



# EMPLOYMENT TRIBUNALS

## BETWEEN

Claimant  
MRS S WHITE

AND

Respondent  
BARTON HOUSE MEDICAL  
PRACTICE (R1)

DR DANIELLE FARRELL (R2)

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL      ON: 24<sup>TH</sup> / 25<sup>TH</sup> / 26<sup>TH</sup> / 27<sup>TH</sup> JUNE 2024  
(VIA CVP VIDEO)

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS: MS V BLAKE  
MS P SKILLIN

### APPEARANCES:-

FOR THE CLAIMANT:-      IN PERSON

FOR THE RESPONDENT:-      MR E WALKER

## JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant's claims against the first respondent of:

- i) Unfair Dismissal;
- ii) Direct disability discrimination (s13 Equality Act 2010);
- iii) Harassment related to disability (s26 Equality Act 2010);;

Are not well founded and are dismissed.

The claimants claims against the second respondent of:

- i) Direct disability discrimination (s13 Equality Act 2010);
- ii) Harassment related to disability (s26 Equality Act 2010);

Are not well founded and are dismissed.

### Reasons

1. By this claim the claimant brings claims of unfair dismissal, and disability discrimination, as set out in greater detail below.
2. The tribunal has heard evidence from the claimant; and Dr Danielle Farrell and Dr Racheal Allen for the respondents. In addition, the tribunal has read a substantial bundle of documents running to nearly 500 pages.

### Background Facts

3. The first respondent Barton House Medical Practice (BHMP) is a medical practice based in Beaminster, Dorset. Both Dr Farrell and Dr Allen were GP's and partners in the practice, Dr Farrell being the Senior Partner. The claimant was employed as the Practice Manager from July 2016. In 2019 Dr Farrell became Clinical Director of the Jurassic Coast Primary Care Network (referred to throughout the documents and evidence as the PCN) a group of surgeries in West Dorset which share administrative, HR, legal and other costs and services. The claimant became the PCN Finance Director on 1<sup>st</sup> November 2021 but remained an employee of BHMP in respect of all her duties, whether performed for BHMP or the PCN.
4. Claimant's Income- The claimant was originally employed as Practice Manager on a salary of some £35,000 for a thirty-five-hour week, which increased to forty hours in 2018. By July 2021 that had increased to £60,861.36 (there is some dispute about an apparent pay rise in May 2021 but it is not relevant for our purposes). In August 2021 she reduced back to 35 hours a week as Practice Manager without any reduction in salary. She was also awarded a pay increase of £24,276.64. She was then on 1<sup>st</sup> November 2022 awarded a further pay increase of £12,500. Taken together with a cost of living pay increase in April 2022, by the date of her dismissal the claimant's total salary from the practice was £99,950.52.
5. In relation to the work carried out by the claimant and other employees of BHMP for the PCN, the PCN was invoiced by BHMP. In the bundle there is one invoice from 16<sup>th</sup>

June 2021 for £13,328.00 which covers the period June 2020 – May 2021 for the claimant's services of "Frailty – 4 hours per week", and "PCN Finance - 4 hrs per week". This would appear to suggest that by that point, and for the previous year the claimant was working approximately 4 days a week on BHMP work and one day a week on PCN work. There is one further invoice in the bundle relating to November 2022 for £4711.64 for "PCN/Frailty HR and Senior Management Finance", but there is no further break down, or identification of to whom or what it relates.

