EMPLOYMENT TRIBUNALS

Claimant: Mrs T Rozier

Respondent: Southampton City Council

Heard at: Southampton (by CVP) **On:** 23 April 2024

Before: Employment Judge Halliday

REPRESENTATION:

Claimant: In person
Respondent: Did not attend

JUDGMENT having been sent to the parties on 13 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Claims and proceedings

1. By a claim form presented on 24 May 2023, the claimant presented claims of
   (a) Unfair dismissal;
   (b) Discrimination on the grounds of disability;
   (c) Unlawful deductions from wages.

2. No response was entered to the claim and the respondent was, thereby, precluded from taking part in the proceedings, without permission of the tribunal.

3. The claim was listed for a case management hearing on 30 November 2023 to clarify the claimant's claims and the following background information was identified.

   3.1. The claimant was employed by the respondent between 2013 and 2022 as a Capital Projects Support Officer.

3.2. The claimant says that she was, at all material times, disabled by reason of clinical depression. Up until 2020, the claimant had a supportive line manager who was aware of her disability and offered appropriate support in terms of one to one meetings. Mr Stuart Anderson then took over as her line manager. Mr Anderson required the claimant to work without regular one-to-one support meetings or any other kind of support and, the claimant believes, was trying to get her into trouble in order to "get her to quit" or be able to dismiss her.

3.3. In June 2022 the claimant was called to a disciplinary meeting. She considers that the allegations raised did not amount to gross misconduct and, in any event, were inaccurate. Ultimately the claimant was dismissed for inaccurately completing a timesheet (on 14 December 2022), an allegation of misconduct which, she says, was never put to her before the disciplinary meeting.

4. Employment Judge Dawson discussed the issues with the claimant and recorded that the matters to be determined by the Tribunal in relation to liability are as follows.

List of Issues

1. *Unfair dismissal*
   1.1 Was the claimant dismissed?
   1.2 What was the reason for dismissal?
   1.3 To the extent that it was misconduct, 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;
      1.3.1 Mr Anderson did not believe that the claimant was guilty of gross misconduct but was simply trying to remove her from the business,
      1.3.2 the claimant was not given 10 working days' notice of the initial preliminary hearing,
      1.3.3 the claimant was not given 10 days' notice of the reconvened hearing,
      1.3.4 the claimant did not receive the evidence in support of the allegations of misconduct in advance of the hearing,
      1.3.5 the claimant was not given time to prepare for the hearing when she was only given the relevant evidence at the hearing,
      1.3.6 the respondent did not obtain an occupational health report before dismissing the claimant, or at any time,
      1.3.7 the letter inviting the claimant to a disciplinary meeting did not say that the claimant was at risk of dismissal, as a consequence of which the claimant did not ask her trade union representative to accompany her,
      1.3.8 the respondent did not provide the claimant with minutes of the meetings,
      1.3.9 the claimant was dismissed for an allegation which she had not been notified of in advance.
   1.4 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?
   1.5 Did the respondent adopt a fair procedure? The claimant challenges the fairness of the procedure as set out above.

2. *Disability*
   2.1 Given that the respondent has not defended the claim and is therefore, deemed not to contest the content of the claim form (Limoine v Sharma) the judge at the final hearing might treat the question of disability as admitted. The following issues arise in the alternative.
   2.2 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:

2.2.1 Whether the claimant had a physical or mental impairment. The claimant says the disability is moderate clinical depression.
2.2.2 Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?
2.2.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
2.2.4 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?
2.2.5 Were the effects of the impairment long-term? The Tribunal will decide:
2.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
2.2.5.2 if not, were they likely to recur?

3. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)
3.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
3.1.1 From the appointment of Stuart Anderson as her manager in 2020, requiring the claimant to work without 1 to 1 meetings or other support.
3.1.2 Not obtaining an occupational health report in respect of the claimant.
3.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant needed support because of her depression?
3.3 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:
3.3.1 meet regularly with the claimant for one-to-one meetings,
3.3.2 speak to the claimant to ascertain whether she needed any further support,
3.3.3 refer the claimant to occupational health for a report.
3.4 Was it reasonable for the respondent to have to take those steps and when?
3.5 Did the respondent fail to take those steps?

In the course of the hearing, a further PCP was identified: Requiring the claimant to continue to work from home and not facilitating her return to the office when restrictions were lifted. The adjustment that could have been made was to facilitate the claimant's return to work in the office.

4. *Unauthorised deductions (Part II of the Employment Rights Act 1996)*
4.1 Were the wages paid to the claimant on her dismissal less than the wages she should have been paid because they did not include payment for two days' accrued hours on the flexible working scheme.

Hearing

5. The claimant submitted a statement and gave oral evidence in the hearing but did not provide any supporting documents. She was distressed in the hearing and her evidence was therefore on occasion muddled and had to be clarified with her. In the absence of any evidence from the respondent, the claimant's evidence was accepted as materially accurate on the basis that it was generally consistent and credible despite her distress, once clarified.

