish Government Sector. Version – 13 July 2021".

64. Included within that document was paragraph 7, under the heading Sickness Absence: *"Due to the pressures likely to be faced by GP practices and the need to follow advice on self-isolation, for this period only, a 'Fit Note' will not be required for the first 10 days of absence."*

5 65. The claimant did return to work, but on 15 July 2021, in order to accommodate a medical appointment on 14 July.

66. She attended work on 15 and 16 July 2021. However, in the course of 16 July, the claimant required to open a door in the office, and came into contact with hand sanitiser which remained on the door handle,
10 presumably from another member of staff who had sanitised their hands but not dried off the sanitiser. As a result, the claimant experienced a significant flare-up of her chronic contact dermatitis. She reported absent from work on 19 July 2021. She did not return to work thereafter.

67. On 2 August 2021, Avril Watson wrote to the claimant (191):

15 *"Dear Lian,*

***Absence Reporting Notice and Attendance Review Meeting***

*I hope that you are feeling in better health and that things are otherwise well with you.*

*You have been reporting unfit for work since 19th July. As yet, we have*
20 *not received medical certification of your absence, which was due to be with us on 26th July in line with the sickness absence authorisation process in our policy. You told me that you will not see a doctor until 11th August, which is the date you have secured a GP appointment. The reason you have given for your absence is that you are suffering from an*
25 *infection. We have concerns that you have not secured an earlier appointment to seek treatment for an illness which has been serious enough to prevent you working for several weeks. GP surgeries understand the requirement for fit notes to comply with sick pay authorisation and routinely arrange for these to arrive with patients*
30 *timeously. I must inform you that, should we not be in possession of*

*medical certification of your absence by 5pm on 11th August, your absence may be recorded as unauthorised and managed accordingly in line with the Maximising Attendance Policy and Procedure which I enclose with this letter…*

5 *Your attendance at work was reviewed at a formal meeting on 2nd July 2021. A plan to return you to the office was then agreed. Having attended the office for two days, your current sickness absence has unfortunately further impeded your return. Since your position remains that you cannot work remotely, the ongoing impacts for service delivery are considerable.*
10 *It is therefore necessary that we review the situation further and I invite you to a formal meeting on 12th August at 2.30pm for this purpose. Formal action up to and including termination of employment are possible outcomes of this meeting.*

*Carolyn Nickels, Head of First Registrations, will lead the meeting and*
15 *she will be accompanied by an Employee Relations Adviser, either Suzanne Knox or Akinbandele Ogunsuyi. The meeting will take place via Microsoft Teams. Unless you advise of a preferred method in the meantime, we will dial you into this meeting using your telephone number. You have the right to be accompanied by a Trade Union representative or*
20 *a workplace colleague and I would ask you to inform me if you intend to be accompanied and provide the contact details of this person in advance to enable us to set them up for the Microsoft Teams appointment.*

*We have experienced that it is very difficult to make contact with you and this has continued to disrupt progress in enabling you back to work and*
25 *confirming details of your absence. I remind you that you are required and expected to be contactable during normal office hours during periods of sickness absence or on paid special leave. You have my direct dial and mobile phone numbers and I ask that you make contact with me via telephone as required prior to this meeting.*

30 *Yours sincerely,*

*Avril Watson*

*Senior Team Leader"*

68. On 6 August 2021, the claimant emailed Mr Francis, the respondent's Health and Safety Manager, to advise him formally that she had suffered an injury at work recently. She said that she was unaware until that date that she required to do so. She went on: *"Prior to my return to work, after a period of furlough/paid leave, I advised RoS that the handwashing/sanitising protocols introduced in response to C-19 would likely cause me harm in respect of a skin condition which until my return was in abeyance. Regrettably my fears have been borne out. Please see the photos attached hereto which were taken on the first and second days respectively (15th and 16th July) that I attended the office. Please note the blistering, inflammation and broken skin…I am securing a fit note in support of my injuries…"*

69. The claimant attached photographs (195 to 197) which demonstrated a significant difference apparent in the condition of her skin. She was not challenged about the veracity of these photographs nor of their dates.

70. Mr Francis advised Ms Watson and Douglas MacDonald, the claimant's other PCS representative, that he had started an investigation into the incident, to get to the root cause of it (193).

71. An Accident/Incident Investigation Report Form was completed and signed by Mr Francis, and dated "Sept/Oct 2021" (242ff). The report noted that no formal accident report form had been completed by the claimant, and that no interview had taken place other than questions which were sent to the claimant. He said that this was due in part to the current restrictions in place, and in part to the claimant's absence from Meadowbank House for the period following the incident.

72. In answer to the question "Was PPE being used or supplied?", Mr Francis recorded that *"No PPE was required; however, it is noted in previous correspondence that a reaction to Lian may occur on touch. It is also noted that gloves, both Nitrile and cotton were offered but declined by Lian as Lian stated that these may cause a reaction to her skin. It is also*

*noted in Lian's own statement that Lian wore her own gloves on public transport and out with RoS to mitigate any reaction to sanitiser when touching objects, door handles etc. These gloves are stated as waterproof ski type gloves. Lian did not wear her own gloves when touching door handles objects within MBH. Lian did not wear any other skin/hand protection whilst in MBH."*

73. He noted that the injuries seemed to focus on the hand area, correlating with the claimant's report. No report was made by the claimant to her line manager or anyone else while she was in the working environment, and a delay in reporting the incident.

74. The claimant submitted a Fit Note dated 11 August 2021, covering the period from 11 August to 28 August 2021 (200). The doctor confirmed that the reason for her absence was *"Contact dermatitis on hands",* and added the following comments: *"Recommend referral back to Occupational Health as a priority please, irritation to soap and hand sanitiser at work exacerbating symptoms."*

75. The claimant attended a meeting with Carolyn Nickels on 12 August 2021, accompanied by her PCS representative, Mr MacDonald. Akin Ogunsuyi attended with Ms Nickels and took notes (201ff).

76. Ms Nickels opened the discussion by saying that she understood that the claimant had previously said that she was unable to work from home, and asked if this was still the case. The claimant responded: *"Confirmed she is still unable to work from home as her home environment is still not suitable. Stated that couple of weeks before lockdown, she decided to refurbish flat and had kitchen boxed up in her front room, electrics keep cutting in and out. Family live down south were carrying out the work so hasn't been possible for them to come up to carry out the rest of the work."*

77. Ms Nickels suggested that the claimant's absence following 15 July was due to an infection. The claimant disputed this, and said that the reason for her absence was not discussed in the first call with Ms Watson. The

claimant then explained that she felt that in the Optima referral her concerns about skin condition were not taken seriously. She went on: *“Explained that there were hand sanitisers at each door and people were using the sanitiser before they open the door and leaving sanitiser on the door. Blistering caused by contact dermatitis. Asserted that her injury was caused by this and the commercial soap in the bathroom. Stated that she normally has access to prescriptions for emollients, but they were taken off the prescription list – GPs were advised not to prescribe them during lockdown but they are now available since restrictions lifted.”*

78. The claimant requested that she be placed in a room where the doors could remain open, or be placed in a room on her own, and Ms Nickels indicated that she would look into these requests. They discussed whether the claimant could wear gloves. She explained that she had discussed this with her GP, and that she was concerned that gloves are porous. She said that on the bus she uses waterproof ski gloves.

79. Later, there was a discussion about the Optima report. The claimant was noted: *“Felt another OH referral would only be useful if she spoke to a different person – reiterated that she had a very open and detailed discussion at the last assessment, but the report didn’t reflect this. Felt it wasn’t taken seriously as the recommendation didn’t reflect discussion. Would have expected more specific reference to the hand washing protocols and what might cause damage and harm.”* When asked what she thought about a further OH referral the claimant said that she was really disappointed with the last referral and would prefer to make her own recommendations which she felt was covered by that meeting. She said that she could not imagine that there would be many more obstacles to overcome, and agreed that another referral would not be useful at that time.