6. There are two significant points of dispute. The claimant alleges that it was orally agreed between her and Dr Farrell in or about August 2021 that she could reduce her hours as Practice Manager to thirty-five but retain the same salary; and that she would be paid a further £24,277 representing two days' work per week for the PCN. The further pay rise in November 2021 was as a result of becoming Finance Director of the PCN and represented a further day's work per week for the PCN, giving a total of approximately £36,750 in respect of PCN work. Thus by the end of November 2022 she was being paid for 24 hours per week (three days) for the PCN, and 35 hours a week (4 and a half days but being paid for 40 hours) as Practice Manager.
7. Dr Farrell disputes this. She does not accept that she agreed either the reduction in hours without a reduction in pay in the Practice Manager role, or for the £24,277 for the PCN work. In relation to the hours worked for the Practice Dr Farrell referred us to the claimant's 2017/2018 appraisal in which her hours of work were increased to 40 from 35 to reflect the fact that the claimant was regularly working those hours as overtime; and that she would not have agreed to reduce the hours without a matching reduction in pay. She accepts that the £12,500 was agreed on appointment as PCN Finance Director, but her evidence is in effect, that at that point she was not aware that the claimant was already being paid £24,277 for two days' work per week for the PCN. The letter created by the claimant purportedly showing her agreement to the £24,277 was not signed by her, was never sent or copied to her, and does not reflect any agreement by her; and the payment was an unauthorised increase paid by the claimant to herself without the knowledge of the partners.
8. The claimant relies on a letter dated 1<sup>st</sup> August purportedly from Dr Farrell, which reads: " I am pleased to inform you we are increasing your salary by £24,277 per annum as of 1st August 2021 for your work in the PCN network." Her evidence is that whilst she wrote it Dr Farell was present in her room at the time and approved it. The respondent relies on the metadata which shows that it was created at 09.57 on 18<sup>th</sup> August 2021 at a time when Dr Farrel was in surgery seeing patients. It is not in dispute that the claimant never asked Dr Farell to sign it, nor sent her a copy, nor copied her in when she sent it to payroll for her salary to be increased.
9. We have set out the factual dispute as it is one of the central issues between the parties, and the conclusion that the claimant had made unauthorised payments to herself for this amount is one of the central findings of gross misconduct which led to her dismissal. However, and for the avoidance of doubt there is no claim for wrongful dismissal, and for the purposes of the claim for unfair dismissal it is not our task to resolve his factual dispute and determine what conclusions we would have reached,

but to ask whether the conclusion reached in the disciplinary process was reasonably open to the respondent. Our conclusions in respect of that are set out below.

10. Disability - The claimant was diagnosed and treated for cancer from March 2021, and it is accepted that she was at all material times a disabled person, within the meaning of s6 Equality Act 2010.
11. Events leading to dismissal - The events which led to the claimant's dismissal began in the autumn of 2022. It is not in dispute that in or around October 2022 the claimant informed that partners that the practice was £90,000 overdrawn / in debt to the PCN, although she stated that with anticipated income that by the end of the first quarter of 2023 BHMP would be £19,000 in credit. Insofar as it is possible to judge from the limited information we have it appears that PCN and the practice finances had been mixed rather than kept separate, which had resulted in some £90,000 of PCN finance being used for the purposes of the practice and a debt to the PCN of the £90,000 resulting at that point. In the course of the hearing the claimant contended that there were essentially two reasons for this. Firstly, the information provided by the PCN made it impossible to separate or identify PCN finance and practice finance, and secondly that at least part of the overspend was the fault of Dr's Farrell and Allen who had failed to reduce their partners' drawings during 2022, despite have been notified that they should do so as early as March 2022.
12. At around the same time Dr Farrell instructed Teresa Larcombe (Business Manager) and Cami Warne (Admin Manager) to conduct a review of the PCN contract. This raised a number of questions about the Practice/PCN finances, and the claimant was invited to a meeting on 29<sup>th</sup> December 2022, which was attended by the claimant, Dr Farrell and Dr Allen. It is at this meeting that the comments alleged to be direct discrimination/ harassment are alleged to have been made. They are discussed in detail below. In the meeting on 29<sup>th</sup> December 2022 there was a detailed discussion of finances, and of the claimant's working hours. It is the evidence of Dr Farrell and Dr Allen that it was at this meeting that they became aware that the claimant was working and being paid for a sixty-hour week. The claimant disputes this.
13. The partners determined that further investigation was needed and engaged Peninsula Face2Face, an external consultant to carry out the investigation. The investigator was Matthew Fordham who reported on 8<sup>th</sup> February 2023. He interviewed five witnesses, considered written submissions from the claimant, who was absent through illness, and considered a substantial quantity of documentation set out in eighteen appendices to the report. He made the following recommendations:
  58. In light of the above findings, it is recommended that SW is informed of the outcome of the Investigation and is invited to attend a Disciplinary hearing to answer the following allegations:
    1. It is alleged that you have undertaken conduct that cause the practice to lose trust and confidence in you, namely:

- a. You processed an increase in salary for yourself of £24,277 in August 2021 without the authorisation to do so.
  - b. You have continued to claim for hours worked as Frailty Manager despite not undertaking the work required for this role.
  - c. You have claimed payment for the alternative to Frailty Manager duties for work done on Finance duties without authorisation.
  - d. The various increases that you identified to your salary and provided evidence of from 2016 to 2021 add up to a salary of £93,977 yet your current salary is £99,950.52. Your current salary is therefore in excess of any authorised figure by £5,973.52. This point is made aside from the allegation 1a above.
  - e. You continued to receive a salary based on 40 hours for your role as Practice Manager at Barnton House from August 2021 when this should have been reduced pro-rata to 35 hours per week.
2. It is alleged that you failed to inform the partners about the practice's financial situation at a suitably early stage in 2022 in line with reasonable expectations for your role, leading to substantial financial effects on the partners.
  3. It is alleged that you have failed to manage a payment of £2,000 paid by the practice for additional duties to be undertaken by Joanne Churchill since June 2022. You also received additional monies for admin support for the Pharmacist team. JC submitted overtime sheets if this admin work was in addition to her Barton House hours, but you did not simply claim the overtime, you put in an invoice for £583 every month.
  4. It is alleged that you have failed to account for costs to the practice of £29,852.52 per annum in wages that are not attributable to any employee. This is due to costs attributed to CW, SW, JC and CS being £92,649.48 and wages going out are £122,502.00.
  5. It is alleged that you have failed to undertake adequate line management of Frailty as evidenced by absence of induction of staff, appraisals not being completed, contracts not signed, your lack of knowledge about staff working there, incorrect salary payments and expenses payments and lack of leadership leading to staff turnover (appendix 18).
  6. It is alleged that you failed to undertake a requirement of your role in maintaining oxygen cylinders on the practice premises.
  7. It is alleged that you have failed to maintain documents in your office in a reasonably competent and confidential manner, leading to the risk of breaches of confidentiality.

14. He considered that points 1 and 3 should be considered as gross misconduct, and points 2 and 4 -7 as serious misconduct.
15. The partners accepted these recommendations and suspended the claimant on 27th January 2023. By a letter dated 14<sup>th</sup> February 2023 the claimant was invited to a disciplinary meeting to be held on 17<sup>th</sup> February 2023.
16. On 17<sup>th</sup> February the claimant submitted a grievance. It too was considered by an external Peninsula Face2Face consultant Nadine Foster who reported on 20<sup>th</sup> April 2023, and did not uphold the grievance. There are no allegations relating to the grievance so it is not necessary for us to deal with it further.
17. The disciplinary process was put on hold whilst the grievance was dealt with. On 11<sup>th</sup> May 2023 she was invited to a reconvened disciplinary hearing on 16<sup>th</sup> May 2023. The hearing was conducted by another Peninsula Face2Face consultant Rhian Shepherd. She upheld allegation 1 a); partially 1b) and c) which she considered together; partially upheld 1d) and e) , which she also considered together; and allegation 4 . She did not uphold allegations 2, 3, 5, 6 or 7. She concluded that allegations 1 a) b) c) d) e) were allegations of gross misconduct and she recommended dismissal without notice.
18. The partners again accepted these findings and recommendations and on 29<sup>th</sup> June 2023 dismissed the claimant without notice. The letter set out the following findings:
  - 1) *It was alleged that you have undertaken conduct that cause the practice and PCN to lose trust and confidence in you, namely:*
    - a) *You processed an increase in salary for yourself of £24,277 in August 2021 without the authorisation to do so.*
    - b) *You have continued to claim for hours worked as Frailty Manager despite not undertaking the work required for this role.*
    - c) *You have claimed payment for the alternative to Frailty Manager duties for work done on Finance duties without authorisation.*
    - d) *The various increases that you identified to your salary and provided evidence of from 2016 to 2021 add up to a salary of £93,977 yet your current salary is £99,950.52. Your current salary is therefore in excess of any authorised figure by £5,973.52. This point is made aside from the allegation 1a above.*
    - e) *You continued to receive a salary based on 40 hours for your role as Practice Manager at Barton House from August 2021 when this should have been reduced pro-rata to 35 hours per week.*