Findings of fact

6. In November 2013, the claimant was informed by the Head of Housing Investment at the respondent that there was a new position of Capital Projects Support Officer in his department for which he thought the claimant would be suitable. They had met on a project on which the claimant was working as a contractor. The claimant was

successful at interview and was offered the role which was a permanent one. The claimant had some personal issues in relation to her marriage and explained to her new line manager that she had been diagnosed with moderate clinical depression and felt that she could not commit to a permanent position at that time. After discussion between her new line manager and HR it was confirmed to the claimant that if the claimant were to accept the role, the respondent would support her through the personal issues and with her low self-esteem and with her mental health issues.

7. The Tribunal accepts the claimant's evidence in relation to her medical conditions and finds that she suffered from moderate clinical depression as disclosed to the respondent from on or around 16 December 2013 and that this continued throughout her employment with the respondent and was, or ought reasonably to have been known to the respondent throughout her employment. She was on prescribed medication at all material times and even with the benefit of her medication, her depression affected her ability to regulate her daily routine and impacted on her emotional and mental well-being, her self-esteem and her personal relationships.

8. The claimant commenced work with the respondent on 16 December 2013 at Shirley Depot. Following her appointment, monthly one to ones were held to support the claimant with both her role and her personal issues and mental health. The claimant left her husband and divorced but her mental health remained poor.

9. The claimant continued in her role and with the support provided in her monthly one to ones and during annual appraisals, performed satisfactorily. At times her mental health deteriorated further, and she had a few episodes where she was distraught and had to have some time off, but she was supported by the respondent, including attending two appointments with Occupational Health which the claimant found to be beneficial.

10. In 2017, the claimant was still on medication for depression and was also diagnosed with Hypothyroidism, which meant lifetime medication. The combination of these drugs and physical and mental stress caused fainting episodes and intolerance to alcohol, but the claimant continued in her role with support from her line manager with no issues. The claimant does not rely on her Hypothyroidism as a disability for the purposes of this claim.

11. In 2019, the claimant was informed by her original line manager that she would be retiring at age 65, in approximately 18 months' time.

12. The claimant's line manager was then moved within Capital Assets to Asset Management and the claimant stayed within Construction Refurbishment. The claimant's new interim manager was based in a different location at One Guildhall Square, so the claimant moved there in early 2019, prior to the rest of the team moving there that summer. Stuart Anderson became the claimant's line manager a few months later.

13. Initially the claimant was happy with the change and helped set up the new accommodation and logistics for the team, however when the rest of the team also moved to the new offices, the situation became difficult for the claimant.

14. Mr Anderson, her line manager, did not hold one to ones with the claimant to discuss her work or provide other support to her and he did not discuss her mental health with her or check-in with her. This together with some organisational restructuring involving Capita resulted in the claimant feeling isolated.

15. Due to the pandemic the claimant started to work from home in late March 2020. She had a laptop to work on and took some relevant paper files home with her. The

respondent made arrangements for a colleague and personal friend, Debbie Morey, to call the claimant weekly during lockdown, but the Tribunal accepts the claimant's evidence that this was a well-being check and did not encompass discussions about how the claimant was managing her work at home.

16. The claimant felt isolated when working from home. It was the first time she had done this in 36 years of working and she was living alone at that time. There were no welfare calls from her line manager or one to one meetings with him to support her in her role, and she found it difficult and depressing to be working from home alone.

17. The claimant's former manager left in January 2021. She had not been replaced so the claimant was allocated additional duties relating to Fire Safety (which her previous line manager had been undertaking) with little notice or handover.

18. By February 2021, the claimant was struggling due to her isolation, and she had a physical and mental breakdown in early March 2021 as a consequence of the extra work and lack of support. She was admitted to hospital with a low glucose reading, tachycardia, hypertension and hyperventilation. The claimant was in hospital for eight days with depression, fatigue and organ issues, (heart, liver and pancreas) and after she was discharged from hospital, she was then signed off sick until the end of March 2021.

19. The respondent's absence management process should have been applied at this time, but this did not happen due to the lockdown.

20. The date the claimant returned to work was not clear from the evidence, but the Tribunal concludes it was on or around the end of March 2021 and on her return the claimant was referred to occupational health. The claimant continued to work from home and received some support from a well-being officer but none from her line manager.

21. The claimant's occupational health appointment was scheduled for 8 June 2021 but she was away on that date so she could not attend, and it was not re-scheduled before she left her employment.

22. The claimant continued to struggle both personally and with work in late 2021 and early 2022 and contacted her line manager on a number of occasions but received no or only brief responses. She was not offered one to ones or any other regular catch-ups with Mr Anderson. There was no criticism of or comment on her work.

23. In early 2022, it became busier, site work re-commenced, and some employees started being allowed to return to the office, although home-working continued for the claimant and other employees. The claimant continued to feel stressed and depressed.

