



EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant
MS I SZLEK**

AND

**Respondent
APETITO LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT: BRISTOL ON: 8TH / 9TH / 10TH / 11TH / 12TH / 15TH / 16TH APRIL
2024**

**EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)**

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:- MS S PANKOWSKI (SOLICITOR)

**INTERPRETER (POLISH) MS A TEXEIRA -VAZ (8 / 9TH / 10TH /
11TH / 12TH APRIL)
MS A SYTA (15TH / 16TH APRIL)**

FOR THE RESPONDENT:- MR G GRAHAM (COUNSEL)

JUDGMENT

The judgment of the tribunal is that the claimant's claims of:-

- i) Unfair dismissal;
- ii) Discriminatory dismissal (s39(2) Equality Act 2010);;
- iii) Direct age and/or disability discrimination (s13 Equality Act 2010);
- iv) Harassment related to age and/or disability (s26 Equality Act 2010);

- v) Discrimination arising from disability (s15 Equality Act 2010);;
- vi) Failure to make reasonable adjustments (s20 Equality Act 2010); ;
- vii) Unlawful deduction from wages (s11 Employment Rights Act 1996);;

Are dismissed.

Reasons

1. By this claim the claimant brings a claims of unfair dismissal and discriminatory dismissal, direct disability and/or age discrimination, harassment related to age and/or disability; the failure to make reasonable adjustments; discrimination arising from disability; and unlawful deduction from wages.
2. The tribunal was unable to secure non-legal members for the hearing and both parties consented to the case being heard by an Employment Judge sitting alone, for which the tribunal is grateful to them both.
3. The tribunal has heard evidence from the claimant, and she has tendered witness statements from Natalia Warzynska, and Ruby Anne Cook. Both are former work colleagues but neither attended to give evidence.
4. The tribunal has heard evidence for the respondent from Mr Szymon Ruda (Team Leader), and the claimant's immediate line manager); Mr Mark Lovett (Head of Health Safety Fire and Environment) - who heard the claimant's grievance); Mr Kevin McDonagh (Operations Manager (Sweets and Packaging)), against whom most of the allegations are made and who carried out the disciplinary investigation; Mr Paul Jerram (Operations Manager Meals and Preparation), who was the disciplinary officer; and Mr Chris Dawks (General Manager for Manufacturing), who heard the claimant's disciplinary appeal.

Summary

5. The claimant's claims in summary are that she was the victim of age and disability discrimination, primarily at the hands of Mr McDonagh. Primarily between July and December 2022 he refused adjustments to accommodate her disability, and openly commented that she was too old for the job and should leave. When he failed to force her to leave he fabricated disciplinary allegations against her which led to her dismissal. In addition she was underpaid in that she was paid at Grade 1 but carried out a grade 4 role for a number of years prior to her dismissal.
6. There are an enormous number of disputes of fact particularly between the claimant and Mr McDonagh against whom most of the allegations lie, and my conclusions as to their respective credibility and reliability are set out below.

Background

7. The respondent produces frozen food for the health and social care sector including home delivery frozen meals for elderly and vulnerable people. The claimant commenced employment on the 11th October 2004 as a Production Operative. Mr Kevin McDonagh became Operations Manager in the Sweets and Packaging department on 14th February 2014. He became Operations Manager for the team in which the claimant then worked in around September 2014. The management structure is that the Production Operatives report to a Team Leader (from March 2022 Mr Szymon Ruda) who reports to a Shift Supervisor, who reports in turn to the Operations Manager, Mr McDonagh.
8. By 2016 the claimant was employed as a Grade 4 Versa Pack Technician working on the Auto Pack line. The respondent's case, as supported by the documentary evidence, is that at her own request she sought to alter her terms and to return to being a grade one Production Operative. This application was approved in July 2016, from which point the respondent's case is that she remained a Production Operative working primarily in the packing department until her dismissal in February 2023.
9. The claimant's case is not entirely clear but in her witness statement, and in her oral evidence, she maintained that she started working as a grade 4 Technician in 2011. She did not move to become a Production Operative in July 2016, but was moved in December 2018 by Mr Gregory (or perhaps Mr Ridout). Mr Gregory left in June 2019 and Mr McDonagh moved her back to working as a grade 4 Technician, but she was never paid at grade 4 from that point onwards. In her oral evidence that she contended that she had moved back to the grade one role at approximately the end of 2020 or early 2021, and she had been working in the grade one production role for approximately two years at the point of her dismissal. While she was employed during that time primarily as a grade one Production Operative, she was regularly asked to perform the role of grade 4 technician, but was not paid for that role when she performed it.

Events Leading to the Claimant's Dismissal

10. The central dispute in the case, and one of the foundations of the allegations against Mr McDonagh is the claimant's dismissal. Specific challenges to the fairness of the claimant's dismissal are dealt with below however the outline of events is as follows.
11. Respondent's case - On 2nd December 2022 the respondent received a customer complaint that a frozen beef hot pot had been found, when the lid was removed, to contain a blue cleaning wipe, which was under the lid on top of the frozen meal. Mr McDonagh was asked to investigate. He reviewed the production records and was able to pinpoint the time that production took place due to the code printed on the label, which was 11:19 a.m. on the 3rd November 2022. As a result he was able to obtain CCTV footage. As the wipe had been found on top of the food underneath the lid, it appeared that it must have entered the package after the tray was filled with