- 2) *It was alleged that you failed to inform the partners about the practice's financial situation at a suitably early stage in 2022 in line with reasonable expectations for your role, leading to substantial financial effects on the partners.*
- 3) *It was alleged that you have failed to manage a payment of £2,000 paid by the practice for additional duties to be undertaken by Joanne Churchill since June 2022 with no explanation as to what duties are to be undertaken for this money.*
- 4) *It was alleged that you have failed to account for costs to the practice of £29,852.52 per annum in wages that are not attributable to any employee. This is due to costs attributed to CW, SW, JC and CS being £92,649.48 and wages going out are £122,502.00.*
- 5) *It was alleged that you have failed to undertake adequate line management of Frailty as evidenced by absence of induction of staff, appraisals not being completed, contracts not signed, your lack of knowledge about staff working there, incorrect salary payments and expenses payments and lack of leadership leading to staff turnover (appendix 18).*
- 6) *It was alleged that you failed to undertake a requirement of your role in maintaining oxygen cylinders on the practice premises*
- 7) *It was alleged that you have failed to maintain documents in your office in a reasonably competent and confidential manner, leading to the risk of breaches of confidentiality.*

*To summarise the above and the report attached:-*

- Allegation 1 A is upheld as gross misconduct*
- Allegation 1 B-C is upheld as gross misconduct*
  
- Allegation 1 D-E is partially upheld as gross misconduct*
- Allegations 2-3 are not upheld*
- Allegation 4 is upheld as serious Misconduct*
- Allegations 5-7 are not upheld*

*Having carefully reviewed the circumstances and considered your responses, we have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. We have referred to our standard disciplinary procedure when making this decision. It states that an act of misconduct of this nature warrants summary dismissal.*

*You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.*

*You have the right to appeal against our decision and should you wish to do so you should write to Dr Rachael Allen and Dr Danielle Farrell within 7 days of receiving*

*this letter giving the full reasons why you believe the disciplinary action taken against you was inappropriate or too severe.*

19. The evidence before us, which was not challenged, was that Drs Farrell and Allen were advised by Peninsula Face2Face that the decision whether or not they accepted the conclusions and recommendations of report was a matter for them, and they had to make the final decision. As is set out in the letter they did review the report and its findings, and did accept its recommendations. In summary they concluded that the acts of gross misconduct justifying dismissal were :
- i) In August 2021 the claimant processed an unauthorised pay increase for herself of £24,277 p.a.;
  - ii) That she claimed for work on Frailty which she had not carried out, and unauthorised payments for work on PCN finance;
  - iii) She had claimed pay of £99,950.52 which was £5,973.52 more than she was entitled to even on her own figures.
20. The claimant appealed and an appeal hearing was arranged for 17<sup>th</sup> July 2023. It was heard by Rachel Barlow of Peninsula Face2Face. She did not uphold the appeal.

### Unfair Dismissal

21. There are four questions for the tribunal in relation to a claim for unfair dismissal.
22. Reason for dismissal – Firstly, was the genuine reason for dismissal a potentially fair reason within s98 ERA 1996. The respondent contends that the claimant was genuinely dismissed for misconduct, which is a potentially fair reason. It points to the fact that the practice engaged external consultants to investigate, and then to determine the disciplinary allegations and appeal, and that at no stage could they have known or anticipated the consultants were going to uphold or dismiss any particular allegation or recommend dismissal. By way of example Ms Shepherd did not uphold a significant number of the disciplinary allegations. In any event there was no necessity to do so, and had they wished to, once they discovered that the claimant had awarded herself a pay rise of £24,277 which Dr Farrell knew she had not authorised, the claimant could have been dismissed very swiftly had they chosen to do so. Secondly they acted entirely in accordance with those recommendations at every stage. Thirdly, the practice had continued to employ the claimant throughout her period of ill health and the question of a disciplinary process or dismissal did not arise before the issues as to the finances arose in the latter part of 2022. The only conclusion must be that they acted entirely in good faith throughout.
23. The claimant contends that the allegations against her were concocted, or at least exaggerated, and that the real reason was either her disability, or a combination of her disability and her other medical conditions including a heart condition. Dr Farrell had