24. In both March and May 2022, the claimant had laptop problems over a number of weeks, and she was in dialogue with Getronics (IT Support) and Dell engineers were called out. She was able to continue to work as she had paperwork to progress. Managers at the respondent (including the project manager) were aware of the claimant's issues.

25. On 15 June 2022, the claimant unexpectedly received an email about an investigation from Mr Anderson. The letter referred to the fact that it had been decided to initiate the investigation after much deliberation and confirmed that it was a 'fact finding exercise'. The claimant did not believe the allegations to be serious enough to potentially warrant dismissal but was nonetheless very distressed.

26. In or around the middle of July 2022, the claimant received an email from Ms Jennifer McNeill inviting the claimant to a Teams Investigation meeting on 20 July 2022 in relation to a number of disciplinary allegations:

    26.1. the claimant did not use a laptop bag, and the claimant did not transport a laptop properly;
    26.2. on occasions in March 2022 the claimant could not have been working;
    26.3. on 16 May 2022 the claimant could not have been working;
    26.4. the claimant took confidential information home;
    26.5. the claimant did not answer emails in a timely manner.

27. Whilst the investigation was on-going Mr Smith, Mr Anderson's line manager, had weekly teams calls with the claimant to check on her well-being. The claimant had no contact from Mr Anderson.

28. In the investigation meeting the claimant was asked questions about the allegations and specifically what had happened on Monday 16 May 2022. The claimant explained that on that day she had left her laptop and charger at her boyfriend's house when she left at about 11.30 am. The claimant explained that for personal reasons she did not want to return to collect it straight away and she therefore spent the afternoon in a café and then went and collected her laptop later that day. She explained that she had reported that the laptop had not been with her for all of the day on 16 May 2022 first thing on the following morning (17 May 2022) in line with the respondent's policy to do so.

29. A second investigation meeting was held approximately a week later. The claimant answered further questions and shared some text messages relating to the appointments with Dell at her home demonstrating her laptop issues.

30. The claimant also provided the investigator with copies of her timesheets for the weeks in question. They correlated with the Business World timesheets. She states that she demonstrated integrity in so doing as she did by self-reporting the fact that she had not had her laptop with her for all of the day on 16 May 2022. She had previously received a warning for leaving her laptop in the office which was not subsequently found (approximately two years before) and was mindful of her obligations to do so this time.

31. In relation to the two hours, she booked on 16 May 2022 whilst she did not have the laptop, she says, and the Tribunal accepts, that these were worked, but at times outside core hours. The Tribunal also accepts her evidence that she frequently did work for which she did not record time including the fact that she had started work by 6.30 am on 16 May 2022 and did not record that she started work until 7.30 am.

32. On 8 August 2022 Ms McNeill called the claimant and asked some further questions. In that call, the claimant explained about her mental health issues and that she did not feel she had not been supported or listened to. She explained her medical history and the time spent in hospital and talked about two previous (expired) warnings (one of which related to her leaving the laptop in the office) explaining why she did not appeal. No referral to occupational health was made at this time.

33. On 14 October 2022 the claimant received a letter inviting her to a disciplinary hearing on 28 October 2022 in relation to the matters under investigation. The claimant was informed she would be sent the relevant documents to her home address and electronically. There were 700 pages of documents which the claimant could not review effectively on her phone. The hard copies did not arrive and by 25 October 2022, it transpired the bundle had been sent to the wrong address. The claimant was stressed by her inability to prepare for the hearing and notified the respondent that she would attend with Helen Wentworth as her companion, but she

felt unwell and unprepared as she did not have hard copies of the documents.

34. The respondent postponed the disciplinary meeting due, they said, to the claimant's ill-health, although the claimant maintains that the postponement was required due to the lack of hard copy documents.

35. On 7 November 2022 the claimant attended a doctor's appointment and was signed off sick for two weeks due to 'mental health issues'. The claimant sent her sick note to Mr Anderson on 10 November 2022 and received a brief email response saying "thanks". The claimant was distraught to receive no further communication.

36. On Thursday 17 November 2022 the claimant received a letter inviting her to a rescheduled hearing on Tuesday 22 November 2022 in the afternoon. The claimant had still not received the disciplinary pack, and the hearing had been scheduled for the claimant's first day back from sick leave, so it was postponed again. No referral was made to occupational health at this time.

37. On Tuesday 29 November 2022 the rescheduled disciplinary hearing was held but was not finished. The claimant was accompanied by a colleague. The claimant had still only received the 700 page bundle electronically and she was provided with a hard copy of the bundle at the hearing. The claimant did not confirm in her evidence who chaired the disciplinary hearing, but the Tribunal concludes that it was not Mr Anderson.