80. The claimant then raised concerns about the content and tone of the letter inviting her to that meeting. She was unhappy that the letter insinuated that her inability to work had been her fault.

81. Ms Nickels confirmed that she would then make a decision about the next steps.

82. She wrote to the claimant on 25 August 2021 (208) to summarise the discussions in the meeting of 12 August. She went over the situation as she understood the claimant's ability to work at home and in the office, and said: *"I want to assure you that your health and wellbeing remain a priority for us. However, I'm sure you can also appreciate that your continued absence is not a sustainable position for RoS so it is important that we continue to work towards your return to productive work."*

83. Ms Nickels confirmed that it was in order for the claimant to bring in her own hand washing products. She also went over the concerns which the claimant had raised:

*"**You advised that you were told that you did not need to supply a fit note immediately providing when you do submit it, it covers the full period of the absence. The letter contradicts this advice and states your fit note was due on 26/07/21.***

*This does seem to have been a mistake and I apologise for the conflicting advice you were given and any anxiety this then caused.*

***You were unclear from the letter of the purpose of our meeting on 12/08/21.***

*The letter was written on the basis that the reason for your absence, an infection (which was our understanding at the time), did not tally with the 3+ weeks delay in getting a GP appointment; you had no fit note to confirm your absence and it had been difficult to contact you (I will cover your point in relation to making contact below) to seek any further information. On that basis, the meeting was required to discuss your unauthorised leave. The letter included some options for you around submitting a fit note which changes the nature of the discussions, hence why the letter may have come across as vague in terms of purpose of the meeting. I apologise for any stress or anxiety caused by this uncertainty.*

***You were concerned about inaccuracies relating to making yourself available and advised that you had never missed a scheduled call and always returned missed unscheduled calls.***

*I followed up on this particular point with a number of people who have been your line manager or point of contact during your extended period of furlough, special leave and sick leave and all concluded that you have been extremely difficult to make contact with.*

*While you've been available for scheduled one to one calls, contact with you outside of this has been incredibly difficult and indeed time consuming for managers. There are multiple examples where a member of RoS has called you, received no answer, left a voicemail and had to do so 2 or 3 times before you return the call., frequently a number of days later. The Occupational Health telephone consultation was delayed for the same reason. During scheduled team meetings, team leaders would dial you into the call and receive no answer while other team members, including others on furlough dialling into the calls themselves, were having to wait while the team leader tried to add you to the call only to get your voicemail. In short, the amount of time and effort taken to maintain contact with you during the last 17 months has been significant.*

*While you're absent with illness, it is understood that you may not always be able to take a call. However, while you were on furlough and special leave on full pay, it is a reasonable request that you make yourself available to take calls with your team leader to keep in touch…*

*As you're currently signed of work until 27th August, please continue to liaise with Avril in terms of arranging your return to the office on Monday 30th August, in line with your GP fit note."*

84. An exchange of text messages took place between Ms Watson and the claimant (217) on 26 August 2021. Ms Watson said at 1323: *"Hi Lian. Hope you are feeling better. Can you please let me know if you are returning to work next week? As discussed I'm on leave tomorrow and now Sean is also off. If you won't know until tomorrow I'll ask Ruth to pick*

*to access paperwork (sic). Just drop me a text either way and I'll update Ruth."* The claimant replied at 1327: *"Hi Avril. Just taking things day by day. I'm waiting to hear back from my GP about extending my fit note. I shall forward it on as soon as possible. Enjoy your leave. Regards Lian."*

5 85. The claimant submitted a further Fit Note dated 28 August 2021 covering the period from that date until 10 September 2021. The reason for absence was noted as "skin condition" (215). However, it appears that this Fit Note was not received at that time.

86. On 1 September 2021, it was noted that the claimant had not logged on
10 to the respondent's system. Attempts to contact her were not successful, and her trade union representative Mr MacDonald was unable to assist either. As a result of concerns on the part of Ms Watson, Mr Bennett contacted the police, and an emergency welfare check was carried out by them. After 10pm that evening, the police contacted Mr Bennett to advise
15 that they had made contact with the claimant and that all was well.

87. On 7 September 2021, the respondent determined that the matter should be taken further. Craig Gardiner, Head of Service Delivery, wrote to the claimant on that date (218) to invite her to a formal Hearing.

88. He stated:

20 *"Last week, the lack of contact and nil response from you to several calls, voicemails and texts to both your landline and mobile from both your manager and a PCS rep was so concerning that the police had to be contacted to make a formal welfare check on 1 September. Fortunately, as a result of this, contact was made with you via the police, but this was*
25 *an extremely upsetting and time-consuming situation for all of those concerned.*

*I have asked for an investigation to be carried out in to the events leading up to your current absence as I believe there is a case to answer on the breakdown of mutual trust and confidence in our employment*
30 *relationship. This is based on the following:*

- *Your continued refusal to enable us to support you to work from home, which has always been, and remains, our preference for your return to productive work;*

- *Your continued absence from work at MBH in spite of the extensive measures taken to support your safety;*

- *Your current absence being potentially linked to using hand cleansing products in spite of the fact that you were requested to source suitable alternative products for any conditions that you have, prior to your return;*

- *A continuous pattern experienced by several colleagues and managers of difficulty in contacting you.*

*Therefore, I am inviting you to a formal meeting on 15 September 2021 at 10am. This meeting will be held via Microsoft Teams and we will dial you in at the appropriate time. Please let me know which number would be best to contact you on. Akin Ogunsuyi (Employee Relations Adviser) will also be present. The purpose of the meeting is to explore the most recent events outlined above in more detail, and the historic events that have culminated in this situation, and to give you an opportunity to respond.*

*I would advise you that as breakdown of mutual trust and confidence is in question here, consideration will be given to several potential outcomes, up and including dismissal. However, a decision on this will not be made until you have had a full opportunity to put forward your full response and the hearing has been concluded…*

*Your previous return to work for only two working days on 15 and 16 July was not a satisfactory experience. At this point, it is unclear to us whether you plan to return to work on 13 September or whether your current sickness absence would be prolonged for a further period. However, given the issues that you have raised and your reason for absence, we cannot facilitate your return to work at this time. Any*

*decision on your return to MBH will be taken after you have responded to the issues discussed at the formal meeting."*

89. The claimant was taken aback at the terms of this letter, and the indication that her employment may be terminated. She contacted Dougie MacDonald, her PCS representative, for advice.

90. Mr MacDonald emailed Mr Gardiner, with a copy to Stephen Bennett, on 10 September 2021 (221) advising that he would be attending with the claimant. He expressed surprise that given the possible serious implications of the Hearing there was no paper pack contained with the letter to the claimant. He requested a copy of the papers to be relied upon at the Hearing.

91. Mr Bennett responded (220) that afternoon. He said that they did not have a pack for this Hearing. He repeated the bullet points detailed in the letter of 7 September 2021 to the claimant, and stated:

*"Craig has been provided with Lian's emails about her current health condition that she sent to Robert Francis. Lian obviously has copies of those. Craig has also had sight of the letters and meeting notes from Lian's recent meetings with Ruth and Carolyn which Lian has copies of. I think you do too, but do you need copies of them? Let me know and I can send them through. These meeting notes obviously cover a lot of the concerns outlined in the four bullets above.*

*The only additional info is the recent lack of contact that resulted in a police welfare check. Craig has spoken to Avril and I about that but we haven't documented anything as such. It is simply that you, me and Avril were so concerned that I contacted the police. What happened after that is not precisely known by any of us, because that is a police procedure, although I am sure Lian will have her thoughts on what happened and why."*

92. On 13 September 2021, Douglas MacDonald sent an email to Mr Gardiner (224) in his own name, though it was composed by John

Jamieson. They raised some queries about the process, and in particular made reference to the requirements of the respondent's disciplinary procedure. They stated that they did not believe that the facts had been clearly established. They observed that when they phoned HR to find out what papers were being relied upon, they were told that the only matter under consideration was Mr Gardiner's letter. They pointed out that this was "rather odd" since there had been an OHS report, an accident at work form completed and also an inappropriate communication from a manager suggesting that there was an issue of discipline, yet confirming that it was an absence review meeting.