- food but before the lid was applied. This might imply that it had entered the package at some point within the Meals Production department. Mr McDonagh reviewed the CCTV footage at of the Meals Production department for the time indicated and could find nothing untoward. However, the photograph of the wipe showed that it had not absorbed any liquid from the meal, which would appear to suggest that the wipe was not inside the packaging until after the food was frozen. After being filled and the lid applied the meals go to a spiral freezer in which they are frozen at -40° for 55 minutes. From there they go to the packing lines. Accordingly they will be packed approximately an hour after they have left the Meals Production department.
12. The respondents records showed that on 3rd November 2022 Beef Hot Pot meals had been processed on line one in the respondents Packing Department, and that claimant was the production operative on that line at that time. Mr McDonagh reviewed the CCTV footage for the packing department and specifically line one, and at approximately 12.15. 30 seconds, the claimant is seen to remove a package that that she had earlier placed in a basket of meals to be sent for distribution, to then place it in an apparently empty basket to her left, and then manipulate the meal in the basket. She then removes it from the basket and replaces it back in the basket from which she had taken it to be sent for distribution. Prior to doing this the CCTV footage shows her removing a blue wipe from a bucket of wipes nearby, and after this the blue wipe is no longer visible..
 13. The claimant attended a fact finding meeting on the 12th December 2022 at which time she was suspended, and then an investigation meeting on 15th December 2022. At the conclusion of the investigation at Mr McDonagh concluded that it was the claimant who had inserted the blue wipe between the lid and the frozen food, when she was manipulating the meal inside the basket.
 14. Claimant's Case -the Claimant's case was at times not at all easy to follow. In her witness statement she alleges that Mister McDonagh created an entirely false disciplinary allegation, which was then subject to an investigation by himself. This would appear to suggest that there never was any genuine customer complaint at all, or that somehow Mr McDonagh had somehow faked all or part of the customer complaint or the evidence in relation to it to frame her.
 15. The claimant maintained throughout her oral evidence that the meal that she can be seen removing from the basket into which she had first put it, and from which she took it and placed it in an apparently empty basket to her left, was not a beef hot pot but was in fact a lasagna. She contends that the stills from the CCTV footage show that there had been a spillage of the contents which were not fully frozen and that a large red area and a large yellow area, that can be seen on the surface of the lid, are in fact spilt tomato or tomato sauce, and cheese. Initially she stated that there had been a break in production and that she had seen this spillage and placed the meal in the empty basket. However she denied that she had ever taken a blue wipe from the wipe bucket or used a blue wipe or a blue paper towel to clean this spillage from the package. She later stated that she had in fact previously put a separate meal in that basket which simply needed the lid smoothed and the edges crimped, and that

- the meal she is seen taking out of the basket is not the same one that she is seen placing in it.
16. A large part of the evidence in this case has been taken up with an examination of both parties claims as to what the CCTV footage does or does not show. It has been shown frequently to nearly all of the witnesses, and as a result I have also watched it on numerous occasions, frame by frame on occasions, and zoomed in during the evidence of Mr Dawks. In my observation the respondent's basic case that the claimant is seen to remove a blue wipe with her right hand, to then put both hands into the basket and manipulate something inside it, and then remove the food tray she had earlier placed in the basket and place it back in the basket for distribution, at which point the blue wipe can no longer be seen, is clearly correct and those events are shown on the CCTV footage.

Claims

17. The claims set out below were identified by EJ Beever at the case management hearing on 11th October 2023 (For ease of comprehension the numbering from his CMO is retained):

Time limits

- 1.1 The claim form was presented on 20 February 2023. The claimant commenced the Early Conciliation process with ACAS on 1 February 2023 (Day A). The Early Conciliation Certificate was issued on 3 February 2023 (Day B). Accordingly, any act or omission which took place before 1 November 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.
- 1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
- 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
- 1.2.2 If not, was there conduct extending over a period?
- 1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 1.2.4 If not, were the claims made within a further period that the

Tribunal thinks is just and equitable? The Tribunal will decide: 1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

2. Unfair dismissal

2.1 Was the Claimant dismissed? The Respondent accepts that it dismissed the Claimant.

2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996. The Claimant denies this. The Claimant contends that the disciplinary allegation was fabricated by her manager, Mr McDonagh, and in accordance with the principles in Jhuti v Royal Mail 2019 UKSC 55, it is Mr McDonagh's state of mind that is to be attributed to the Respondent and not that of the Decision Maker (Mr Jerram). It is the Claimant's case that Mr McDonagh's state of mind was that the Claimant was too old for the job and/or was unable to run 2 machines and was not capable of lifting heavy crates and had complained of poor sanitation conditions.

2.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

2.3.1 Mr McDonagh had fabricated the disciplinary allegation

2.3.2 CCTV did not show that the Claimant had, as alleged, placed a wet wipe in the food package

2.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.5 Did the Respondent adopt a fair procedure? The Claimant challenges

the fairness of the procedure in the following respects;

2.5.1 Proceeding with the disciplinary hearing when the Claimant was unfit to do so

2.6 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

2.7 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

3. Unauthorised deductions (Part II of the Employment Rights Act 1996)

3.1 What is the legal entitlement to payment that the Claimant relies upon?

3.1.1 the Claimant contends that she was paid wages at the rate payable to a grade 1 worker whereas she claims to be entitled to be paid at the higher rate payable to a grade 4 worker.

3.2 Were the wages paid to the Claimant on [date to be inserted] less than the wages she should have been paid?

3.3 Was any deduction required or authorised by statute?

3.4 Was any deduction required or authorised by a written term of the contract?

3.5 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

3.6 Did the Claimant agree in writing to the deduction before it was made?

3.7 How much is the Claimant owed?

4. Disability

4.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Whether the Claimant had a physical or mental impairment. She relies on 3 conditions: back and shoulder pain, anxiety and depression and the menopause

4.1.2 Did they have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

4.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

5. **Direct Disability discrimination (Equality Act 2010 section 13)**

5.1 Did the Respondent do the following things:

5.1.1 Between July to December 2022, the Claimant asked Mr. McDonagh for assistance with lifting heavy crates due to her shoulder and back pain, he said everyone here had back pain and was lifting the heavy crates. (witnessed Ricky Lee, Ania Placzek, and Justin Greenland). This happened over 10 times in this period- (Disability – shoulder and back pain).

5.1.2 Between July to December 2022, Mr McDonagh told the Claimant if he allowed her to sit down for a break due to back pain, he would have to let everyone else sit down. (witnessed by Ricky Lee, Ania Placzek, or Justin Greenland). This happened over 10 times in this period (Disability – shoulder and back pain)

5.1.3 Between July to December 2022, the Claimant was left alone to run two lines despite telling the manager, Mr McDonagh, she was in pain and agony. This happened over 10 times in this period (Disability – shoulder and back pain)

5.1.4 Between July to December 2022, whenever the Claimant told Mr McDonagh she wanted to sit down for

5 or 10 minutes because of her back pain, he said could not allow her to sit, leaving the Claimant crying openly. (witnessed by Ricky Lee or Ania Placzek, Justin Greenland) (Disability – shoulder and back pain)

5.1.5 Between July and December 2022, C asked Mr Kevin to leave work early and explained her back pain was terrible, but he told her she needed to finish her shift. This happened over 4 times in this period (Disability – shoulder and back pain; anxiety and depression)

5.1.6 Between July to December 2022, Mr Kevin told C to wear a face mask, although she had an exemption card, causing her anxiety. (witnessed by Ricky Lee or Ania Placzek, and Justin Greenland) (Disability – menopause; anxiety and depression)

5.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who s/he says was treated better than s/he was and therefore relies upon a hypothetical comparator.

5.3 If so, was it because of disability?

5.4 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected disability?

6. **Direct Age discrimination (Equality Act 2010 section 13)**

6.1 The Claimant describes herself as 56 years of age and compared herself with named comparators who were in the age group of 35 – 45 years of age.