38. The disciplinary hearing was reconvened on 2 December 2022.

39. In the reconvened hearing on 2 December 2022, the claimant was not given the opportunity to recap her evidence from the 29 November 2022 hearing, as she wished, before she was moved on to the next point. She felt that the outcome was predetermined and that she was not being listened to.

40. In relation to the original disciplinary allegations:

    40.1. the claimant accepts that she did not use a laptop bag, and the Tribunal accepts her evidence that she was not provided with one and the one she purchased was the wrong size but that as she was working from home during this period, this was not generally an issue;

    40.2. on or around the 16 March 2022, the Tribunal finds that the claimant was not working on her laptop during all her core hours as Dell engineers were with her, fixing her laptop but accept that the claimant was ready and available for work and able to undertake other work that did not require a laptop;

    40.3. in relation to the allegation of breach of confidentiality, the Tribunal accepts that the claimant took files home when she was instructed to start working from home when the pandemic struck. In the absence of any evidence from the respondent and accepting the claimant's evidence that the project manager was aware that she had the files, and Mr Anderson was not meeting with her regularly to discuss her work with her, the Tribunal does not find that this this constituted a culpable breach of confidentiality by the claimant;

    40.4. on the 16 May 2022, the Tribunal finds that the claimant worked from 6.30 am to 11.30 am at her boyfriend's house and then left her boyfriend's to go home. She did not take her laptop with her. She was distressed following a falling out, so she went and had coffee and cake in a café and then went back to her boyfriend's house to resolve matters. Her laptop was there, and the Tribunal accepts that she did have her laptop with her from the time she returned to his house; and that there was insufficient evidence for the respondent to fairly

conclude that she did not, given the existence of a photo showing it with her, albeit in a non-laptop bag. The Tribunal concludes that the claimant did record time inaccurately that day by stating that she was working during core hours when she did not have her laptop with her at that time and was not in fact working;

40.5. The Tribunal accepts the claimant's evidence that she often worked more than her required contractual hours and did not always record those hours or claim time in lieu for recorded hours worked but that she did not necessarily work those hours at the right time and that on 16 May 2022 this was the case. The Tribunal infers that this resulted in the further allegation that the claimant did not answer emails promptly.

41. The claimant was dismissed on 14 December 2022 for falsifying her timesheets which the Tribunal finds was not one of the original disciplinary allegations raised against her. Mr Anderson was waiting outside the room on 14 December 2022 to ensure that the respondent's property was returned. The claimant was paid for 8 weeks' notice.

42. The claimant had no current disciplinary warnings at that time.

43. The claimant complains that the procedure followed was unfair (she says in breach of ACAS guidelines) and the Tribunal concludes that:

43.1. she was given 10 working days' notice of the initial disciplinary hearing scheduled for 28 October 2022;
43.2. she was not given 10 days' notice of the reconvened hearing scheduled for 29 November 2022 or the reconvened hearing held on 2 December 2022;
43.3. she did not receive the evidence in support of the allegations of misconduct in a reviewable form in advance of the hearing on 29 November 2022 but was given a hard copy in the hearing and she was therefore not able to prepare for the hearing adequately;
43.4. she did not receive minutes of the meetings;
43.5. the letter inviting the claimant to a disciplinary meeting did not say that the claimant was at risk of dismissal, as a consequence of which the claimant did not understand the seriousness of the allegations made against her and did not ask her trade union representative to accompany her;
43.6. the claimant was dismissed for an allegation which was not included in the original disciplinary letter, and she was therefore not able to respond to it in the disciplinary hearing.

44. Following her dismissal the claimant was not paid for two days she had worked under the flexi-work scheme (which the Tribunal accepts had been worked and should therefore be paid) and was not provided with copies of her P45 or P60 which were stored electronically. She was also not provided with the opportunity to collect her personal belongings, and these were not returned to her by the respondent.

45. The respondent did not obtain a medical report from occupational health before or during the disciplinary process.

46. On 28 December 2022 the claimant discussed the disciplinary outcome with her trade union representative who assisted the claimant with her appeal. The claimant had not spoken to her union representative previously because she had not understood that dismissal was a potential outcome of the disciplinary process, and she had felt that she was able to explain each of the five allegations adequately.

47. The claimant received a letter in early January acknowledging the appeal and stating that only items submitted in the Disciplinary Hearing would be considered. The appeal hearing was held on 2 March 2022. The respondent sought to introduce a

covert recording made by Mr Anderson of a conversation with the claimant but after representations made on her behalf by her trade union representative, this was not considered at the appeal. The Tribunal find that the appeal hearing did not constitute a re-hearing. The decision to dismiss was not overturned on appeal.

The Law

Disability Discrimination

48. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The definition of disability is set out in section 6 of the EqA and the factors to be considered by the Tribunal are identified at point 2.2 of the list of issues.

49. The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges failure by the respondent to comply with its duty to make adjustments to her working conditions whilst she was an employee.