on any analysis expressed concerns as to whether her health would allow her to continue in both roles for the practice and the PCN at the meeting on 29<sup>th</sup> December 2022. Even if the dismissal was not discriminatory the real reason for dismissal related to her health and not the alleged misconduct relied on by the respondent.

24. Secondly she points to the presentation to a board meeting from February 2023 in which the PCN roles are set out. They include a Finance Manager, but not a Finance Director which was her title. She concludes, and invites us to conclude that the respondent had by that point already decided to remove her, at least from her role with the PCN. The respondent denies this, and particularly denies that the distinction between Finance Manager and Finance Director in the Board meeting presentation can bear the weight the claimant places on it. For both reasons she submits we should not accept the respondent's evidence.
25. If the claimant is correct in her submissions, the respondent would not have established the potentially fair reason relied on and the claim would be bound to succeed.
26. Having heard the evidence from Dr Farrell and Dr Allen, we accept that the sole and genuine reason for dismissal was the misconduct which had been found to have occurred during the disciplinary investigation and hearing. It follows that the respondent has established a potentially fair reason for dismissal.
27. The next three questions are the "Burchell" questions. Did the respondent undertake a reasonable investigation, did it draw reasonable conclusions as to the misconduct, and was dismissal a reasonable sanction. In determining those questions we are not entitled to substitute our own view for that of the respondent, and must apply the reasonable range of responses test to each of those questions.
28. Reasonable Investigation - The respondent contends that the investigation, in the broadest sense including the initial investigation, the disciplinary hearing and the appeal could not have been more thorough or meticulous. At each stage every point raised by the claimant was considered and dealt with, and a mass of documentary evidence considered. Even if it is possible to criticise some aspects of the process, which the respondent does not accept, looked at overall the investigation at all stages necessarily fell within the range reasonably open to the respondent.
29. The claimant asserts essentially that the investigation was procedurally unfair. Her laptop had been returned to the respondent whilst she was suspended and she had no access to the accounting or other documentary evidence, from which she contends she could have refuted the allegations and defended herself. She had offered to be allowed supervised access to the records but this was refused. Whilst the investigation may appear to be thorough, at each stage the only evidence considered was that provided by the respondent. It follows that the investigation, and therefore any conclusions drawn from it, are fatally flawed.

30. The respondent submits that whilst the fact that the claimant was not allowed access to the documents is correct, that in the course of this litigation it has complied with its disclosure obligations and all relevant documents have been disclosed. The claimant has not been able to point to any document that was not before the investigator, disciplinary or appeal officer which would have fundamentally affected any conclusion; and nor has she made any application for specific disclosure if she thought disclosure was incomplete and documents being withheld. In the circumstances, even if the tribunal thinks that she should have been granted access to the documents, the claimant cannot show that this has caused her any actual prejudice in presenting her side of the story at any stage.
31. In our judgment the investigation at all stages was both extremely thorough, and took into account and considered all the points made by the claimant. We accept that in the circumstances described above the absence of permission to access the documents did not so fundamentally affect the fairness of the investigation to place it outside the range reasonably open to the respondent.
32. Looked at overall we are satisfied that the investigation, in the circumstances, fell within the range reasonably open to the respondent.
33. Reasonable Conclusions – The respondent submits that on any analysis the conclusions drawn were reasonable. To take the most significant allegation of whether the pay rise of £24,277 was or was not authorised, Ms Shepherd had the evidence of the claimant and Dr Farrell, which was mutually contradictory. Ms Shepherd drew rational conclusions as to whether the letter purportedly from Dr Farrell could have been written by the claimant with Dr Farrell present, as the claimant alleged or not present, as Dr Farrell alleged. Secondly she entirely rationally concluded that the process for dealing with this pay rise was different from those immediately before or after it, which was unusual in and of itself, and particularly unusual given the amount involved. It follows that her reasons for concluding that it had not been authorised necessarily fell within the range reasonably open to the respondent.
34. It submits that all of the disciplinary allegations were considered with care, as is clear from the number that were not upheld; and that where there has been a finding of misconduct it has been supported by detailed factual findings and analysis. All of the findings in the report, which were accepted by the respondent are based on rational factual conclusions and analysis. In the circumstances they necessarily fall within the range open to the respondent.
35. The claimant does not accept that any of the conclusions as to the misconduct could or should have been drawn. She had worked for the respondent for seven years without any disciplinary action, and before the creation of PCN and the intermingling of BHMP and PCN finances there had never been any question of or allegation of the mismanagement of BHMP finances. In those circumstances she was entitled to be believed in her factual account of events; and even if it was reasonable to criticise the management of the finances, that was a consequence of the mixing of PCN/BHMP