93. They observed that the length of the claimant's absence appeared to be being blamed upon her, when there were a number of events which were outwith her control. They asked for a copy of the risk assessment carried out prior to her return to work, with any accompanying recommendations.

94. Mr MacDonald wrote separately to Avril Watson on 13 September 2021 (226), in which he asked that the disciplinary/absence letter be removed from the claimant's record, since the matters included were never discussed, and that the letter be replaced by one which reflected an absence review. *"Otherwise the letter misrepresents the meeting that did take place and could be viewed as overly intimidating."*

95. Mr Bennett replied that day to say that he did not see the point of removing the letter from the record, as the important document was the note of the meeting. He said that the letter had been drafted and sent to the claimant when they were unaware of any reason for her absence, which effectively would have made the claimant absent without leave.

96. Mr Bennett also wrote to Mr Gardiner on 14 September 2021, without copying that email to the claimant or her representatives (229) to state:

*"Morning Craig*

*You may have noticed that I agreed with a statement Dougie made yesterday about LB – 'But I agree, RoS was only in a position to return Lian to MBH from mid-July.'*

*To clarify, we were bringing people back to MBH several months prior to July, but we were delayed with LB because she did not sign off her OH Report for several months. Part of this delay was the fault of our OH provider, Optima. However, Optima also advised me that they had difficulty in contacting LB to arrange an appointment to discuss her concerns with the first version of the OH Report. LB disputed this problem in contacting her by Optima. An appointment was finally arranged in June. Prior to this, LB absolutely refused to share any detail with me about her OH Report of her health conditions, so we were unable to proceed with a return to MBH until after the follow-up appointment, after which Louise Lumsden was finally able to facilitate through the EW process which took us up to July."*

97. The meeting was postponed until 20 September 2021, and on 15 September Mr Bennett emailed Mr MacDonald and Mr Gardiner (313) with a timeline with associated documents embedded within. A copy was forwarded to the claimant, though given that she was only able to view the document and attachments on her phone, she was largely unable to scrutinise the documents.

98. It is worth observing at this point that this timeline (314ff) was not produced at the start of or prior to the Hearing in this case, but following questions raised by the Tribunal about the two other timelines produced within the bundle which could not have been the timeline supplied prior to the dismissal hearing conducted by Mr Gardiner. The respondent's solicitor accepted that this was the case, and informed the Tribunal that she had only discovered on the previous evening that there was a third timeline. She undertook to produce that document, together with the email or letter which showed when and to whom it was disclosed, by the following day, which she did.

99. The Tribunal has some observations to make about the timeline, its content and the mode of its production, which are set out in our decision section below.

100. The hearing, characterised as a "Review Meeting", took place on 20 September 2021. The hearing was chaired by Mr Gardiner, who was assisted by Akin Ogunsuyi, of Human Resources, who took notes (230ff). the claimant attended and was accompanied by Mr MacDonald.

101. The purpose of the hearing was noted as being to *"Discuss ongoing absence and recent lack of contact leading to police welfare check."*

102. The claimant stated at the outset that she was concerned about the language in the invitation letter, which stated that she had refused to work from home: her position was that she had never refused, but had been unable to do so, and that this was still the case. She insisted that she had had some conversation with Ms Lumsden about getting internet set up at home but that she had never been offered a laptop or a dongle. She had concluded that her only option was to work from the office, but that she and her family were now working on how to complete the renovations to her flat as soon as possible.

103. Mr Gardiner was unable to comment on the provision of a dongle but pointed out that the claimant had said that it was a "lifestyle choice" for her not to have had internet access at home. The claimant's response was that that had been a passing comment, and that she did not have a problem with this but had never had the need for the internet at home. She went on to say that now there was a possibility that she could have internet installed as the restrictions had been lifted and she was working on making her flat a suitable environment.

104. The claimant expressed concern that the invitation letter had suggested that she was at fault for not having been at productive work for 18 months. She pointed out that this was partly due to furlough, special leave and delays which were out of her control. She had also returned to

productive work in July and would have remained there if not for the injury sustained at work.

105. She said that she was unclear as to what steps had been taken to secure her safety on return to Meadowbank House, and indeed that she was not aware of any steps taken to assure her safety. She said she was unaware of the risk assessment which had been carried out.

106. With regard to the third point in the invitation letter, she said she was concerned that it was suggested that she had been purposely in contact with hand sanitiser to cause herself an injury. Mr Gardiner asked her why she had not responded to Robert Francis on his inquiry as to what steps should be taken by her to protect herself on her return to the office. The claimant said that she had responded. This was a reference to her letter to Mr Frances (undated)(284). In that letter she had stated: *"Each day I left home/work and went directly to the bus stop where I caught a bus which took me directly to my destination. I did not visit any shops during these trips, however, I did go to a shop during my lunch break on 15th July – nevertheless I did wear my gloves during this excursion and I washed my hands (followed by the application of an emollient) as soon as I returned to MBH…I am very careful about what I use on my skin and what I expose my skin to and have been since I was first afflicted by this condition in 2017 which is how I have been able to manage the condition and successfully hold it in abeyance."*

107. Mr Gardiner raised the fourth point in the invitation letter, relating to the lack of contact which had led to the police being called out for a welfare check. Mr MacDonald explained that he knew that the claimant was due back on 30 August and checked whether or not she had digitally logged on. He was worried when he noted that she had not, and checked if there had been any contact with Avril Watson the next day. He said that he was now aware that the claimant had sent a text message to Ms Watson on 26 August in which she had said that she might be extending her fit note, and that had he been aware of that he would not have asked for a welfare

check to be carried out. He also said that he expected that someone from HR would visit her.

108. When the claimant was told that she had not confirmed the position after that, she said that her phone was bad. She also said that she had attempted to send her fit note to Ruth Jamie by email from her phone, but had not realised that it had not been delivered, and that her phone stopped working shortly after that, on 27 August.

109. She noted from the timeline that there were criticisms about her having been difficult to contact, but maintained that these concerns were not raised with her at the time, and wondered why she was only made aware of this at the hearing. She pointed out that during the furlough period, she had had limited contact from the respondent.

110. Mr Gardiner stated: *"Felt that there had been a lot of time and effort put involved in trying to get LB back to work and other things that had transpired over a significant period, but that LB had only managed 2 days' worth of work in 18 months."*

111. The claimant reiterated that this had not been her fault, and that the majority of her absence was due to furlough and delays in process. She asked Mr Gardiner to take into account that she had always been a conscientious and responsible worker for over 20 years, that she had never been in trouble before and that she would not intentionally jeopardize her employment, and that there were circumstances which were of no fault of hers which had led to such a lengthy absence.

112. In his evidence before this Tribunal, Mr Gardiner said that he had got the impression that the claimant had tried to put up as many barriers as possible to prevent going back to work, then when she had to return to work, the incident with hand sanitiser happened, and "she was able to go off sick". He also said that he considered that it was the claimant who was responsible for the incident at work which caused her absence, due to the "accountability factor to try to ensure around that", which he was never sure the claimant took into consideration. Later in his evidence, he

commented that "part of the injury that had happened may have been deliberate which led to her being off sick".

113. He considered the information available to him and the points made by and on behalf of the claimant, and issued his decision by letter dated 27 September 2021 (238ff).

114. He confirmed that the purpose of the meeting had been *"to explore the breakdown of mutual trust and confidence in our employment relationship as a result of you not having worked productively for 18 months now, in spite of the efforts of RoS to support you to do so."*

115. The letter went on:

*"The breakdown is based on the following:*

- *Your continued refusal to enable us to support you to work from home, which has always been, and remains, our preference for your return to productive work;*
- *Your continued absence from work at MBH in spite of the extensive measures taken to support your safety;*
- *Your current absence being potentially lined to using hand cleansing products in spite of the fact that you were requested to source suitable alternative products for any conditions that you have, prior to your return;*
- *A continuous pattern experienced by several colleagues and managers of difficulty in contacting you.*

*I had asked for an investigation to be carried out and you received copies of a summary of the situation since March 2020, with several supporting documents and reports from the various managers involved, prior to the meeting on 20 September, where you were given an opportunity to respond. I have enclosed a copy of the meeting notes for your information.*

*After long and serious consideration, my decision is that there has been a fundamental breach of mutual trust and confidence in our employment relationship. As a result, your employment contract with Registers of Scotland will be terminated.*

5 *This decision is based on the following factors:*

- *In September 2021, 18 months after all RoS employees were sent home as a result of the pandemic, you have not returned to productive work (apart from two days in July), in spite of having received your full salary for this entire period;*

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- *All efforts to return you to productive work from home, via multiple managers, have failed for a number of varied reasons put forward by you. whilst I understand that you had been having your flat renovated prior to lockdown, I do not believe that you have taken necessary and prioritised steps to have work completed in a timeframe that would allow you to work from home, which has always been RoS' preferred option. I don't believe that some of the work couldn't have been progressed before now, and even now you cannot give a timeframe when this work will be completed.*

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- *You stated at the meeting that you had never refused a laptop. I have checked with managers who have been trying since April 2020 to support you in working from home, which of course would involve a laptop to be sent to your home. Further, looking at the evidence, I believe that barriers have been put in place by you that have made it impossible for RoS to send you a laptop and enable you to work from home, including, but not limited to, your refusal to arrange a broadband connection at your home. Again, I cannot see when or how this could be brought to a timeous end that would satisfy RoS as an employer.*

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- *I believe that RoS has done all it can in order to make your working environment safe within the office. If you were keen to*

*return to work I believe you would have taken all necessary steps to ensure you could contribute effectively and safely in the office environment eg, by providing your own hand cleansing products suitable for any health condition you may have, as requested to do so prior to your return. I do not believe this to be the case.*

- *Reports from multiple managers that you have been regularly difficult to contact since the earliest days of the pandemic and at one point contact was only re-established through a police welfare check. With regard to the most recent lapse in contact with your manager, I do not believe the reasons provided were satisfactory. Your text messages did not state that you had been given an extension to your fit note. In fact, when reading them, the impression given was that you needed to speak to the doctor and no confirmation was sent to your manager to confirm that the line had been extended.*

*Therefore, your contract has been terminated with effect from 30th September 2021. I would advise that you are not required to work your notice. You will be paid for your notice period and any outstanding annual leave that you are due in your final salary payment…*

*If you would like to appeal this decision this should be done in writing within 10 working days of receipt of this letter, making clear the basis for your appeal. Please address any appeal to Stephen Bennett, ER Manager. As the offices are closed this must be via email…"*

116. In his evidence, Mr Gardiner suggested that while "breach of trust and confidence" and "breakdown of trust and confidence" could mean the same thing, they could also be different. He did not accept, however, that the breakdown was in any way the fault of the respondent.

117. The claimant was upset and frustrated when she received the letter confirming her dismissal, and accordingly, with the assistance of Mr Jamieson, she submitted a letter appealing against her dismissal, dated 8

October 2021 (245ff). She indicated that the letter required to be lengthy not only to address the decision to dismiss her, but also the timeline document purporting to be an investigation into the facts of the case.

118. She said that the appeal covered 4 main areas:

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- That the disciplinary process had not been followed;
- That the facts were not clearly established, and some of the accusations made were misleading;
- That the respondent failed in its duty of care by not carrying out a risk assessment or sending the claimant for a further OHS referral prior to her return to work on being notified of a medical concern, namely a compromised immune system;

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- That an OHS referral after the accident at work could have informed a workstation assessment, in order to get the claimant back to productive work.

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119. Janet Egdell, Accountable Officer, wrote to the claimant on 11 November 2021 (254) in order to invite her to attend a formal meeting on 19 November 2021 by Microsoft Teams.

120. The appeal hearing took place on 19 November 2021 from 3 to 5pm. Janet Egdell chaired the meeting, and was assisted by Akinbandele Ogunsuyi and Ioanna Lampiri, both of HR, both note-takers. The claimant attended and was accompanied by Mr Jamieson. Notes were produced (259ff).

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121. Ms Egdell explained that the purpose of the hearing was to hear the grounds of the appeal, and that she was looking for new evidence. She also confirmed that while Mr Jamieson had proposed that a number of witnesses be called to the hearing, she reserved the right to choose whether she would bring in such witnesses. She also said she wanted to hear what the questions were and how they fitted in with the grounds of appeal.

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122. Mr Jamieson set out "the legal parameters" of the case, referring to case law. He concluded his submission in this regard by suggesting that Ms Egdell should seek legal advice.

123. Ms Egdell stated that it was correct to say that the respondent had not treated the case as a disciplinary one. She clarified that the claimant's point was that the respondent should have followed a disciplinary procedure.

124. Mr Jamieson went on to argue that the facts on which the dismissal had been based had not been established, and there was misleading information contained in the papers. For example, Mr Bennett had said that Ms Dyer had carried out a Covid risk assessment, which was not correct.

125. The claimant was permitted then to speak from a written statement. She maintained that she had not contributed to the breakdown in mutual trust and confidence, given that she had never been dishonest with the respondent; on the contrary, she had always engaged and co-operated with all colleagues and points of contact. However, she considered that colleagues had chosen to create a false narrative about her. she pointed out that her absence was partly due to furlough due to the Covid-19 pandemic, and also delays in the OHS reporting process. She maintained that it was incorrect to say that she had refused a follow-up appointment with them.

126. She also stated that she considered that the furlough and special leaves had been conflated with her recent absence on the grounds of ill health following the incident in July 2021. She insisted that she had never refused to work from home, but that her circumstances had meant that she was unable to do so. She said that she would gladly have worked if the environment had been correct, but that there was no room for a desk or a chair. Ms Egdell asked her if she had been able to work from home, whether that would have meant that she needed to sit on the sofa with a laptop on her knee. The claimant agreed and added that this would not

have been ideal. However, she said that it was not possible to work from home and that she had to be able to work from the office.

127. The claimant maintained that she had attempted to obtain copies of her payslips from the respondent, in order to obtain a personal loan to hire contractors to carry out and complete the work in her flat. However, she was told that she had to provide a personal reason as to why she needed these payslips, and that without it she would have to await her return to Meadowbank House. As a result, she was unable to obtain a personal loan to effect the completion of the works within her flat.

128. She also said that the suggestion that she was averse to using technology in her home was another fabrication. She said she did not have broadband or wi-fi in her home not because she did not want it but because she did not need it. She explored the possibility of obtaining broadband at home at the end of October 2020, but then further restrictions were imposed and she could not have an engineer attend her home to fit it. Also, given the difficulties that the respondent was having in obtaining laptops, she recognised that there was little point at that stage in installing broadband. She was, in addition, under the impression that she would be part of the first wave of staff returning to the office in November 2020, though that did not transpire. She felt that she had been accused of being obstructive and unreasonable for a refusal to break the law.

129. As to the problems with OHS, she said that an IT transition caused them to lose her file, and nobody anticipated that the report would take such a long time. In any event, she felt disappointed by the terms of the OHS report.

130. She observed that if it were true that she was difficult to contact, she could not understand why it took 17 months for this matter to be raised with her. She only became aware of this accusation when Ms Watson wrote to her on 2 August 2021.

131. The claimant maintained that the respondent did not make considerable efforts to return her to the workplace, as she was the one who had asked that a risk assessment be carried out due to her conditions.

132. As to the police welfare check, she considered that this had been misrepresented.

133. Mr MacDonald was called to answer some questions. Ms Egdell insisted that any questions were asked through her, as she was keeping everyone to the agenda and to the grounds of appeal, and it was her role to identify if Mr Jamieson's questions were within scope.

134. Ms Egdell stated, towards the end of the meeting, that there were 5 minutes left in the meeting, and asked if they wished to ask any further questions.

135. The meeting concluded with Ms Egdell confirming that she would take some time to consider all that was said, and issue her decision.

136. On 29 November 2021, Ms Egdell issued her letter of decision following the appeal hearing (280).

137. She confirmed her decision to uphold the decision to dismiss the claimant.

138. She accepted that the respondent had not followed a disciplinary process, as her employment was ended for some other substantial reason as a result of a breakdown in mutual trust and confidence.

139. She said that she did not consider it within scope of the appeal to investigate all that had happened between November 2020 to September 2021. She agreed that the period of furlough leave was not relevant. She stated: *"I considered whether, if some events/discussions during this period, were not exactly as noted in the background information, this would have changed the hearing decision. I conclude that it would not have made a difference to the outcome."*

140. With regard to the alleged failure of the respondent to meet its duty of care, she maintained that she did not need to opine on whether action by either the claimant or the respondent could have prevented the contact with hand sanitiser, but that taking the claimant's explanation at face value, there would have been an ongoing risk to her of coming into contact with hand sanitiser in the office, and therefore that a different risk assessment would not have changed the decision.

141. She determined that a further OHS report would not have made a difference to the decision.

142. She concluded her decision as follows:

*"In summary, over the period of November 2020 to September 2021, with the exception of two days, you were neither able to work from home nor from the office, and there was no suggestion in our discussion that these circumstances have changed.*

*There was some debate running through the background information, the appeal grounds and your explanations to me, as to whether some of this absence could have been prevented through different actions either by yourself or by RoS. This reinforced to me that there had been a mutual breakdown of trust and confidence between yourself as employee, and RoS as employer."*

143. No evidence was led in relation to remedy, the Tribunal having determined that it was appropriate to leave that matter to a further Hearing, if required.

**Submissions**

144. The parties presented written submissions to the Tribunal, which were read and taken into full account in our decision below. Where relevant, reference will be made to those submissions in that section. The Tribunal does not consider it necessary to set out the terms of the submissions in any detail at this stage.

**The Relevant Law**

145. In an unfair dismissal case, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

*"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*

*(b) shall be determined in accordance with the equity and substantial merits of the case."*

146. In the case of **A v B (2010) ICR 849 EAT**, the claimant was dismissed on the grounds of "loss of trust and confidence", following a report that he was regarded as a risk to children received by the employer from the police. While accepting that the circumstances of that case were quite different to these, the EAT expressed the following view: "*We have observed a growing trend among parties to employment litigation to regard the invocation of "loss of trust and confidence" as an automatic solvent of obligations: it is not. In the present case it is necessary to identify more particularly why CAIC's disclosure is said to have, in effect, made it impossible for the Respondent to continue to employ the Claimant."*

147. In a footnote to that Judgment, the EAT went on to compare the case of **Macfarlane v Relate Avon Ltd UKEAT/0106/09**, and stated: *"Even in*

*the context where the language of 'trust and confidence' is most well-established, i.e. constructive dismissal, the question is not simply whether the relationship of trust and confidence has been destroyed or seriously damaged but whether that breakdown is as a result of unjustifiable conduct on the part of the employer. In the present context the point is slightly different but it is, equally, necessary to go behind the simple question whether trust and confidence has broken down."*

148. Section 15 of the Equality Act 2010 provides:

(1) *"A person (A) discriminates against a disabled person (B) if –*

*a. A treats B unfavourably because of something arising in consequence of B's disability, and*

*b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

## Discussion and Decision

149. The issues in this case are as follows:

**Knowledge of disability**

1. **Did the respondent know, or could they reasonably be expected to know, that the claimant was disabled (under section 6 of the Equality Act 2010) by reason of her chronic contact dermatitis, at the time of dismissal?**

**Discrimination arising from disability**

2. **Whether the claimant's absence from work between February 2021 and 15 July 2021 and then 17 July 2021 until 27 September**

**2021 arose in consequence of her disability, chronic contact dermatitis?**

3. **If so, did the respondent treat the claimant unfavourably (by dismissing her) because of that outlined at 2 above?**

4. **If so, did the respondent treat the claimant unfavourably in pursuit of a legitimate aim, being to employ staff that were able to perform the role for the respondent and those with whom they held a relationship of trust and confidence?**

5. **If so, was the action taken by the respondent a proportionate means of achieving that legitimate aim?**

**Unfair Dismissal**

6. **Whether the claimant was dismissed for a potentially fair reason under section 98 of the Employment Rights Act 1996, namely some other substantial reason?**

7. **If a potentially fair reason is established, did the respondent follow a fair procedure when dismissing the claimant?**

8. **Whether the decision to dismiss fell within the band of reasonable responses of a reasonable employer?**

150. We take these issues in turn.

**Knowledge of disability**

1. **Did the respondent know, or could they reasonably be expected to know, that the claimant was disabled (under section 6 of the Equality Act 2010) by reason of her chronic contact dermatitis, at the time of dismissal?**

151. The condition relied upon by the claimant in this case as a disability is chronic contact dermatitis. The claimant was dismissed on 27 September 2021. The respondent admitted in the course of these proceedings,

before the Hearing, that the claimant was at the material time a disabled person, but continued to deny that they knew, or could reasonably be expected to know, that the claimant was disabled under section 6 of the 2010 Act.

152. We require to consider what information the respondent had up to and including the date of dismissal about the claimant's condition of chronic contact dermatitis.

153. On 15 January 2021, the respondent referred the claimant to Occupational Health (115) in order to establish whether there were any underlying health conditions which would necessitate reasonable adjustments being put in place, and seeking guidance in relation to travelling to work on public transport. At that point, the claimant was not absent on sick leave, but on special leave. Nothing in the referral made any reference to chronic contact dermatitis.

154. On 25 February 2021, following a telephone conversation conducted by a Senior Occupational Health Adviser, Iain Dunkley, a report was produced, though it is important to note that this report was not made available to the respondent until June 2021, following a number of delays in finalising the terms of the report between Optima Health and the claimant, and (in the case of Optima Health), a transition between IT platforms.

155. In that report, the claimant was noted to have concerns about her immune system which made her, she believed, more vulnerable to serious illness from Covid-19; it went on, however, to refer to having discussed *"an established condition affecting the skin on Lian's hands for which she normally uses prescription emollients. She advises that these are not available under current government guidelines at the moment. She tells me using hand gels and generally available soaps has exacerbated this causing pain and difficulty with her hands. This may be a barrier to being able to adopt recommended hand hygiene measures."*

156. The Adviser did not express a view as to whether or not the claimant was suffering from a condition amounting to a disability under the 2010 Act.

He also said that no routine review was planned by Optima Health, but that should further advice or information be required in relation to the claimant's condition, he recommended consideration be given to a referral to an Occupational Health Physician.

157. On 8 June 2021, the claimant informed Mr Bennett that she was suffering from a skin condition which made it impossible for her to use hand sanitiser; on 2 July 2021, she met with Ruth Jamie, and talked about the difficulty of obtaining a suitable prescription to deal with her skin condition, noting that hand sanitiser and soap had a negative impact on her skin; and during that meeting she discussed alternative options, such as the use of nitrile gloves, and the need to find an alternative to washing or sanitising her hands.

158. From these exchanges it was clear that the claimant was suffering from a skin condition, but not that she was suffering from chronic contact dermatitis.

159. A general risk assessment was carried out, bearing the claimant's name (151ff). Reference was made to the claimant being able to bring her own hypo-allergenic hand sanitiser if required.

160. The claimant's attendance at work resulted in her coming into contact with hand sanitiser left on a door handle on 16 July 2021, and thereafter she was absent due to a reaction to that incident. She presented fitness to work notes to the respondent, including that on 11 August 2021 (200) which identified her as having contact dermatitis. She did email Robert Francis, Health and Safety Officer, on 6 August 2021, (194) to say that prior to her return to work she had advised the respondent that handwashing or sanitising protocols introduced in response to Covid-19 *"would likely cause me harm in respect of a skin condition which until my return was in abeyance. Regrettably my fears have been borne out…"*

161. When she met with Carolyn Nickels on 12 August 2021, the claimant spoke about the incident which had caused blistering due to contact

dermatitis; she described the impact upon her skin and that she had not as yet had the opportunity to see a consultant dermatologist.

162. A report from a Consultant Dermatologist dated 27 July 2022, some 9 months after her dismissal, was produced to the Tribunal (304/5) in which it was said that the dermatitis had started to develop *"a year or so ago"* and described hand sanitisers as the main cause of the flare-ups.

163. On the basis of the evidence available to us, we are unable to conclude that, with the information the respondent had, they could reasonably be expected to know that the claimant was suffering from a condition which amounted to a disability within the meaning of section 6. It was not clear, in our judgment, that the condition was a "long-term" one at the time of dismissal, and the specialist report of July 2022 suggests that the condition started to develop approximately a year or so before. The evidence does not suggest that the respondent could have known, in addition, that the condition had a substantial and adverse effect on her ability to carry out normal day-to-day activities at that point.

164. However, that is not the end of the matter. The Statutory Code of Practice on Disability produced by the Equality and Human Rights Commission provides, at paragraph 5.14 and 15:

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

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

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165. We gave consideration to the steps which it would have been reasonable for the respondent to take in the circumstances of this case. They obtained from Optima Health a medical report which was, to some extent, inconclusive, and which proposed a further medical report be obtained if further information were to be sought.

166. That report was delayed for reasons which are not, on the evidence, very clear. The claimant appears to blame Optima Health, while there is a suggestion that she was not easy to contact during that time when the report was in draft.

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167. In any event, on 11 August 2021, once she had had to go on sick leave, her GP recommended referral back to Occupational Health as a priority, in relation to the irritation to soap and hand sanitiser at work which had exacerbated symptoms. By that stage, the respondent did not take that step of referring the claimant to Occupational Health again.

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168. The following day, 12 August 2021, during her meeting with Ms Nickels, the claimant expressed her disappointment with the Occupational Health process, saying that she felt that another referral would only be useful if it were with another person; and also saying that she was not sure that Occupational Health could come up with anything different. It was noted that it was *"agreed that another referral would not be useful at this time".*

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169. It is difficult to know what to make of this exchange. The claimant's overall position appears to have been that she did not wish to be referred to Occupational Health again. While a different employer may have pressed the point, and particularly sought to persuade her that an appointment with an Occupational Health Physician may be of assistance, we are not of the view that the respondent failed to do all that could be reasonably expected of them in investigating whether the claimant was a disabled person at this stage, standing the claimant's view that a further OH referral would have been unlikely to add anything, given her knowledge of the process to date.

170. As a result, we have concluded that the respondent did not know, and could not reasonably be expected to have known, the claimant was a person disabled within the meaning of section 6 of the Equality Act 2010 at the date of her dismissal.

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**Discrimination arising from disability**

**2. Whether the claimant's absence from work between February 2021 and 15 July 2021 and then 17 July 2021 until 27 September 2021 arose in consequence of her disability, chronic contact dermatitis?**

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**3. If so, did the respondent treat the claimant unfavourably (by dismissing her) because of that outlined at 2 above?**

**4. If so, did the respondent treat the claimant unfavourably in pursuit of a legitimate aim, being to employ staff that were able to perform the role for the respondent and those with whom they held a relationship of trust and confidence?**

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**5. If so, was the action taken by the respondent a proportionate means of achieving that legitimate aim?**

171. In light of our finding under issue 1, the claimant's claim of discrimination arising from disability, which is predicated on the respondent's knowledge of her disability at the time of dismissal, must fail.

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**Unfair Dismissal**

**6. Whether the claimant was dismissed for a potentially fair reason under section 98 of the Employment Rights Act 1996, namely some other substantial reason?**

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**7. If a potentially fair reason is established, did the respondent follow a fair procedure when dismissing the claimant?**

**8. Whether the decision to dismiss fell within the band of reasonable responses of a reasonable employer?**

172. The reason given by the respondent for the claimant's dismissal was set out in the letter of 27 September 2021 by Mr Gardiner (236).

173. We consider that this letter requires careful scrutiny.

174. In the first paragraph, Mr Gardiner stated that *"the purpose of this meeting was to explore the breakdown of mutual trust and confidence in our employment relationship as a result of you not having worked productively for 18 months now, in spite of the efforts of RoS to support you to do so."*

175. Following the details contained in the four bullet points about *"the breakdown"*, Mr Gardiner set out his decision: *"After long and serious consideration, my decision is that there has been a fundamental breach of mutual trust and confidence in our employment relationship."*

176. The use of the two terms – breakdown of mutual trust and confidence, and fundamental breach of mutual trust and confidence – gives rise to subtly different interpretations. In his evidence, Mr Gardiner did not appear to be certain as to whether there was a difference between the two phrases.

177. In our judgment, a breakdown of mutual trust and confidence suggests that relations between an employer and employee have reached a point where they can no longer work together. The phrase is often accompanied by the word "irretrievable".

178. On the other hand, a breach of trust and confidence suggests that an act or acts of one party to the relationship has caused the other to conclude that they can no longer trust or place confidence in that party, and therefore termination of the relationship is inevitable.

179. Ms Forrest argued, in her submissions, noting that Mr Gardiner was unable to explain the difference, that it was "perhaps semantics to argue around the labelling" when it is clear that Mr Gardiner was of the view that it was the actions of the claimant which brought about the breakdown, or breach, of the implied term of trust and confidence. We cannot sustain

this submission. We do not regard this as a semantic matter, but as a matter of great importance in determining the real reason for dismissal here.

180. If a relationship breaks down due to irretrievable relationship divisions, termination of employment may be justifiable by an employer even if there is no misconduct or inappropriate act on the part of the employee. A breach of trust and confidence, as a reason for dismissal, arises where an employer takes the view that the employee has behaved in such a way as to be responsible for that breach, leading to termination of the relationship. It implies serious fault on the part of the employee.

181. It is necessary to go behind the simple question as to whether or not trust and confidence had broken down in this case. The respondent's position appeared to be that they thought it had, and therefore the matter required no further discussion. The claimant did not agree that the relationship had broken down, and was surprised and unhappy that it was terminated when it was.

182. In our judgment, a proper analysis of the letter of dismissal makes it clear that the respondent did find the claimant to be at serious fault in not returning to work, and that her actions were the cause of the dismissal.

183. They found that the claimant had been guilty of a "continued refusal to enable us to support you to work from home"; continued absence from work in spite of extensive measures taken to support her safety; her current absence being linked to using hand cleansing products when she had been requested to source alternative products; and a continuous pattern whereby colleagues had had difficulty in contacting her.

184. In our judgment, these are criticisms of the claimant's actions or failures. These are not merely symptoms of a breakdown of relations, but, in our view, a clear indication that the respondent considered the claimant to be deliberately and stubbornly placing obstacles in the way of her return to work, over an 18 month period.

185. We make the following observations:

- The claimant is essentially being criticised for failing to put in place arrangements so that she could work at home. Her contract does not require her to do so, but her place of work is at Meadowbank House. We find it extraordinary that the respondent continued to criticise the claimant for, for example, not contracting with a third party to arrange for broadband to be installed in her home, when they neither provided the claimant with a laptop or dongle, nor actually attended at her flat at any stage to establish what requirements may have had to be put in place.

- It is, in our judgment, rather a bold assertion by an employer that they can regard it as a failing by an employee to put in place measures to enable them to work at home without taking steps to assist that employee in doing so. An employee's home is their private place, and we are unaware of any right on the part of the employer in this case to insist that the claimant alter her living arrangements in order that they can secure work from her while she is there.

- The claimant's continued absence from work is referred to, but without any clear explanation as to which absence or category of absence Mr Gardiner means. It is clear, in our judgment, that he has conflated several different periods of leave, without distinguishing between them, as he should have. For the first six months of her absence, the claimant was on furlough leave, put in place by the respondent in response to the lockdown imposed due to the pandemic from March 2020. While this was altered on appeal, it is indicative of Mr Gardiner's mindset that he swept the furlough leave up together with the subsequent periods of leave. Thereafter, from October 2020, the claimant was placed, by the respondent, on special leave, on full pay. That was a decision of the respondent, accepted by the claimant, but which, as we understand it, applied to many other staff unable to work in the

office or at home at that point. The period of 18 months includes the period up until the date when the claimant was referred by the respondent to Optima Health, a necessary pre-requisite of her return to work. At the very least, that period of leave until the Optima Health report was available cannot purely be regarded as a matter laid at the claimant's feet; if the respondent wanted her to return to work sooner, they could have arranged the referral sooner. Taking the period up until the Optima Health report was available into account as a "continued absence" was illogical, and in our view entirely unfair. Once the report was available, a period of time was required in order to establish whether or not the physical environment and the arrangements in place for the claimant to return were adequate in light of her status as someone who was shielding due to fears about Covid-19, and by July 2021, that return to work was possible. We noted with interest that Mr Bennett, whose general attitude to the claimant emerges from his timeline as being quite hostile, told Mr Gardiner that he had agreed with a statement made by Dougie MacDonald on 13 September 2021, when he said *"But I agree, RoS was only in a position to return Lian to MBH from Mid-July"* (229); he also accepted that at least part of the delay in the production of the Optima Health report lay with OH, though he seemed to try to resile from that agreement in his email to Mr Gardiner. In any event, that appeared to be an acceptance on the part of Mr Bennett that at least part of the delay in returning the claimant to work until mid-July lay with others than the claimant, yet Mr Gardiner completely failed to take this into account. The claimant then returned to work for 2 days in July 2021, but went off sick after that until her dismissal, a period covered entirely by fitness to work certificates.

- In our judgment, the respondent's attitude to the period of the claimant's absence was careless and cavalier, and completely failed to consider the claimant's explanations for the delay, but to

take into account the entire 18 month period at the date of dismissal demonstrated a failure to analyse carefully the reasons for the different periods involved.

- The reference to "extensive measures" being taken to ensure the claimant's safety is something of an exaggeration. A risk assessment was carried out, but did not in our judgment amount to a personal risk assessment for the claimant, notwithstanding that it bore her name. We were unable to discern exactly what extensive measures were taken for the claimant in order to ensure her safe return.

- The claimant's current absence, which we understood to refer to her sickness absence following her return to work in July, was said to be related "potentially" to "using hand cleansing products" in spite of being told to source alternative products. Again, the respondent has taken a very broad sweep at this allegation. The claimant's dermatitis was not caused by her using hand cleansing products, and there was no evidence before the respondent that this was the case at all. Her explanation to the respondent was that she had touched a door handle, unwittingly coming into contact with hand sanitiser left there by someone else, which caused her skin to react badly. The respondent did not dispute this version of events at any stage. Notwithstanding the respondent's duty to ensure a reasonably safe place of work for the claimant, they appeared to take the view that she was responsible for this incident because she had not found an alternative substance to use. The claimant was very clear – and again this was unchallenged – that she had consulted her GP about this and had not been able to find any alternative emollient or cleanser which would satisfy both the needs of her skin and the of her employer in ensuring that any emollient used would not transfer the Covid-19 virus.

- What caused us even greater concern was that Mr Gardiner, in his evidence, strongly implied that the claimant had deliberately put her hand where she knew that she would come into contact with a hand sanitiser: in examination in chief when asked if he believed that the claimant would have remained at work had she not suffered her injury at work, when he said that he "personally didn't believe it, that the claimant wanted to be at work. I got the impression that the claimant had tried to put up as many barriers to prevent going back to work then when she had to, this happened and she was able to go off sick". It is impossible to avoid the conclusion that Mr Gardiner believed that the claimant deliberately allowed herself to come into contact with hand sanitiser in order to allow her to absent herself from work. It was never suggested to the claimant that she had deliberately caused such a self-inflicted injury, but it is clear that Mr Gardiner regarded this, rather blithely, as a justifiable conclusion which he took into account in his decision.

- As to the difficulties which the respondent said it had in contacting the claimant, we were unpersuaded, on the evidence given by the witnesses called by the respondent to this Tribunal, that there was indeed clear evidence that the claimant failed to keep in touch or to return calls. She herself was critical of the respondent's failures to keep in adequate touch with her while she was on furlough leave during lockdown. We saw some evidence about this, but it is clear, in our judgment, that Mr Gardiner considered this to be established fact and proceeded accordingly. We did not find that that was a safe or fair way to proceed.

186. It is our judgment, therefore, that Mr Gardiner's decision was taken on the basis that the claimant had acted in a way which he regarded as unacceptable, and justified terminating her employment. He did not, however, state this in the letter of dismissal. He used the phrases we have referred to above, and gave as the reason for dismissal "some other

substantial reason". Of course, in the statute the phrase "some other substantial reason" is not of itself a reason for dismissal, but a general definition of reasons which may justify dismissal. We address the procedure followed below but it is difficult to avoid the conclusion that the respondent did not wish to rely upon conduct as a reason for dismissal as it would have required them to comply with the process contained in their disciplinary procedure.

187. In our view, this was a dismissal for the reason of conduct. Mr Gardiner's confusion over the terminology, coupled with his clear assertions of wrongdoing on the part of the claimant, made it clear that the real reason for his decision was that he considered that the claimant had engaged in a lengthy course of conduct to prevent the respondent returning her to work. Rather tellingly, he also accepted, under cross-examination, that he had initially thought that the reason for the meeting was misconduct, but was corrected about that by Mr Bennett, the author of the lengthy timeline which formed the basis of the dismissal.

188. As a result, we do not find that the respondent has proved that the claimant was dismissed on the grounds of some other substantial reason, namely a breakdown, or breach, of trust and confidence, but on the grounds of her conduct over that sustained period of time.

189. We then considered whether or not the respondent followed a fair procedure in dismissing the claimant.

190. In our judgment, they did not. The procedure they chose to follow was very difficult to discern. It appeared to be the respondent's position that since they were proceeding on the basis of a breakdown of trust and confidence, no particular procedure was required to be followed, and they did not require to adhere to their disciplinary procedure or their capability procedure.

191. We were drawn to the conclusion that they adopted a relatively informal procedure in order to be able to bring the claimant's employment to an

end as soon as possible, without having to deal with the formalities of a disciplinary procedure.

192. We considered that since this was clearly a dismissal based on conduct, they did not follow a fair procedure because they did not clearly indicate to the claimant that her employment may end because of her conduct. They did, in fairness, tell the claimant that her employment could be terminated in the meeting of 20 September 2021; but it should be noted that they also told her that before the meeting of 2 August 2021, which was an absence review meeting, and then withdrew from that position, having realised that it was in error. Simply telling the claimant that her employment may be terminated at the meeting of 20 September 2021 was not an indication that they were following a fair procedure, nor a guarantee of how they would approach the matter.