Reasonable adjustments

50. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement for the employer to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. Person A discriminates against a disabled person if person A fails to comply with that duty in relation to the disabled person.

51. Section 212(1) EqA states that 'substantial' means 'more than minor or trivial'

52. Paragraph 20 of Schedule 8 to the Equality Act 2010 sets out that this duty is not engaged if the employer does not know and could not reasonably be expected to know […] that the employee firstly has a disability and secondly is likely to be placed at a disadvantage.

53. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

54. In relation to reasonable adjustment claims, the burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed them at a substantial disadvantage (Project Management Institute v Latif [2007] IRLR 579). Thereafter the onus remains on the claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. At the point where the duty to make reasonable adjustments has been engaged, and the claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The respondent would then need to show, on the balance of probabilities, that the adjustment could not reasonably have been achieved.

55. In Martin v City and County of Swansea EA-2020-000460-AT, the EAT relied on an earlier case to emphasise that PCPs "were not designed to be traps for the unwary" but instead that a practical and realistic approach should be adopted to identify a workable PCP which should not then be over-fastidiously interpreted by the Tribunal with the result that a properly arguable reasonable adjustments claim cannot be advanced, particularly when dealing with litigants in person.

56. Guidance on the approach to be taken in reasonable adjustment claims was also given by the EAT in Environment Agency v Rowan 2008 ICR 218, EAT in which His Honour Judge Serota QC stated that a tribunal must consider:

    56.1. the PCP applied by or on behalf of the employer,
    56.2. the identity of non-disabled comparators (where appropriate), and
    56.3. the nature and extent of the substantial disadvantage suffered by the claimant.

57. In Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06, the EAT held that, while an employer would be wise to consult with a disabled employee in order to be better informed, the reasonableness test relates to what adjustments are made and not what was considered. Relying on an earlier decision, (British Gas Services v McCaull [2001] IRLR 60), the EAT held that the duty to make reasonable adjustments does not impose a duty on the employer to discuss with an employee what steps it might reasonably take. In Spence v Intype Libra UKEAT/0617/06, it was held that obtaining a medical report is not in itself a reasonable adjustment. In Watkins v HSBC Bank plc UKEAT/0018/18 the EAT noted the difference between a risk assessment (which is not a reasonable adjustment following Tarbuck) and the provision of ongoing management support to ensure that a risk does not occur, which can be a reasonable adjustment.

58. The Tribunal has also considered the relevant provisions of the Equality and Human Rights Commission statutory Code of Practice (EHRC Code) and in particular chapter 6 including paragraph 6.28 which sets out the factors that are relevant in assessing reasonableness.

Unfair Dismissal

59. Section 94 of the Employment Rights Act 1996 (ERA) sets out the right not to be unfairly dismissed. A complaint of unfair dismissal can be brought under section 111 ERA.

60. Section 98 ERA sets out the provisions relating to the fairness of dismissals. First the respondent has to show that there is a potentially fair reason for the dismissal within section 98(2) and second, the tribunal must decide whether the respondent acted fairly or unfairly in dismissing for that reason. Misconduct is a potentially fair reason for dismissal under section 98(2).

61. Section 98(4) ERA deal with fairness generally and provides that in determining the fairness or unfairness of a dismissal, the tribunal must have regard to whether in all the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and this shall be determined in accordance with equity and the substantial merits of the case.

62. In misconduct dismissals there is established guidance on "fairness" within the meaning of section 98(4) ERA which is set out in the decision in British Home Stores v Burchell 1978 IRLR 379 and Iceland Frozen Foods limited v Jones 1982 IRLR 43. The Tribunal must decide whether the employer has a genuine belief in the employee's guilt; whether the belief is held on reasonable grounds, after carrying

out a reasonable investigation; and in all respects the tribunal must decide whether the employer acted within the range of reasonable responses open to an employer in those circumstances. The tribunal must not substitute its view for that of the reasonable employer (Post Office v Foley 2000 IRLR 827 and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

63. If the dismissal is procedurally unfair or the claimant could otherwise have been fairly dismissed, the cases of Polkey v AE Dayton Services Limited [1987] UKHL 8; Software 2000 Limited v Andrews [2007] ICR 825; W Devis & Sons Limited v Atkins [1977] 3 All ER 40; and Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604 provide that an adjustment should be made to any compensatory award to reflect the possibility that a claimant would have been dismissed in any event.

64. In relation to a potential reduction of any basic award ordered due to the culpable conduct of the claimant, section 122(2) of the ERA sets out that: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly".

65. Section 123(6) of the ERA applies to a potential reduction for contributory fault when making a compensatory award: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

66. The Tribunal has also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and in particular section 207A(2) and the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code).

Decision

67. The Tribunal first considers the disability discrimination claim on the basis that the complaint that the respondent failed to make reasonable adjustments may be relevant in considering the claimant's unfair dismissal claim.