6.2 Did the Respondent do the following things:

6.2.1 Between July to December 2022, Mr McDonagh often told the Claimant, when she asked for help lifting heavy food crates, that she was too old to do the job (witnessed by

Ricky Lee, Ania Placzek, or Justin Greenland) This happened over 20 times in the period. (Age)

6.2.2 Between July to December 2022, Mr McDonagh told the Claimant in front of other employees working on the line that the factory needs young and strong workers (witnessed by Ricky Lee, Ania Placzek, and Justin Greenland). This happened over 10 times in the period (Age)

6.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who s/he says was treated better than s/he was and therefore relies upon a hypothetical comparator.

6.4 If so, was it because of age?

6.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to age?

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

6.6.1 *(the Respondent has not identified its legitimate aims if any and should do so prior to disclosure)*

6.7 The Tribunal will decide in particular:

6.7.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

6.7.2 Could something less discriminatory have been done instead;

6.7.3 How should the needs of the claimant and the respondent be balanced?

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

7.1 Did the Respondent treat the Claimant unfavourably by:

- 7.1.1 Between July to December 2022, Mr McDonagh asked the Claimant to provide a doctor's note to use the toilet during working hours. This happened over 8 times in this period
 - 7.1.2 Between July to December 2022, Mr. McDonagh blamed the Claimant for not working faster to clean up the spillage, although she told him that her shoulders and back were in pain but he would often walk away (witnessed by Ricky Lee, Ania Placzek, or Justin Greenland) This happened over 5 times in the period
 - 7.1.3 On 4 December 2022, Mr McDonagh told the Claimant to shut up and stop complaining about her back pain. He told her to go and work for Lidl because she is too old for the job now. (witnessed by Ricky Lee)
- 7.2 Did the following things arise in consequence of the Claimant's disability?
- 7.2.1 The need to use the toilet arose from anxiety/depression and the menopause
 - 7.2.2 The Claimant's ability to work at a faster rate was restricted by her shoulder and back pain
- 7.3 Was the unfavourable treatment because of any of that/those things?
- 7.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
- 7.4.1 *(the Respondent has not identified its legitimate aims if any and should do so prior to disclosure)*
- 7.5 The Tribunal will decide in particular:
- 7.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 7.5.2 Could something less discriminatory have been done instead;
 - 7.5.3 How should the needs of the Claimant and the Respondent be balanced?
- 7.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

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

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

8.2.1 The requirement to lift heavy crates and pack in pallets

8.2.2 The requirement to bend over, lift heavy containers, and place them on the line.

8.2.3 The requirement to run two lines at times

8.2.4 The requirement to stand throughout the entire shift

8.2.5 The requirement to put items on the line for packaging

8.2.6 The requirement to cover more than one job at the same time.

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

8.3.1 due to her anxiety and depression and menopause compared to someone without the Claimant's disability, she was unable to carry out work in a timely manner/concentrate/do more than one job at the same time/ extra workload at a set time/ lift heavy creates.

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

8.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

8.5.1 Allowing the Claimant to sit down while working on the line.

8.5.2 Allowing the Claimant short breaks to sit down and recover.

8.5.3 No lifting heavy crates and pulling heavy items

8.5.4 Allowing time off to see GP

8.5.5 Allowing the Claimant time off work to look after medical conditions

8.5.6 Instructing other workers on the line to help with lifting or bending

8.5.7 Assigning other employees to help lift heavy crates and pack on lines

8.5.8 Assigning another employee to assist in running the lines instead of C running two lines at the same time.

8.6 Was it reasonable for the Respondent to have to take those steps and

when?

8.7 Did the Respondent fail to take those steps?

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

9.1 Did the Respondent do the following things (*and whether age related and/or disability related and if so which disabilities is identified in brackets in each instance*)::

9.1.1 Between July to December 2022, the Claimant asked Mr. McDonagh for assistance with lifting heavy crates due to her shoulder and back pain, he said everyone here had back pain and was lifting the heavy crates. (witnessed Ricky Lee , Ania Placzek, and Justin Greenland). This happened over 10 times in this period- (Disability – shoulder and back pain)

9.1.2 Between July to December 2022, Mr McDonagh told the Claimant if he allowed her to sit down for a break due to back pain, he would have to let everyone else sit down. (witnessed by Ricky Lee, Ania Placzek, or Justin Greenland). This happened over 10 times in this period (Disability – shoulder and back pain)

9.1.3 Between July to December 2022, Mr McDonagh told other employees several times to report the Claimant to HR because she could not keep up with work. (witnessed by Ricky Lee, Ania Placzek, and Justin Greenland) This happened over 10 times in this period (Disability – shoulder and back pain)

9.1.4 Between July to December 2022, Mr McDonagh did not give the Claimant time off work to see her GP to seek medical treatment for her pains but told her to visit the GP on weekends instead. This happened over 10 times in this period (Disability – shoulder and back pain)

9.1.5 Between July to December 2022, C reported to Mr McDonagh about the dirty food crates, and the Quality Control was not inspecting them. He often told her to shut her mouth and not speak, leaving the Claimant in tears. (witnessed by Ricky Lee or Ania Placzek, or Justin Greenland (Age and Disability –menopause; anxiety and depression)

9.1.6 Between July to December 2022, the Claimant said Mr McDonagh often sends other workers on lunch break first, leaving her to run two lines alone, causing her back and shoulder pain to be exacerbated. He treated her less favourably than

younger employees. (witnessed by Ricky Lee, Ania Placzek, and Justin Greenland) (Age and Disability – menopause; anxiety and depression)

- 9.1.7 Between July to December 2022, C told Mr. McDonagh she could not sleep because the 7 years' wages the company owed were causing her mental breakdown; he replied, 'so what'. (witnessed by Ricky Lee, Ania Placzek, or Justin Greenland) (Disability – anxiety and depression)
- 9.1.8 Around 12 December 2022, Mr McDonagh reported the Claimant to HR Lisa because she wanted to change the size of the food box covers because it was small, causing food spillages. The unwanted conduct is that Mr McDonagh then asked the Claimant if she had taken her medication that day.(Disability – menopause; anxiety and depression)
- 9.1.9 Between December 2022 and February 2023, Mr McDonagh falsely accused the Claimant of putting blue wipes in the food. (Age and Disability – menopause; anxiety and depression)
- 9.1.10 Between December 2022 and January 2023, Mr McDonagh told employees, including Rickey and Justin, that the Claimant was going to get the sack for putting wipes in the food. (Age and Disability – menopause; anxiety and depression)
- 9.1.11 Around 12 December 2021, the Claimant gave Mr McDonagh her sick note, but he did not give it to the Payroll. The Claimant did not get paid for two weeks, causing her to lose her flat because she could not afford her rent. (Age and Disability – menopause; anxiety and depression)
- 9.1.12 In January 2023, the Claimant repeatedly received emails asking her to attend the disciplinary meeting even though she told HR, Ms Hanna, she was taking treatment for her mental health, strong tablets and brain fog, asking her to reschedule the disciplinary meeting. (Age and Disability – menopause; anxiety and depression)

9.2 If so, was that unwanted conduct?

9.3 Did it relate to the Claimant's protected characteristic, namely age/disability?

9.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. Discriminatory Unfair Dismissal (Equality Act 2010 s. 39(2) EqA)

10.1 Did the Respondent dismiss the Claimant because of age and/or disability?

10.2 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to age/disability?