finances and should not result in any finding of any misconduct on her part, let alone gross misconduct.

36. The difficulty for the claimant is, as set out above, that we are not determining what conclusion we would have reached, but whether the conclusion that was reached by the respondent was reasonably open to it. We accept that in respect of all the disciplinary allegations that were upheld, that they are rational and supported evidentially. It follows that they necessarily fell within the range reasonably open to the respondent.
37. Sanction- In our judgment if the conclusions as to the misconduct were reasonably open to the respondent, which for the reasons given above they were, then the sanction necessarily was also as it unquestionably amounts to gross misconduct.
38. It follows that having answered all four questions in the respondent's favour that he claim for unfair dismissal must be dismissed.

#### Disability Discrimination

39. The claimant relies on three acts of disability discrimination. All three are alleged to be direct discrimination; and the second and third are alternatively alleged to be harassment:
- i) The claimant's dismissal;
  - ii) During the 29<sup>th</sup> December 2022 meeting that Dr Farrell told the claimant that, in part because of her disability, she was unfit to continue her role;
  - iii) During the 29<sup>th</sup> December 2022 meeting that Dr Farrell said "What would your children do if you dropped down dead".

#### Direct Discrimination

40. Section 13 (1) Equality Act 2010 provides – *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
41. This requires the tribunal to identify three elements of:
- i) Less favourable treatment; which is
  - ii) "Because of" a protected characteristic;
  - iii) In comparison with a an actual or hypothetical comparator.
42. Less favourable treatment – The test for whether treatment is "less favourable" is objective, although the tribunal can take into account the claimant's perception that it was less favourable in determining whether objectively it was.

43. “Because of” – The nature of the requirement for a finding that any less favourable treatment was “because of” the protected characteristic was summarised by Linden J in *Gould v St John’s Downshire Hill 2021 ICR 1 EAT*: “*The question whether an alleged discriminator acted “because of” a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the “reason why” question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a “significant influence” on the decision to act in the manner complained of. It need not be the sole ground for the decision... [and] the influence of the protected characteristic may be conscious or subconscious.*”
44. Burden of Proof – S136(2) Equality Act 2010 provides: ‘*If there are facts from which the court [or tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*’ This is the requirement for the claimant to establish a ‘prima facie case’ of discrimination, ‘stage one’ of the test. If the burden does shift s136 (3) provides that s136(2) does not apply if ‘A shows that A did not contravene the provision’, “stage two’.
45. Evidentially the process required of the tribunal was summarised by Lord Nicholls in *Nagarajan v London Regional Transport 1999 ICR 877, HL*: ‘*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.*’

#### Harassment Related to Disability (s26 Equality Act 2010)

S26 Equality Act 2010 provides:

- (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
- (b) the other circumstances of the case;

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

46. “Related to” - No specific definition is given in the Act, but the phrase allows for a wider causal connection than the “because of” test for direct discrimination. In determining whether specific conduct is related to a particular protected characteristic the tribunal is entitled to take into account the context of the conduct alleged.