Disability

68. The Tribunal concludes that the claimant does have a disability under section 6 EqA by reason of her depression which she had from the start of her employment with the respondent, and which continued throughout her employment. The Tribunal further concludes that this was known to the respondent (or ought reasonably to have been known to it, if the respondent would have sought to deny knowledge) at all material times as evidenced by the fact that the claimant was provided with additional support by her original line manager as agreed with HR from the start of her employment. The Tribunal concludes that the claimant's long-term depression, even with medication had and has a substantial impact on her ability to regulate her daily routine, results in low self-esteem, and impacts on her emotional well-being and her mental health and on her ability to maintain healthy personal relationships and did so throughout her employment with the respondent. At the time she commenced employment with the respondent this impact was significant enough to deter the claimant from accepting the role offered to her and was discussed at the commencement of the claimant's employment with her original line manager. The Tribunal accepts the claimant's evidence that her mental health has fluctuated at different times but remained a significant issue throughout her employment and

throughout her employment impacted on her ability to engage in the routine of working and with colleagues to a significant extent.

Failure to make reasonable adjustments

69. The Tribunal concludes that the agreement to hold regular one to one meetings with the claimant's line manager for the purpose of supporting the claimant to manage her depression and its impact on her mental health and specifically her ability to cope at work was an agreed reasonable adjustment at the start of her employment, whether or not identified as such at that time. The Tribunal does not conclude that the additional support offered by her previous line manager in relation to her personal situation did constitute a reasonable adjustment.

70. In this claim, the claimant asserts a failure to make reasonable adjustments. Two PCPs and suggested reasonable adjustments were identified in the original case management hearing, the adjustments being: a failure to hold one to ones with her from the time her line manager changed, and a failure to obtain an Occupational Health report before she was dismissed. In the course of the hearing a further reasonable adjustment was identified: that the claimant should have been supported to return to the office at the earliest opportunity following the lifting of the lockdown requirements. Although this adjustment (and relevant PCP) was not identified at the case management hearing expressly, it was identified in the course of this hearing and as the respondent was not in attendance the Tribunal concluded it was in accordance with the overriding objective to add it to the list of issues to be determined.

71. The Tribunal first considers if each of the relevant PCPs was applied to the claimant.

    71.1. In relation to the requirement to work without one to ones or other support, the Tribunal concludes that the claimant was provided with some limited support by Debbie Morey around the claimant's well-being during the pandemic and by Mr Smith during the investigation, however the claimant did not have one to ones with Mr Anderson from on or around late 2019/early 2020 when he took over as her line manage and no alternative arrangements were made to provide additional support to her in her role. In the absence of any evidence from the respondent and on the basis that the Tribunal has accepted the claimant's evidence that the one to ones were originally set up as specific additional support for her, the Tribunal concludes that the respondent did have an expectation that employees would work without regular one to one meetings (or other additional support) so this was a practice which was applied generally as well as to the claimant. The Tribunal further concludes that from the time the claimant started her employment, the respondent was aware that requiring her to work without regular one to one meetings (or other additional support) would place the claimant at a substantial disadvantage compared with an employee without her disability as she needed support in managing her depression at work.

    71.2. In relation to the PCP that the respondent did not obtain an occupational health report, this practice would only apply where an employee had a health condition, and one was potentially required to address an ill-health issue. No occupational health report was obtained when the claimant returned to work after her period of sick absence in March 2021 although the claimant states that this was a breach of the respondent's capability policy and as an appointment was originally arranged for the 8 June 2021, the Tribunal concludes that it was not the respondent's policy or practice not to make a referral, but rather that at that time, the usual practice of making a referral to occupational health on return from extended sick leave was not followed. The

failure to follow the respondent's usual practice on this one occasion does not constitute a PCP.

71.3. The claimant also says that no occupational health report was obtained when the claimant was investigated and subsequently disciplined for her actions. Whilst the respondent may have failed to consider the impact her disability had on her behaviour in reaching the decision to dismiss as a result of failing to take medical advice, the occupational health report would have been a mechanism to identify any reasonable adjustments required; the Tribunal does not find that a policy of not referring an employee to occupational health in the context of a disciplinary investigation is in itself a PCP, or in the alternative the Tribunal concludes that it would not be reasonable to expect the respondent to refer every employee to occupational health in the context of a disciplinary process.

71.4. In relation to the third PCP that the respondent required the claimant to work from home and did not facilitate her return to the office when lockdown restrictions were lifted, the Tribunal is satisfied that the practice of working from home after the pandemic was a practice that was generally applied to employees and that the claimant was not supported to an early return to working in the office. The Tribunal further concludes that from the time the claimant started her employment, the respondent was aware that the claimant needed additional support with mental health issues and was on notice both from the history of working with her, her period of absence in March 2021 and her attempts to gain support from Mr Anderson, to which no or only brief response were received, that requiring her to work from home when she lived alone placed her at a substantial disadvantage compared with colleagues who did not suffer have the claimant's disability as she needed support in managing her depression at work and the respondent ought reasonably to have known that isolation made her condition worse. The Tribunal has found that the respondent did put in place some support for the claimant by ensuring regular contact with Ms Morey whilst requiring her to work from home, which evidences that it did consider that the claimant was at risk due to her depression and that it was aware of the substantial disadvantage the claimant was put to, by being required to work from home, but the Tribunal does not accept that this personal support was sufficient.