193. In our judgment, the respondent's approach to this procedure was unfocused and opaque. The claimant professed herself shocked to have been invited to an absence review meeting a matter of weeks after she had gone off sick, particularly when that invitation told her that she could be dismissed at the meeting; she remained surprised and concerned when she was invited to the September meeting as well.

194. The manner in which the process was followed was, further, unclear. Mr Gardiner's invitation to the meeting indicated that *"I have asked for an investigation to be carried out into the events leading up to your current absence".* No investigation was subsequently carried out, either by Mr Gardiner or by anyone else.

195. No investigation report was presented to the claimant or her representatives; all that was sent, on 15 September 2021 (after the initial meeting had been postponed) was a timeline which, as we have found, was not in fact a timeline but a partial version of events influenced strongly by personal opinions expressed by the HR manager who composed it, with documents embedded into the electronic version. The claimant could not read the documents, and the respondent knew or must

have known that she had limitations in her access to electronic devices and the internet.

196. The respondent's attitude to this seemed to be that they were not following a disciplinary or capability procedure, and therefore they did not need to meet the standards therein. However, they must comply with principles of fairness, and in our judgment, given the difficulties which the claimant had in reading documents online, it was unfair to expect the claimant to be fully prepared to respond to the allegations prepared.

197. Some of the documents which were presented to us – for example, notes of conversations prepared by Ms Lumsden and notes relating to attempts to contact the claimant – were not presented to the claimant and her representatives at or before the dismissal meeting, but clearly played a significant part in Mr Gardiner's thinking.

198. We were also of the view (as we have explained above) that Mr Gardiner took into account a factor which was never raised with the claimant at any stage, namely that he considered that her injury on her return to the office in July 2021 was her own responsibility; he went further in examination in chief when asked if he believed that the claimant would have remained at work had she not suffered her injury at work, when he said that he "personally didn't believe it, that the claimant wanted to be at work. I got the impression that the claimant had tried to put up as many barriers to prevent going back to work then when she had to, this happened and she was able to go off sick". It is impossible to avoid the conclusion that Mr Gardiner believed that the claimant deliberately allowed herself to come into contact with hand sanitiser in order to allow her to absent herself from work. However, he did not put this to the claimant in her dismissal meeting; nor was it put to the claimant in cross-examination by the respondent's representative at this hearing.

199. It was not fair for Mr Gardiner to take such a significant factor into account without allowing the claimant to respond to it; and, further, it reinforces

our finding that the claimant was dismissed for reasons relating to conduct rather than some other substantial reason.

200. We take into account that the letter of 2 August was issued within a matter of weeks of the claimant going off sick, well within the timescales normally applicable under the respondent's capability procedure for absence review; and that when she attended the dismissal meeting of 20 September, she had been absent for some 8 weeks, but this was not an absence review meeting nor a capability review meeting.

201. It is our conclusion, therefore, that the respondent adopted an informal procedure which did not follow the requirements of the more formal procedures required under disciplinary or capability processes; and that by doing so, they presented the claimant with a confusing and unsettling set of circumstances in which it was unclear to her precisely why she was being brought to a dismissal meeting at that particular stage, when she was absent on duly certified sick leave.

202. We have considered whether the appeal meeting overcame some of the procedural issues in this case. Ms Egdell certainly allowed the claimant to attend and to be represented at the appeal hearing, and restricted the period under consideration by removing the period of furlough. However, the uncertainties as to the true reason for dismissal remained under Ms Egdell, and her insistence on restricting the hearing to the scheduled time period, for no reason which was apparent to us, and on advising the claimant's representatives that any questions for any individual at the hearing would require to be approved by her, demonstrated, in our judgment, an attitude to these events which was not open to the claimant's submissions. We do not consider that the appeal corrected any procedural failings in the process.

203. Our conclusion, therefore, is that the respondent did not inform the claimant at any stage that her conduct was the reason why they were dismissing, or had dismissed, her; that the reason for the meeting was unclear in advance of it; that the procedure followed in convening the

meeting was unfair and prejudicial to the claimant; that there was no proper investigation into the facts of the case; that there were matters taken into account by the respondent of which the claimant was unaware, or which were not clearly relevant; and the appeal process did not correct the failings in the process.

204. Accordingly, we consider that the respondent failed to follow a fair procedure in this case.

205. Finally, we reviewed the evidence in order to determine whether or not dismissal was within the range of reasonable responses open to a reasonable employer.

206. On the basis that the reason for dismissal was, in reality, the claimant's conduct, and that the procedure followed by the respondent to reach the conclusion that she should be dismissed, we are of the view that the decision to dismiss was outwith the range of reasonable responses open to a reasonable employer in the circumstances of this case.

207. We remind ourselves that we must not substitute our own decision for that of the respondent, and we take into account the circumstances in which they took the decision to dismiss.

208. However, we consider that the respondent failed to act reasonably in this case by dismissing at the point when they did, and failed to disclose properly the real reason for dismissal.

209. It appeared to us that the respondent considered that they had reached an impasse with the claimant, brought about by the claimant's stubborn and unreasonable refusal to return to work either at home or at Meadowbank House, and took the view that they had no alternative than to dismiss her. We have already found that the decision to dismiss was unfairly made, for the reasons given above.

210. However, it is clear to us that the respondent failed to take into account their own, or Optima Health's, responsibility for the delays in presenting the OH report; that the claimant remained on paid special leave at the

instigation and with the knowledge of the respondent up until the point when she returned to the office in July 2021; that Mr Bennett expressed the view, from which he sought subsequently to withdraw, that July was the earliest it was possible to return the claimant to work; that the claimant's last absence was related to ill health and was sanctioned by fitness to work certificates; and that the reason given for dismissal was not the real reason, namely that it was based on her conduct.

211. In addition, we found it astonishing that the respondent had no regard whatsoever to the claimant's lengthy and unblemished prior service, amounting to 20 years, during which, on the evidence, there is no basis to suggest that she was ever subject to any criticism as to her conduct, her attendance or her performance. Even if they were justified in concluding that there were serious difficulties in the ongoing relationship between them, they failed to take account of a very relevant fact, namely that the claimant had served the respondent competently and faithfully for 20 years prior to this set of circumstances arising. It appears that it counted for nothing in determining whether or not there was a possibility that the relationship could be repaired.

212. The claimant emerged in this Hearing as an intelligent individual, whose commitment to her work we saw no reason for the respondent to question. Ironically, after a period during which they did not deal with the claimant's circumstances in a formal manner, the decision to dismiss her at the point when they did was evidence of a rush to judgement, in our view.

213. Accordingly, we conclude that the claimant's dismissal did not fall within the range of reasonable responses open to a reasonable employer in all the circumstances of this case.

214. It is therefore our judgment that the claimant's claim for unfair dismissal succeeds. The case will now proceed to a Hearing on Remedy on dates to be determined as suitable for the parties.

**Application to Amend**

215. The claimant submitted an application to amend her claim very close to the conclusion of the Hearing. The respondent opposed that application, and we agreed to reserve consideration of the application to this Judgment.

216. It is conceded by the claimant in her submissions, by way of an email dated 9 January 2024, that if her claim that her dismissal was an act of discrimination fails, any claim of personal injury will also fail.

217. Accordingly, having reached the conclusion that the claimant's claim under section 15 of the Equality Act 2010 failed owing to the lack of actual or constructive knowledge on the part of the respondent of the claimant's disability at the date of dismissal, the application to amend her claim falls to the ground, and is refused as a consequence.

**Murdo A Macleod**
Employment Judge

**19 March 2024**
Date of Orders

Date sent to parties 19/03/2024

I confirm that this is my Note and Orders in the case of Boughen v Registers of Scotland and that I have signed the Note and Orders.