10.3 To the extent that there was unlawful age discrimination, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

10.3.1 (*the Respondent has not identified its legitimate aims if any and should do so prior to disclosure*)

10.4 The Tribunal will decide in particular:

10.4.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

10.4.2 Could something less discriminatory have been done instead;

Credibility/Reliability

18. As can be seen from the list of issues set out above, almost all of the claimant's claims involve allegations against Mr McDonagh. They are all factually denied. In respect of the underlying facts almost all of the disputes turn on whether the claimant's evidence or Mr McDonagh's is accepted, and credibility and reliability are therefore central to the conclusions of fact in this case.

19. The claimant, in effect, invites the tribunal to accept fundamentally that she is telling the truth, and did not insert the blue wipe in the food tray. Mr McDonagh did not simply misinterpret the evidence and conclude that she did, but manipulated it or in some way faked it, and is lying about a very significant number of allegations. The claimant contends that a large number of the factual allegations are supported by her

- two witnesses. Although they have not attended to give evidence I can give at least some weight to the fact that there is some evidential support for her claims.
20. The respondent submits, in relation to her supporting witnesses, that no weight can or should be given to the evidence of individuals who have not attended to be cross-examined, and whose credibility and reliability cannot be judged by the tribunal. There is no documentary support for any of their evidence, and large parts are identical to and appear to have been cut and paste from the claimant's. Indeed significant parts of their evidence supports the claimant's original written position which the claimant herself resiled from in oral evidence, which on any analysis casts considerable doubt on the reliability of their evidence.
21. The respondent asserts that Mr McDonagh's evidence is more credible than that of the claimant. It is entirely consistent with the documentary evidence, and in particular the conclusions he drew from the CCTV footage were not only reasonable but the most rational and objectively reasonable conclusions that could be drawn. There is no evidence whatsoever that he ever bore any animosity towards the claimant. Given that it is not in dispute that there were two levels of management between the claimant and Mr McDonagh, his evidence that decisions that are attributed to him are simply things that he would never have been involved in, unless there was a dispute between the claimant and those other managers which the claimant does not allege, is inherently more plausible.
22. By contrast the respondent contends that in various respects the claimant's evidence is demonstrably unreliable, and in parts simply untrue. Accordingly they submit that the claimant is not a credible or reliable witness; and that any comparison between her and Mr McDonagh will inevitably lead to the conclusion that on the balance of probabilities his evidence is the more reliable. In support of the submission that the claimant's evidence is inherently unreliable they rely principally on the contentions set out below.
23. Disability – For the reasons set out and discussed below they contend that the claimant's description in her Impact statement, in many respects bears little or no relation to the medical evidence. Where her written or oral evidence is able to be compared to contemporaneous documentary evidence it is demonstrably at best exaggerated, and at worst invented. For the reasons set out below I accept this analysis.
24. Employment History – One of the claimant's claims is for back pay for four years, having been paid at grade 1 and not grade 4. In order for this to be correct she must necessarily have been employed in a grade 4 position. However the documentary evidence from July 2016 demonstrates that the claimant, at her own request, reduced to a grade 1 role at this point. Whilst she may occasionally have acted up after that, and would have been entitled to increased pay on those occasions, from July 2016 she was employed as a Grade 1 Production Operative.
25. The claimant's evidence is that she remained in a Grade 4 role until December 2018, was then appointed to a grade 1 role until June 2019, at which point she was re-

- appointed to a grade 4 role. This is not supported by any documentary evidence. Moreover Mr Ruda's evidence was that he became her line manager in March 2022 when she was doing, and remained doing a grade 1 packing role. At that point she was plainly not carrying out a grade 4 role, and her written account and claim cannot be correct. However, the claimant's oral evidence was that she had in fact returned to the grade 1 packing role in or about the end of 2020 or early 2021. The respondent submits that it is impossible to reconcile her claim and her written evidence with her oral evidence. If something as basic as her evidence about the role she was employed to perform and when she was employed to perform it cannot be relied upon, it casts at very least considerable doubt on the reliability of the rest of her evidence.
26. Blue Wipes – The respondent submits that prior to the hearing it did not appear to be in dispute that, as shown on the CCTV, prior to handling the meal in dispute the claimant had taken a blue wipe from a bucket behind her, and had it in her hand whilst moving the meal to a separate basket. The claimant had accepted this in her investigatory interview on 15th December 2022, during which she was shown the CCTV footage. She had positively asserted it in her complaint about Mr McDonagh on 20th January 2023, and in her letter of appeal; and in her ET1. Moreover during Mr Dawks evidence, when he was being challenged as to his conclusion that she had done so, the tribunal was shown the zoomed in footage which he had watched and which clearly and obviously showed the claimant taking a blue wipe with her right hand.
27. However, the claimant has maintained throughout the hearing, and despite that evidence, that she did not do so; that she did not admit to having done so in the investigatory interview; and that if her own documents appear to accept that she did that they have been edited and incriminating material added by the respondent.
28. The respondent submits that this evidence is essentially nonsensical; and that it can easily be disproved simply by watching, certainly the zoomed in footage, from the CCTV. Having seen the CCTV footage in my judgment the respondent is clearly correct, and she is clearly shown removing a wipe with her right hand, and the claimant's evidence in this respect is simply baffling.
29. Meal – The respondent's evidence is that the meal the claimant is shown handling was beef hotpot, as that was what was being packed on Line 1 at the time. The claimant contends that it was a lasagna. The reason for this is that one of the stills from the CCTV footage shows a large red and separate large yellow area on the lid of the package. It was originally put to Mr McDonagh that this was a lasagna without a lid, but in evidence the claimant contended that it showed a spillage of tomato sauce and cheese from the contents which had not been fully frozen onto the lid.
30. The respondent submits that this cannot be true. The production record is a retrospective record of the meals filed and packed that day, and unless the assertion that they have been faked by Mr McDonagh is correct, the meal cannot have been lasagna. In any event there are separate stills of two other meals showing the same red and yellow areas and these are meals the claimant put straight in the basket to

- go on for distribution. Necessarily the red and yellow areas cannot depict substantial spillages as she could not have done this. Again they submit that the simple explanation, that this is how the meal lids show up on the CCTV footage, must be correct, and the claimants explanation and evidence demonstrably untrue.
31. Finally it was put to the claimant that if, as she said, she had noticed the spillage and had removed the meal from the distribution basket and put in a separate basket, and if her evidence that she did not have a blue wipe in her hand was correct she could not have cleaned the meal, and then put the meal back in the distribution basket. However she did put it back. At this point the claimant stated for the first time that the meal she put into the basket was not the same one she took out, but one which she put in earlier and only needed some adjustment to the lid. The respondent submits that at this point it was plainly obvious that the claimant was simply making it up as she went along; and moreover this could not possibly be true in any event as she subsequently put the same basket on the roller to be filled for distribution and it is clearly empty. It follows that the claimant's evidence as to this cannot be true or reliable.
32. CCTV – Perhaps the most baffling evidence was some of the evidence about the CCTV. At one point in evidence the claimant contended that the CCTV footage being shown was not the CCTV footage she had been shown in the investigatory meeting. She stated that in the CCTV footage she had originally been shown it could clearly be seen that she was lifting the lid of the meal and placing the blue wipe inside. When asked whether she was saying that there was CCTV footage showing her doing precisely what she was accused of, she stated specifically that she had seen this footage, but that as she knew she had not done it she knew that the footage was faked. In re-examination she resiled from this saying that she had not seen any such footage, but had been told by Mr McDonagh that the CCTV footage showed her doing it, which the actual CCTV footage did not.
33. The respondent submits that for the claimant to give evidence that she had specifically seen this footage, and later equally give specific evidence that she had not is hard to follow or understand. However it was all evidence given on oath and is inherently self-contradictory and necessarily unreliable.
34. Conclusions- I have set out in some detail the points made by the respondent in closing submissions and in cross-examination as credibility and reliability are central to the resolution of this dispute. I accept that for all the reasons set out above the claimant's evidence is inherently unreliable, and in places simply baffling, and I have concluded that where there is a dispute I prefer, on the balance of probabilities, the evidence of the respondent.
35. I have also concluded that in the absence of having heard evidence from them, particularly as in my judgment there are problematic aspects of their evidence (as set out above) which would need to be explored in evidence, that it is not possible to place any evidential weight on the written statements of the claimant's supporting witnesses.

36. Mr Graham invites me to go further and conclude not simply that the claimant's evidence was self-contradictory, inconsistent and inherently unreliable, but that at least in places the claimant was simply lying. By way of example, and as put to her in cross-examination, the assertion that the meal that she had taken from the basket to her left and placed in the basket for distribution on the rollers was not the same one she had placed in that basket, was demonstrably untrue; and was a lie she was driven to by the implications of her own evidence that the red and yellow patches on the lid were spillages of tomato and cheese, and that she did not have a blue wipe or towel in her hand. If that evidence was correct she could not have cleaned any spillage and could not have put the same meal back in the distribution basket. She clearly understood the implications, and instead of stating that she must be wrong about one or both of the primary contentions, she elected to tell an obvious lie.
37. The claimant cut an extremely sorry figure giving evidence. She was very upset at times and appeared to struggle to answer very straightforward questions; and it is difficult not to have some sympathy for her. However the conclusion that parts of the claimant's evidence were deliberately untruthful appears to me to be an impossible one to avoid.

Unlawful Deduction From Wages

38. The claimant's case as set out in her witness statement, is that she was restored to Grade 4 Technician position June 2019 and was entitled to be paid at that grade from that point. The respondent's evidence is that from July 2016 she was employed as a Grade1 Production Operative and was correctly paid at all times.
39. The burden lies on the claimant to prove this claim, and the documentary evidence supports the respondent. There is no documentary evidence in support of the claimant. In addition for the reasons set out above I prefer the evidence of the respondent. It follows that the claimant has not satisfied the burden of showing that there was any unlawful deduction from her wages; and this claim must be dismissed.

Unfair Dismissal

40. The respondent contends that this is a straightforward "Burchell" claim. The claimant was genuinely dismissed by Mr Jerram, and her appeal dismissed by Mr Dawks, because they each individually on the basis of the evidence concluded that the claimant had placed the blue wipe into the meal. These were reasonable conclusions on the evidence; and deliberate contamination of a foodstuff is inevitably gross misconduct for which dismissal is a reasonable sanction.

Fabrication of the allegations/evidence

41. The claimant's first challenge to the fairness of the dismissal is that either the disciplinary allegations themselves and/or the evidence in support of them were fabricated by Mr McDonagh, who then investigated them himself; and that the conclusions of both decision makers are tainted by the fact that they had been misled by Mr McDonagh into believing that genuine evidence of her guilt existed, whereas in

- reality it had been created or faked by Mr McDonagh himself in order to secure her dismissal. This is therefore a *Jhuti v The Post Office* type claim where Mr McDonagh's knowledge that she was innocent, and that he had fabricated the allegations and/or the evidence against her must be imputed to the decision makers. In my judgement if true this would necessarily render the dismissal unfair and it is sensible to consider it first.
42. The respondent contends that this is an absurd allegation which cannot possibly be true. It was not put to Mr McDonagh what precisely he was alleged to have done and/or which bits of evidence he had faked. However the respondent contends that for it to be true Mr McDonagh would have had to have faked the customer complaint, or at least faked the date and time information to coincide with a time during which the claimant was working, and then faked the production records to show that the food being packed by the claimant was the beef hotpot, about which the customer had complained. He would then need to fake the CCTV footage to show the claimant taking a blue wipe, immediately before removing a meal from the basket and manipulating it. No evidence has been advanced by the claimant, and nothing put to Mr McDonagh to suggest how this would be possible, let alone had actually happened. The respondent submits that this is simply a desperate attempt to avoid the fact that the evidence against the claimant is overwhelming; and the obvious explanation, that in fact there has been no fabrication of any evidence, is clearly the correct one.
43. The respondent is obviously correct that there is no direct evidence that this could or did happen; and in my judgement this allegation has effectively been reverse engineered. The claimant contends that she knows that she did not commit the misconduct alleged of putting the blue wipe in the meal; and therefore any evidence that tends to show that she did must necessarily have been fabricated somehow. She invites the tribunal to accept her evidence, and to draw the same conclusion she has, that the evidence against her must have been fabricated even if there is no evidence as to how that happened.
44. The difficulty for the claimant is that there is simply no evidence in support of this allegation, and in my judgement there is no evidential basis on which I could make any finding that it had occurred. In addition, and in any event, having heard the evidence of Mr McDonagh, I accept this evidence that he did not do any such thing.
45. It follows that I do not make a finding that the allegations and/or evidence has been faked or manipulated by Mr McDonagh.

Reason for Dismissal

46. That being the case the first question is whether the respondent has satisfied the burden of showing that the claimant was dismissed for a potentially fair reason. Having heard the evidence of Mr Jerram and Mr Dawks, which I accept, I am satisfied that the claimant was dismissed because the respondent held a genuine belief that she had committed the misconduct alleged, and that she was dismissed for a potentially fair reason falling within s98(2)ERA 1996.

47. The next questions are the well-known Burchell questions. Was there a reasonable, investigation, were reasonable conclusions as to the misconduct drawn from that investigation, and was the dismissal a reasonable sanction. The range of reasonable responses test applies to each of those questions.
48. Investigation – The investigation was carried out by Mr McDonagh. Unless the evidence of fabrication is accepted, which for the reasons given above I do not; it is hard to find any fault with the investigation. Mr McDonagh identified when the meal had been produced, obtained the CCTV footage of the Meals Production and Packing departments, and observed the claimant take a blue wipe, remove a meal from the basket, which must from the timing have been beef hot pot, place that meal in the basket next to her, do something to it with both hands and then return it to the original basket, at which point the blue wipe can no longer be seen. The claimant was given the opportunity at both an original fact finding, and then formal investigation meeting to explain what she had been doing. It is hard, in my judgement, to see what further investigation could have been carried out or that there was any further line of enquiry that could have been undertaken.
49. It follows that in my judgement the investigation clearly fell within the range reasonably open to the respondent.
50. Reasonable Conclusions – Both Mr Jerram and Mr Dawks evidence, which I accept, is that they independently viewed the CCTV footage and concluded that it showed the claimant placing the wipe in the meal.
51. The claimant contends that this was not a conclusion that was reasonably open to either of them as the CCTV does not show this happening. It does not show her taking a blue wipe, and her hands are in the basket and what she is doing cannot be observed. The conclusion that the blue wipe was placed in the meal by her is simply speculation and was not reasonably open to them on the evidence.
52. In my judgment the difficulty for the claimant is that the conclusions appear entirely logical. The wipe is shown sitting on the surface of the meal and has not absorbed any liquid. At least one logical conclusion from this is that the wipe was put under the lid after the contents were frozen, which would put this in the Packing Department or later. The CCTV clearly shows the claimant taking a blue wipe with her right hand, or again at least the conclusion that it clearly shows this was reasonably open to Mr Jerram and Mr Dawks. She then removes a meal already placed in the basket for distribution, puts it another basket and does something to it with both hands, before replacing it in the distribution basket, at which point the blue wipe can no longer be seen. In those circumstances the conclusion that both reached that the footage showed the claimant putting the wipe in the meal was one that was necessarily reasonably open to them .
53. The claimant's other challenge to the fairness of the conclusions is procedural. She did not attend either the disciplinary or appeal meetings; and contends that she was not well enough to attend. It follows that she never had a reasonable opportunity to

- put forward her account at either stage, and the conclusions are necessarily partial and unfair, and could not reasonably have been reached.
54. The respondent submits that it had obtained Occupational Health advice specifically as to whether the claimant was fit enough to attend the meeting. The advice was that she was, but should be allowed to attend with a representative of her choice, and provided with regular breaks. The respondent submits that there is no medical evidence to contradict this, and that even if the claimant asserts, as she does, that the Occupational Health advice was wrong, that they were entitled to act on it.
55. In my judgement this correct and the failure of the claimant to attend either meeting, when she was given a reasonable opportunity to does not so fundamentally affect the fairness of the decision as to render it unfair.
56. In case, and in the event that I am wrong in that conclusion the respondent submits that somewhat unusually the absence of the claimant having the opportunity to put forward her defence has not in any event prejudiced her. The basis for this is that had she advanced the defence that she has in the tribunal; that she did not have a blue wipe in her hand, which both Mr Jerram and Mr Dawks concluded that she did, and that she was packing lasagna not beef hot pot, and that there was an innocent explanation for what she was doing would have rejected out of hand, as they were in cross-examination. There is simply no possibility that the outcome could have been any different if the claimant sought to advance the account she has in the tribunal, in the light of what is shown on the CCTV footage. Again it appears to me that this must be correct.
57. Sanction – That leaves the question of sanction. On any analysis the deliberate contamination of a foodstuff being produced by the respondent can necessarily reasonably considered to be gross misconduct; and the claimant has not suggested that if the respondent reasonably concluded that she had committed the misconduct that dismissal fell outside the range of reasonable responses.
58. In the circumstances as all the “Burchell” questions have been answered in the respondent’s favour it follows that the claimant’s claim of unfair dismissal is bound to be dismissed.

Discriminatory Dismissal

59. The claim that the dismissal was discriminatory is based on the proposition that it was engineered by Mr McDonagh either as an act of age or disability discrimination. For the reasons given above I do not accept that assertion, and have not found it proven, and it follows that this claim must also be dismissed.

Disability

Law

60. A disabled person means an individual who has a “physical or mental impairment” which has a “substantial and long term adverse effect on the ability to carry out normal day to day activities”. In this context “substantial” means more than minor or trivial; and long term means lasting or likely to last for twelve months or more.
61. A general summary of the overall structure of the law is set out below and specific points relevant to this case are dealt with in relation to the individual issues:

The Relevant Law

Section 6 of the Equality Act provides as follows:

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

Schedule 1 to the Equality Act 2010 contains further clarification on the matters to consider when determining disability and provides in so far as is relevant:

Long-term effects

*2 (1) The effect of an impairment is long-term if—
it has lasted for at least 12 months,
it is likely to last for at least 12 months, or
it is likely to last for the rest of the life of the person affected.*

Impairment

*The meaning of impairment is dealt with at A3 of the Guidance which provides:
“the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.”*

Thus ‘Impairment’ in s.6 EQA 2010 bears ‘its ordinary and natural meaning... It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects’ (McNicol v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498, CA) The term is meant to have a broad application.

The meaning of ‘substantial adverse effect’ is considered at section 212(2) EQA 2010 and paragraph B1 of the Guidance which provides “a substantial effect is one that is more than a minor or trivial effect”.

The Tribunal's focus, when considering adverse effects upon day-to-day activities, must necessarily be upon that which claimant maintains he cannot do as a result of his physical or mental impairment" (see Aderimi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591).

In that context, the appendix to Schedule 1 of the Equality Act 2010 includes examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include "a total inability to walk, or inability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue, and persistent distractibility or difficulty concentrating."

Conversely the guidance indicates that the following factors would not reasonably be regarded as having such an effect: "experiencing some tiredness or minor discomfort as a result of walking unaided from a distance of about 1.5 kilometres or 1 mile; inability to concentrate on a task requiring application of several hours."

Day-to-day activities include normal day-to-day activities and professional work activities, even if there is no substantial adverse effect on activities outside work or the particular job (see Igweike v TSB Bank Plc [2020] IRLR 267). In conducting that assessment, the tribunal should disregard the effects of treatment (see Guidance at sections B12 to B-17).

The Guidance addresses recurring or fluctuating effects at C5. Examples of how to address episodes of such conditions as depression, or conditions which result in fluctuating symptoms are given at paragraphs C6, C7 and C 11; they provide:

C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long term.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the "long-term" element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

C11. If medical or other treatment is likely to permanently cure condition and therefore remove impairment so the recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those are facts. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stops, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

In order to determine whether a claimant has a disability the tribunal should consider four questions (see Goodwin v Patent Office [1999] ICR 302, EAT):-

- i) did the claimant have a mental and/or physical impairment? (the ‘impairment condition’)*
- ii) did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’)*
- iii) was the adverse condition substantial? (the ‘substantial condition’),*
- iv) and was the adverse condition long term? (the ‘long-term condition’).*

It will not always be essential for a tribunal to identify a specific ‘impairment’ if the existence of one can be established from the evidence of an adverse effect on the claimant’s abilities — J v DLA Piper UK LLP 2010 ICR 1052, EAT. Similarly, it is not always necessary to identify an underlying disease or trauma where a claimant’s symptoms clearly indicate that he or she is suffering a physical impairment — College of Ripon and York St John v Hobbs 2002 IRLR 185, EAT

62. The claimant contends she is a disabled person within the meaning of s6 Equality Act 2010 by reason of three conditions set out below:

- i) A shoulder and back condition;
- ii) Anxiety and Depression;
- iii) Menopause.

Impact Statement

63. In her impact statement the claimant describes the overall effect of all three conditions upon her -

” 10 - I will be in constant pain if I don't have painkillers to help cope or physiotherapy. My shoulders and back pain, menopause, anxiety and depression had me suffering tremendously at home and work. At times I could not shower; taking my clothes off was challenging and painful. I could not get undressed or dressed; raising my arms over my head was painful; it took me longer to do this task. Sitting down was painful, getting up was more painful, and I could not use both my hands to push myself up. When I lay down to sleep I was in so much pain that it prevented me from sleeping. I had cold sweats, was constantly in pain, panicked and was anxious due to menopause, anxiety and depression.

“11- My disabilities stopped me from doing my food shopping, pushing trolleys, carrying shopping bags or walking around in the supermarket; I am still ordering my food online and sometimes, taking my shopping bags inside my house upon delivery can be painful and challenging. I stopped cooking meals many years ago because I could not hold the knife to peel vegetables, or cutting them was painful to my hands and shoulders. I used to enjoy cooking, something I cannot do anymore; I eat microwave meals. This made me depressed and anxious. Making a cup of tea was

difficult. I felt that I had no quality of life left in me. I cried openly because of mixed emotions, struggles and inability to do my household cleaning. I had no energy”

“12 - My illnesses stopped me from seeing friends, socialising, and going to the gym. I did not want to speak to anyone because it took me longer to think about what I wanted to say due to my foggy brain. I had severe problems with concentration and memory and could not read and understand what I read. I stopped enjoying my hobby of visiting places and walking around because of my pain and discomfort, which frequently caused my anxiety. I now stay home and do not go out or meet anyone apart from counselling and GP.”

64. If this account is correct the symptoms of the three conditions have had a very significant impact on the claimant’s life, and in particular the many ordinary day to day activities described above.
65. The broad thrust of the respondents submissions is that there is no support for the contention off the life changing level of disability set out in the claimants impact statement as quoted above; and that her description of the symptoms and consequences off the underlying conditions is at best exaggerated, and at worst simply invented.
66. Back and Shoulder Pain – In her Impact Statement the claimant states that she began to suffer back and shoulder pain when she started to work as a grade 4 technician in 2013. Since then the pain has never stopped. From 2015 to date she has continuously sought treatment from physiotherapy and her GP. She takes strong painkillers to help her cope with the pain daily. Her pain affected her work performance over the years. She could not bend over and lift heavy items due to the pain in her shoulder and back. She could not stand for long hours at work constantly bending over to lift because of severe pain in her back hands and shoulders.
67. The respondent contends that medical evidence does not support at the claimant’s account. The medical records contain an entry for the 4th December 2015 in relation to attendance for right shoulder pain, which is diagnosed as a probable rotator cuff problem, and which was treated with a steroid gel and gentle exercise. On the 31st December 2015 she is seen for pain in the right deltoid (intrinsic shoulder muscle) at the end of a day’s work. It is described as sometimes sore at night; better post weekend. The right shoulder was painful on adduction at extremes, but otherwise normal and the diagnosis was likely subacromial bursitis, and she was referred for physiotherapy. On 9th January 2017 she was seen for a number of issues. In respect of the right shoulder it is described as “..Problem with right shoulder since last year. Felt something go in shoulder in September lifting up heavy metal objectThings did improve last year but last week pain recurred.” it’s noted that the claimant declined further physio referral or analgesia, and preferred to look into sports massage. The next reference is to a further episode in March 2020; after that there is no further reference in the medical records for any treatment for back and/or right shoulder pain after March 2020.

68. The respondent submits that given the times and level of symptoms when the claimant did consult her GP, it is inconceivable that if she suffered the symptoms described for the period of time described that there would be no further attendance other than those described above, in respect of right shoulder pain, and no attendance at all in relation to her back. If it's submissions as to credibility are accepted, the claimant's own account, where it is unsupported by the medical evidence should be treated with extreme scepticism and on the balance of probabilities rejected.
69. It follows, the respondent submits, that there is no evidence of continuous or serious shoulder pain constantly affecting the claimant from 2015 as alleged. There are clearly discrete, time limited, and relatively low level episodes of shoulder pain in or around December 2015, September 2016, January 2017, and March 2020. There is no evidence that any of the episodes lasted, or was likely to last for twelve months or longer; and no evidence that these episodes reflect any underlying condition. The claimant cannot therefore be a disabled person by reason of a past disability relating to her right shoulder or back. All of the allegations of direct discrimination, discrimination arising from disability and harassment relate to the period July - December 2022 (except for one in relation to pay which relates to events in 2020). There is no evidence that the claimant was suffering, or had suffered shoulder or back pain for over two years prior to this period, and no evidence that she was suffering any symptoms at all during the period covered by the claims.
70. Anxiety and Depression - In her impact statement the claimant describes developing anxiety and depression around early 2018. She took antidepressant medication (Sertraline and Amitriptyline), to help her cope over the years with anxiety and depression and she is still taking that medication. She was anxious about her workload which caused anxiety and panic attacks. She needed to use the toilet frequently, and could not sleep as her mind was racing thinking about difficulties at work.
71. Again the respondent does not accept that this account is reflected in the medical records. The claimant was first prescribed Sertraline on 13th June 2019, but an entry for 9th July 2019 records that she was feeling much better after a holiday in Poland and had decided not to take it. There is a further reference to low mood on 12th September 2019 which the claimant relates to a sinus operation. There is then no further prescription of either medication until 19th December 2022 after she had been suspended, and this episode is described as a stress and adjustment reaction. The respondent submits that the medical evidence reveals a discrete time limited episode of anxiety/low mood in June 2019 sufficient for Sertraline to be prescribed but not taken, and from which the claimant had recovered following a holiday; a further episode in September 2019; and nothing thereafter until December 2022.
72. The respondent again submits that prior to her suspension and disciplinary investigation there are two discrete episodes of low mood/anxiety. Neither, or even if taken together as one episode, lasted for twelve months; there is no evidence it was likely to do so, and no evidence of any underlying condition.

73. Menopause – The claimant in her Impact Statement describes the onset of menopause symptoms around June 2013. She has hot flushes, sweats at night and cannot sleep. She cries often and laughs at times; has “foggy brain” cannot think or process information quickly, and cannot react quickly. She has to write notes for everything she does like work, appointments, paying bills and buying food.
74. The respondent does not dispute that the claimant was undergoing the menopause, nor that the symptoms she describes are commonly associated with it. However they again submit that there is little or no support in the medical records for the claimants description of the symptoms and effects of the condition.
75. The first reference to a perimenopausal profile is in 14th September 2016, and the first prescription of specific HRT medication is in June 2017 when bloods showed a menopausal profile. The claimant did not continue with it but re-started in January 2018 and the last prescription is for 168 tablets in May 2019 (until approximately the end of October 2019). The claimant contends that there are entries for contraceptive drugs before and after this period which are in fact related to the menopause.
76. Again on the basis of the medical evidence the respondent contends that there are references to hot flushes/sweats but none of the other symptoms described by the claimant; and that all that the medical records show definitively is that she had a period from September 2016 t October 2019 during which she was perimenopausal or menopausal, and was prescribed hormone replacement therapy. The claimant has adduced no medical evidence supporting the symptoms she alleges she has suffered, and no medical evidence as to any deduced effect were she not taking the HRT drugs, and no medical evidence of any continuing menopausal symptoms or effects after October 2019. On the basis of its submissions as to her credibility it contends that on the balance of probabilities her own account cannot be considered reliable, and the tribunal should only bases its decision on allegations supported by the medical evidence.
77. Conclusions- In respect of each of the conditions, in the light of my findings as to credibility I have concluded that I cannot accept the claimant’s evidence unless supported by medical evidence. Put simply there is little or no evidence that the claimant satisfied the statutory definition during the periods covered by the claims.
78. It follows that I accept the respondents submissions and I am not persuaded that the claimant was a disabled person at the relevant times, by reason of any of the conditions individually or cumulatively..

Disability Discrimination Claims

79. As I have concluded that the claimant was not a disabled person all of her claims of disability discrimination are bound to be dismissed. In any event as I have concluded that I prefer the evidence of the respondent the vast majority would be dismissed on the facts in any event. With the exception of the claims for the failure to make reasonable adjustments, all of the claims of direct age or disability discrimination,

harassment, discrimination arising from disability turn on factual allegations against Mr McDonagh which I do not find proven.

80. For completeness sake the claims which would factually have been dismissed even had I accepted that the claimant was a disabled person by one or more of the conditions are :

- i) Direct Discrimination – 5.1.1 – 5.1.6;
- ii) Discrimination Arising from Disability – 7.1.1 – 7.1.3;
- iii) Harassment – 9.1.1 – 9.10

81. The remaining claims are:

- i) Harassment - 9.1.11 – It is accepted that this is factually incorrect and that the event complained of occurred not in December 2021 (or December 2022), but in the early part of 2020. For the avoidance of doubt for the reasons give above I accept that Mr McDonagh did not fail to give her sicknote to payroll at that point or any other time.
- ii) Harassment 9.1.12 – This is an allegation relating to requiring the claimant to attend the disciplinary hearing. This is not an allegation against Mr McDonagh , but must be dismissed on the basis that I have not held that the claimant was a disabled person at the relevant times.

82. Failure to Make Reasonable Adjustments -The failure to make reasonable adjustments claims are bound to be dismissed on the basis of the finding that the claimant was not at the relevant times a disabled person. For completeness sake I accept the respondents submissions that:

- i) Other than 8.2.5 the alleged PCPs were not in any event applied to the claimant;
- ii) That in relation 8.2.5 this did not place the claimant at a substantial disadvantage by reference to the disabilities relied on (8.3.1). ’

83. It follows that the claims for the failure to make reasonable adjustments would also have been dismissed in any event, even had I held that the claimant was a disabled person by reference to one or more of the conditions.

Age Discrimination

84. The age discrimination claims are all based on the proposition that either because of her disability or her age Mr McDonagh wished to force her out of the respondent’s employment as she was not as physically robust as younger colleagues and could not work as hard or as quickly. Mr McDonagh completely denies this and the only evidence in support of it comes from the evidence of the claimant herself and the comments she attributes to Mr McDonagh. Given that I have concluded that where

there is a dispute I prefer the evidence of Mr McDonagh the claims which depend upon the claimant's evidence must necessarily be dismissed.

85. These are:

- i) Direct Age discrimination - 6.2.1 – 6.2.2
- ii) Harassment related to Age – 9.1.5 - 9.1.6 - 9.1.9 – 9.1.10 – 9.1.11 (and see above)

86. That simply leaves 9.1.12 (harassment related to age) in requiring the claimant to attend a disciplinary hearing in January 2023. This is not alleged against Mr McDonagh but must be dismissed on the basis that there is no evidence that the requirement was related to age. In my judgement it was an inevitable result of Mr McDonagh's conclusion in the investigation that there was evidence that the claimant had committed gross misconduct. For the reasons set out above I accept that this was genuinely Mr McDonagh's conclusion.

87. It follows that all of the claimant's claims must be dismissed.

EMPLOYMENT JUDGE Cadney
Dated: 8th May 2024

Judgment entered into Register
And copies sent to the parties on
07 June 2024 By Mr J McCormick

for Secretary of the Tribunals