72. The Tribunal next considers what steps (the adjustments) could have been taken to avoid the disadvantage. The claimant has suggested that:

72.1. her one to one meetings should have continued with her new line manager,
72.2. she could have been spoken to, to ascertain what further support was required,
72.3. she could have been referred to occupational health, and
72.4. she should have been supported to return to working in the office instead of continuing to work from home.

73. Following *Tarbuck* and *Spence* the Tribunal concludes that the mere act of discussing what adjustments are required, whether directly between the claimant and her line manager or with occupational health does not in itself constitute a reasonable adjustment.

74. However, in relation to the holding of one to one meetings, this had proved to be an effective way of supporting the claimant in managing her depression and ensuring she was able to perform her duties whilst at work. The Tribunal concludes that it would have been reasonable for the respondent to have continued the claimant's monthly one to ones with her line manager as it was practical to do so, no additional

costs would have been incurred and it had already proven to be an effective way of supporting the claimant to remain in work and perform her role satisfactorily. The Tribunal concludes that it was a failure to make a reasonable adjustment not to continue with the monthly one to ones.

75. In relation to the suggested adjustment that the claimant was supported to return to work in the office rather than continuing to work from home when the restrictions were lifted, the Tribunal concludes this was a reasonable adjustment which should have been made by the respondent. The Tribunal has accepted the claimant's evidence that some employees were returning to the office, so it was practical for the claimant to do so as well; it would have involved no additional cost; and would have been an effective way of ensuring the claimant could regulate her daily routine, work her core hours alongside other colleagues (as she had done before the pandemic) and manage her depression so it did not impact on her ability to undertake her duties. The Tribunal therefore concludes that the failure to do so was also a failure to make a reasonable adjustment.

76. The claimant's complaint for failure to make reasonable adjustments therefore succeeds.

Unfair Dismissal

77. The Tribunal concludes that the claimant was dismissed on 14 December 2022 for misconduct which is a potentially fair reason under section 98(2) of the ERA. The Tribunal has considered the claimant's allegation that this was not the genuine reason for the dismissal and that Mr Anderson did not believe the claimant was guilty of gross misconduct but was trying to remove her from the business. She refers to the attempt to use a covert recording in the hearing, to his failure to engage with her, and to his waiting outside the room when she was dismissed. However, she has produced no direct evidence to support this assertion, and it is the Tribunal's finding that it was not Mr Anderson who heard the disciplinary or reached the decision to dismiss. The Tribunal therefore concludes that the dismissing officer reached the decision to dismiss because of the claimant's conduct, and that the conduct relied on by the respondent was the claimant's failure to complete her timesheets accurately and specifically on 16 May 2022. The Tribunal therefore concludes that the reason for the dismissal is a potentially fair reason under section 98(2) ERA, namely misconduct.

78. Whilst keeping in mind that the Tribunal must not substitute its view for that of the respondent, the Tribunal concludes that this dismissal was both procedurally and substantively unfair for the following reasons.

    78.1. The respondent had failed to provide adequate support to the claimant with her mental health issues which arose by reason of her depression, from the time staff were sent home at the time of the first lockdown due to the pandemic which started in March 2020. Specifically, the respondent failed to continue with the agreed reasonable adjustment made and consistently applied from the claimant's appointment in 2013 to hold one to one meetings between the claimant and her line manager. The respondent had further failed to consider if additional or alternative reasonable adjustments were required from March 2020 until her employment terminated on 14 December 2022. The claimant had been referred to occupational health following her sick absence in March 2021, but this advice was not obtained because an appointment was made for 8 June 2021 but was cancelled due to the claimant's absence on holiday and was not rescheduled. Further the respondent had failed to support the claimant in returning to work in the office when restrictions were lifted. The Tribunal concludes that had the claimant continued to be supported by regular one to

ones as the respondent had agreed and/or had arrangements been made for the claimant to work in the office rather than at home, than these disciplinary issues either would not have arisen or would have been identified earlier and addressed.

78.2. The respondent further failed to take occupational health advice before dismissing the claimant and therefore was unable to consider the impact her disability had had on her performance and specifically the relevance of her disability to the allegations made against her when the decision as to whether it was fair and reasonable to dismiss was reached. The Tribunal concludes that whilst this was not in itself a failure to make a reasonable adjustment, the failure by the respondent to consider the extent to which the claimant's depression affected her ability to perform her duties as expected renders the decision to dismiss for those reasons outside of the band of responses which an employer could reasonably and fairly reach.