### Dismissal

47. For the reasons give above we have accepted factually that the genuine reason for the claimant’s dismissal was the belief in the misconduct. This claim must fail as a factual allegation.

### Comments

48. Dr Farrell disputes saying the first comment alleged, but does accept the second. In fact both appear to form part of a wider discussion around the claimant’s health, and she accepts and asserts, that during the meeting she was genuinely worried about the claimant’s health. In her evidence she referred to a PCN trip to Center Parcs that had recently taken place. As a result of her heart condition the claimant was very significantly short of breath, and her walking restricted. Dr Farrell was genuinely worried and concerned that she might have a heart attack. In the meeting she was told by the claimant that she was working sixty hours a week, and she queried whether the claimant was fit to do both jobs and work those hours. The notes of the meeting record her raising this and the claimant confirming that she could work her contracted hours. A little later Dr Farrell again queries whether there was enough time for the claimant to do the PCN role to which the claimant asked “..if Dr Farell was suggesting her resignation“. “ DF replied no, but was concerned about time being sufficient and concerns to SW health” “DF asked what will your children say if you dropped dead – SW advised she felt comfortable doing what she is doing”.
49. The respondent submits that it is apparent from these exchanges that Dr Farrell was raising two issues, firstly whether working sixty hours a week in both roles was sustainable in and of itself, and secondly whether it posed a specific risk to the claimant’s health. In her evidence Dr Farrell accepted that she was trying to shock the claimant into taking the risk to her health seriously. This is the context of the remarks, which also includes the fact that at this stage the claimant and Dr Farrell were still close friends.
50. In our judgment there are two difficulties with these claims as claims of direct discrimination. Firstly the test of whether treatment is “less favourable” is objective. In our judgment any employer asking an employee who is working sixty hours a week whether that is sustainable, particularly if the individual employee has a serious health condition, cannot be less favourable treatment as all employers owe their employees duties to provide a safe place and system of work, and are required to comply with the Working Time Regulations in any event. Secondly we would have to conclude that Dr

Farrell would not have raised similar concerns with a hypothetical comparator. This would have to be an individual working sixty hours a week with a serious health condition which was not a disability. In our judgment we are satisfied that Dr Farrell would have treated a hypothetical comparator identically. It follows that these claims must be dismissed as allegations of direct discrimination.

51. In terms of harassment the first question is whether this was unwanted conduct. The claimant necessarily contends that it was, and given that this is a subjective test (unlike less favourable treatment) we accept that this element of the test is made out. Similarly we accept that it is related to the claimant's disability, in that it related to the claimant's health conditions which included cancer. However we also accept Dr Farrell's evidence that she was genuinely concerned for the claimant's health and that she did not have the purpose of creating one or more of the proscribed statutory environments.
52. In terms of whether it had the effect of doing so, this case engages subsection 26(4). In terms of subsections 26(4) (a), (b), and (c):

*(a) the perception of B;*

*(b) the other circumstances of the case;*

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

53. In respect of (a) the claimant's evidence is that she found the comments deeply offensive. In respect of (b), the other circumstances of the case include all the matters set out above, and in particular, although they subsequently fell out, at his point the claimant and Dr Farrell were close friends. In our judgment it must have been apparent to the claimant that whilst she may not have agreed with or shared Dr Farrell's opinion, that both as a doctor and her friend, Dr Farrell was trying to persuade the claimant, albeit in very stark terms, that she was placing herself in grave risk to her health. In terms of whether it is reasonable for the conduct to have that effect it is clear that, and in our judgment must have been clear to the claimant from the exchanges recorded above, that the intention of Dr Farrell was to impress upon her the risk to her health which the claimant did not appear to take as seriously as Dr Farrell.. In those circumstances we are not satisfied that is reasonable for the comments to be considered to have the proscribed effect and these claims must also be dismissed.

54. For the reasons given above all of the claimant's claims are dismissed.

EMPLOYMENT JUDGE CADNEY

Dated: 12<sup>th</sup> July 2024

Judgement sent to parties on  
29<sup>th</sup> July 2024

Jade Lobb  
For the Tribunal Office