78.3. The claimant was not provided with a hard copy of the 700 page bundle of documents before the hearing on 29 November 2022 so did not have sufficient time to prepare for the hearing and was not given sufficient time at the reconvened hearing on 2 December 2022 to revert to the earlier points discussed in the initial hearing. This meant she was not given an adequate opportunity to respond to the allegations made against her.

78.4. The letter inviting the claimant to the hearing did not state that a possible outcome of the hearing was dismissal, so she did not understand this was a risk and did not elect to ask for the support of her trade union.

78.5. The claimant was not dismissed for one of the allegations set out in the invitation to the disciplinary hearing but for falsifying her timesheets and she was therefore not given an adequate opportunity to respond to this specific allegation during the disciplinary hearing. The appeal was not a re-hearing, so this defect was not remedied on appeal. The Tribunal concludes that this is further ground which would render the dismissal unfair.

78.6. The Tribunal has considered if the claimant could have been fairly dismissed for one or a combination of the original allegations but concludes that she could not have been. Firstly, due to the respondent's failure to consider the affect the claimant's disability had on her performance, secondly due to the respondent's failure to support her to perform her duties by making reasonable adjustments as identified above, and thirdly because none of the original allegations taken singly or in combination, could in themselves have led to a fair dismissal for gross or serious misconduct. Specifically, the Tribunal concludes that the failure to have a laptop bag and/or transport a laptop appropriately, is not gross or serious misconduct warranting dismissal; that there was no misconduct in March 2022, when the claimant was unable to work as usual because her laptop was not working properly; that there was no culpable conduct involved in taking home paper files when the claimant was sent home when lockdown started in March 2020 and that other managers knew she had done this even if Mr Anderson., the claimant's line manager, did not; and that a delay in responding to emails is a performance not a disciplinary issue. The incident on 16 May 2022 is more serious, however, in light of the findings made that the respondent failed to make reasonable adjustments or to consider the impact the claimant's disability had on her actions, any decision to dismiss on grounds of this original allegation would have been similarly flawed. The Tribunal also notes that the respondent did not consider this allegation to be potential gross misconduct or serious misconduct warranting dismissal as it was not referred to as such in the disciplinary invite letter and

the respondent did not warn the claimant that dismissal was a potential outcome of the disciplinary process.

78.7. In terms of other procedural defects, it is noted that the claimant was not given 10 days' notice of the disciplinary hearings or the minutes of the meetings, (but whilst this may be a breach of the respondent's policy (which the tribunal has not been provided with) it is not a breach of the ACAS code

79. The Tribunal therefore upholds the claimant's complaint that she was unfairly dismissed.

80. Having concluded that the dismissal is substantively as well as procedurally unfair, and based on the findings set out above, the Tribunal makes no adjustment on the basis that a fair dismissal may otherwise have been possible (as set out in Polkey). The Tribunal concludes that had the reasonable adjustments been put in place, then the misconduct issues would either not have arisen at all, or would have been addressed at a much earlier stage and that along with the failure to warn the claimant that dismissal was a possible outcome and to dismiss her for a disciplinary allegation that was not on the disciplinary invitation, there is no prospect that the claimant could have been fairly dismissed in these circumstances.

81. The Tribunal notes the provisions of the Acas Code which state;

81.1. "Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made"; and

81.2. "This notification [of the hearing] should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting".

82. The Tribunal has found that the length of notice given of the hearings and the failure to provide copies of the minutes does not constitute a breach of the ACAS code. However, the failure to provide the claimant with the evidence relied on in an accessible form before the hearing so she could understand the allegations made against her, the failure to warn the claimant that one potential outcome was dismissal and the fact that the allegation for which she was dismissed was not communicated to the claimant in advance of the disciplinary hearing constitute a breach of the ACAS code.

83. Lastly the Tribunal considers if it is just and equitable that a reduction should be made to either the basic award on the basis of the claimant's conduct before her dismissal and/or to the compensatory award on the basis that the claimant caused or contributed to her dismissal by her conduct. The Tribunal concludes that the claimant's conduct in leaving her laptop behind, not working during core hours on the afternoon of 16 May 2022 and submitting a time sheet which stated that she did, (albeit that she worked those hours at a different time), contributed to her dismissal and makes it just and equitable that both her basic award and any compensatory that may be awarded are reduced by 30%.

Unlawful deduction

84. The Tribunal has found that the claimant had worked for two days for which she had not taken time off in lieu or been paid for as at 14 December 2022 and for which she was not paid following the termination of her employment. The claimant's complaint of unauthorised deduction for two days' pay therefore succeeds.

Remedy

85. The Tribunal will decide the remedy for the successful complaints at a further hearing. This will include whether any adjustment should be made under section 207A(2) TULRCA for failure to follow the ACAS Code.

Employment Judge Halliday
Date: 16 August 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
20 August 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE